Public Procurement and the Economic Partnership
Agreements: assessing the potential impact on ACP
procurement policies

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necessarily represent the views of the Commonwealth Secretariat or its member governments.
Introduction

At the end of 2007 interim Economic Partnership Agreements (EPAs) were negotiated by a number of African Caribbean and Pacific (ACP) states. Of the agreements concluded only the CARIFORUM-EU EPA included a chapter on government procurement. During 2008 negotiations are to take place on comprehensive EPAs between the European Union (EU) and the other ACP regions and states. The EU will seek inclusion of government procurement in these other agreements. Many ACP states have been unsure of the procurement issue and have thus tended to adopt a defensive position. But during the course of 2008 the ACP states must decide how to respond on this issue. It is the purpose of this paper to contribute to an informed debate on this topic. It seeks to do so by first describing the nature of rules on government procurement and discussing the distinction between transparency and liberalization. The paper then sets the broader picture by considering trends in rules on government procurement in other free trade agreements and at the plurilateral level in the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). This is followed by a discussion of the likely costs and benefits for the ACP states of adopting rules similar to those adopted in the CARIFORUM-EC EPA text (henceforth the ‘EPA text’). The paper focuses on the impact of any possible rules on the ACP procurement policies, rather than on the effects of procurement rules on trade between the ACP and the EU. The latter would require a detailed sector by sector study of potential procurement markets that is beyond the scope of this paper. To illustrate the impact on ACP states’ policies two case studies – of South Africa and Uganda – are provided. Finally, the paper suggests a number of ways in which the EPA text might be revised to more readily meet the needs and interests of the ACP states.

Public procurement is of growing importance for developing countries

Public procurement accounts for on average between 7 and 8% of GDP, split more or less evenly between central government, sub-central government and public enterprises or parastatal bodies. The last systematic study of the size of government procurement markets suggested that procurement was about 5% of GDP in non-OECD countries.
The OECD study showed sixty of the 106 developing countries included in the survey made public procurement of less than $1 bn per annum. (OECD, 2002; Trionfetti 2002) But the study was based on data from 1998. Procurement in developing countries that is potentially subject to competition has grown since. (Hunja, 2003) For example, Botswana’s public procurement topped $1bn in 2003, so the expectation must be that government procurement has become more important in ACP states. (Lionjanga, 2003) Across Africa government procurement averages around 10% of GDP and can account for anything up to 70% of public expenditure, as in the case of countries such as Tanzania and Uganda.\(^2\) This growth in its importance has gone hand in hand with reform of government procurement in developing countries. The reform process started in OECD economies in the late 1980s and was driven by a desire to promote more open and competitive procurement and move away from the *de facto* and in some cases *de jure* preferences that most developed country governments provided as instruments to support their national champions.\(^3\) Most developing countries began the process of reform during the 1990s, when new laws were introduced to replace statutes and practices that had often been carried over from the 1950s or 1960s. These reforms were undertaken unilaterally but drew heavily on international (best) practice in procurement. For smaller countries in which aid was relatively important reform was also driven by the need to comply with the expectations of the donors such as the World Bank that required open procurement for their development contracts. Evidence from World Bank Country Procurement Assessment Reports (CPARs) and other surveys suggests that many developing countries have found it difficult to maintain the momentum of reform without external discipline.\(^4\) (Evenett, 2003; Hunja, 2003; and e.g. World Bank 2003) It will be argued below that, from an ACP point of view, the most important question when considering the inclusion procurement in EPAs, is whether this would provide the right sort of external discipline to help maintain the existing national reform processes.

In general the trade effects of procurement rules are not promising for the ACP states

The trade effects of rules on procurement are generally limited. Empirical evidence shows that the greatest impact of rules on procurement is in the form of increased domestic competition. (Evenett, 2004) The volume of government procurement filled by cross border supply has remained limited, even in the European Union where the reforms of the 1990s introduced extensive provisions aimed at creating an internal market for
procurement. Over the years expectations of enhanced market access have motivated certain sectors, such as power equipment and telecommunications to press for ‘liberalisation’ of procurement markets. But on past experience the trade effects of international rules on procurement can be expected to remain modest. For ACP states this is especially true. The OECD procurement markets account for over 90% of the international procurement. Most OECD countries along have now signed the plurilateral 1994 GPA and China is in the process of acceding to the agreement. With some exceptions public procurement markets in the ACP states are not of major importance to EU exports and contractors, although larger ACP countries will have significant markets. In its Global Europe policy strategy of October 2006 the European Commission included opening government procurement markets as an objective, but poorer developing countries were not seen as part of this more offensive approach to market access on the part of the EU. The target was more the larger emerging markets. (European Commission, 2006) The lack of significant productive capacity in ACP states also means that their procurement markets is more likely to be supplied by imports and that the chances of their suppliers competing on EU public markets are limited. Reciprocal opening of procurement markets is therefore unlikely to benefit smaller ACP exporters, at least in the foreseeable future.

**Framework rules and liberalisation**

When considering provisions on public procurement in trade agreements it is helpful to distinguish between *framework* rules and the schedules specifying *liberalisation*. Framework rules set out the procedures to be followed if public procurement\(^5\) is to be open, transparent and competitive. The framework rules in many agreements are broadly similar and in line with what might be seen as an emerging international norm or best practice as codified in the (voluntary) UNCITRAL Model Law. (see below)

Apart from some early EU north – south FTAs such as the Euro-Med Association Agreements and the Trade, Development and Cooperation Agreement with South Africa, which had only very limited one article references to procurement, all recent FTAs have use framework rules analogous to the UNCITRAL Model Law. This is also the case for the framework rules in the 1994 WTO Government Purchasing Agreement. This also broadly holds for the ‘EPA text’ (the CARIFORUM – EC text
on procurement), although this is simpler and therefore tends to mitigate the compliance costs. Table 2 provides a summary of the EPA provisions compared to the GPA, the UNCITRAL Model Law and the procurement chapter in the EU – Chile FTA, which is often seen as a model for EU approach to FTAs. Similar framework rules means that provisions on coverage (thresholds); transparency (laws, rules and individual contracts); contract award procedures (open, selective and negotiated), selection criteria (lowest costs or the economically most advantageous bids); and compliance (bid challenge) are broadly similar. The widespread use of the GPA as the framework also means that there is a measure of consistency across the recent FTAs including those negotiated by the United States.

The second element of any agreement on procurement concerns liberalisation commitments. These take the form of commitments to national treatment for procurement specified in schedules. These commitments are negotiated bilaterally and are usually based on reciprocity. Even in the case of the GPA, a plurilateral agreement, liberalisation commitments are negotiated bilaterally, which is one of the reasons developing countries were not ready to participate in the negotiations on the 1979 and 1994 GPAs. On coverage, distinctions can be made between purchasing entities and sectors. For example, the 1994 GPA distinguishes between three categories: category I (central government), category II (sub-central government) and category III (public enterprises and parastatal purchasing entities). Reciprocity in commitments is achieved by specific combinations of sector and entity coverage. Liberalisation commitments therefore vary across agreements. As a result of negotiations on plurilateral and bilateral levels over the years, there is therefore a reasonably coherent set of framework rules that have been codified in the voluntary UNCITRAL Model Law and the binding GPA, but an intricate, opaque and illiberal set of lists and schedules pursuant of reciprocity. (Arrowsmith, 2003; Reich 1997)

Although the distinction between framework rules and liberalization can be helpful and was used in the WTO Working Group on Transparency in Government Procurement, it remains an artificial distinction. Framework rules or ‘transparency’ broadly defined, promote open competition and are therefore also liberalizing. Indeed, in the more developed economies ‘transparency’ measures are likely to be more important in opening markets than the removal of the few remaining de jure
preferences through national treatment commitments. The picture is, in general, rather
different in developing countries, where *de jure* preferences assume a greater
importance as instruments in development and industrialization policies. The
following table provides an overview of the main elements in rules on procurement.

**Table 1 The elements of rules on public procurement**

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<th><strong>Coverage</strong></th>
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<tr>
<td>Rules may cover procurement of supplies (goods), works (construction) and services. Coverage can extend to central government, (on average 1/3rd of all public procurement), sub-central government (roughly 1/3rd) and public enterprise or parastatal organisations (roughly 1/3rd). Coverage is also determined by thresholds designed to ensure that the most valuable contracts are open to competition, whilst avoiding the significant compliance costs of dealing with lots of smaller contracts.</td>
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<th><strong>National treatment</strong></th>
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<td>Public procurement was excluded from the GATT Art III national treatment and most-favoured nation provisions in 1947, and there remains no agreement to change this at a multilateral level. National treatment obligations in plurilateral or bilateral agreements prohibit formal or <em>de jure</em> preferences for specific categories of suppliers unless there are explicit exemptions.</td>
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<th><strong>Transparency</strong></th>
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<td>Central to the aim of facilitating increased competition, more efficient purchasing and reduced scope for corruption in public procurement is the provision of information. This can encompass the statutory rules and implementing regulation as well as information on specific calls for tender and technical specifications. It can also include post contract award transparency in which purchasing entities are obliged to explain contract decisions and or provide statistics and reports. Without knowledge of contract award procedures or individual calls for tender there can be no competitive tendering. Without information on decisions taken there is unlikely to be effective monitoring and implementation of the procedures.</td>
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<th><strong>Contract award procedures</strong></th>
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<td>In order to ensure flexibility, procurement rules tend to provide for open, selective, limited and negotiated tendering. Open tendering is generally used for standard products and is based on price. Selective tendering is used when the purchasing entity wishes to ensure that suppliers are qualified (both technically and financially) to complete the contract successfully. This requires open and transparent procedures and criteria for the selection of suppliers. Limited tendering is when the purchasing entity invites specific suppliers to bid. Negotiated tenders involve negotiation between the purchaser and supplier over the terms of the contract. Contract award procedures can have more or less detailed rules on how calls for tender are made, and what information is provided, what time limits are set for bidding and for awarding contracts. Short time limits may put foreign bidders at a disadvantage, while long time limits may be detrimental to the service provided by the procuring entity.</td>
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<th><strong>Technical specifications</strong></th>
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<td>By specifying standards, a procuring entity can prefer certain suppliers over others. Rules on procurement therefore tend to require the use of performance standards in place of specific or ‘design’ standards. Performance standards set out how the equipment or system should perform not the details of its components or dimensions and are thus less restrictive. Rules may also require the use of agreed international, regional or national standards rather then firm specific standards which can mean a <em>de facto</em> preference for the (national) firm that produces to that standard.</td>
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<th><strong>Technical co-operation</strong></th>
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<td>Technical cooperation can cover assistance drafting laws or procedures, training officials or exchanges of experience. All agreements on procurement include some form of technical co-operation.</td>
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<th><strong>Special and differential treatment</strong></th>
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<td>S &amp; DT in the case of procurement can take a number of forms. There can be a specific development exemption from the rules, and in particular from the national treatment commitments, to allow for preferences to be used to promote development aims or domestic suppliers. There may also be higher thresholds for developing countries to reduce the costs of complying with the rules, or lower thresholds in developed countries to facilitate asymmetric access to the more developed market.</td>
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<th><strong>Regulatory safeguards (exclusion)</strong></th>
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<td>General exclusions from national treatment and other obligations under procurement rules are common for reasons of human health, national security and national interest. Most agreements also leave governments a residual safeguard in the form of the right not to award a contract. Although this is intended for cases in which there is doubt about the</td>
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ability of the winner of a contract to deliver, it can be used to block the award of a sensitive contract to a foreign supplier. The GPA and bilateral agreements also provide scope for governments retain discretion in the use of enforcement provisions, such as waiving contract suspension rules.

**Compliance or bid challenge**

Experience has shown that without effective compliance, rules on public procurement will have little effect. Given the thousands of contracts awarded every day central compliance monitoring has been deemed to be impracticable. Rules therefore tend to provide bidders who believe they have not been fairly treated with an opportunity to seek an independent review of a contract award decision. Penalties in the case of non-compliance may involve project cancellation or financial penalties (limited to the costs of bids or exemplary damages). Post contract transparency rules requiring information on contracts awarded and reasons why bids failed can also been seen as facilitating compliance.

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### Issues in the international negotiations

GATT 1947 excluded public procurement from the national treatment provisions of Article III and in effect also from the MFN rules of Article I. It was left to the plurilateral level in the shape of the OECD to develop rules during the 1970s. (Blank and Marceau, 1997) The code on government purchasing developed by the OECD in 1975 was adopted as the qualified MFN GPA of the GATT in 1979.7 (Bourgeois, 1982) The impetus behind these negotiations was a mixture of a desire for greater transparency and offensive interests on the part of US exporters of power generation and telecommunications equipment in greater access to the public procurement markets in European and Japanese nationalised utilities.

During the 1980s the action moved to the regional level in the shape of the procurement rules in the Canada – US FTA (CUSFTA) and the EU’s Single Market Programme. These provided the models for stronger enforcement provisions in the shape of bid challenge rules and extended coverage to include utilities. These advances were then incorporated in the strengthened and revised GPA of 1994 to satisfy three of the four major aims of the negotiators at that time, namely; stronger rules, better enforcement and more entity coverage. The extension of coverage, however, came at the expense of a still greater emphasis on reciprocity in the schedules determining coverage. (Arrowsmith, 2002) The forth aim of wider participation was not achieved because only Hong Kong and Singapore of the ‘developing countries’ agreed to sign up. Developing countries did not sign the GPA because; they felt the high compliance costs were not justified, did not like reciprocal negotiations on schedules that gave the large developed markets asymmetric power, and wished to retain procurement as a policy instrument to serve
industrial or development aims. Even some OECD countries, such as Australia and New Zealand, did not sign up because of the high compliance costs.\(^8\)

**The WTO discussions**

Following the 1996 Singapore WTO ministerial meeting a Working Group on Transparency in Government Procurement (WGTGP) was established. (World Trade Organisation, 1996) Developing country opposition to ‘liberalisation’ of procurement markets resulted in WTO work being limited to transparency.\(^9\) Market access issues (defined as the removal of *de jure* preferences for national suppliers) were therefore never put on the negotiating table.\(^10\) This exclusion of liberalisation did little to make issues much easier because of the lack of any clear distinction between market access and transparency. (Linarelli, 2003)

Issues identified by the WGTGP were not surprisingly similar to those covered by the GPA and the various regional initiatives. The discussions in the WGTGP can therefore inform the debate on procurement in the EPAs. The WTO discussions dealt with coverage, procurement procedures, transparency (both pre-bid and post-bid information), decisions on qualification of suppliers and provisions on domestic reviews etc. There were, in addition, questions concerning dispute settlement, technical assistance as well as special and differential treatment for developing countries. (Arrowsmith, 1996; Evenett, 2003)\(^11\) The work in the WGTGP was in turn informed by the experience with the World Bank Guidelines on procurement for its projects (World Bank, 1995) and the UNCITRAL Model Law on Procurement of Goods and Construction work (UNCITRAL, 1994).

The UNCITRAL model law provides a code of best practice for national procurement laws and procedures. It is a voluntary, soft law approach to procurement rules that is broadly in line with the GPA type procedures in terms of its emphasis on transparency and the provision for domestic reviews. But unlike the GPA text, the UNCITRAL model law allows for *de jure* discrimination on development grounds and leaves much more discretion in the hands of national purchasers. (Evenett, 2003).

In terms of coverage, the proponents of comprehensive rules in the WTO (the USA and EU) argued that transparency should apply to all procurement, because of the general
economic efficiency gains from more open and transparent purchasing. Some developing countries argued that WTO provisions should only apply to procurement ‘open to competition,’ in other words procurement covered by ‘liberalisation’ schedules and above the thresholds set in any agreement. This position reflected a view on the part of developing countries that the WTO discussions were about market access not better procurement practice. The dominant view in the WGTGP favoured limiting transparency rules to central government, with many countries pointing to the impracticability and costs of extending transparency rules to cover state or local government. (World Trade Organization, 1999) This reflects the fact that governments often have difficulties maintaining effective procurement procedures in local and provincial government.

There appeared to be consensus in the WGTGP on a continued use of flexibility in contract award procedures, such as the use of open, restrictive and negotiated contracts, but differences over the degree of detail needed to ensure transparency in the use of these procedures. The WTO members seeking an expansive approach (i.e. EU and US) argued that information was needed on a long list of items including: contract details, contact points, delivery details for the bids, information of the type of contract award procedure (open, restricted or negotiated), the criteria for selection of bids, information on any existing (de jure) preferences for national producers or categories of producers, technical specifications, the timetable for completion of the contract, etc. Other WTO members found such a long list burdensome and argued for more national discretion on what should be included in such transparency rules. There was also no consensus on whether there should be transparency for existing de jure preferences, with DCs fearing that publication of such preferences would provide a focus for efforts to remove them. Another issue was whether there should be information on why bids had not been accepted or debriefing for unsuccessful bidders. Here again the issue of compliance costs was raised by developing countries.

On compliance or bid challenge WTO members accustomed to the GPA bid-challenge argued - on the basis of experience with procurement rules in other agreements, - that such decentralised measures were essential if the rules were to be effectively applied. Non-signatories to the GPA argued that enforcement provisions were only relevant for rules on market access and that the costs of maintaining the institutions necessary to provide independent review of transparency in procurement were excessive. Again this
suggests that the developing countries participating in the WGTGP saw the debate as one about market opening. There was also no agreement on whether there should be access to WTO dispute settlement should Members fail to comply with transparency rules. The US in particular argued for this, developing countries argued that the dispute settlement was only relevant when market access was at stake.

Finally, the WGTGP discussed forms of special and differential treatment for developing countries such as a development exemption from the rules and higher thresholds in terms of coverage for developing countries. The developed countries also offered technical assistance in drafting procurement laws and implementing the transparency rules. (World Trade Organization, 2002)

The work of the WGTGP produced some valuable material and there appeared to be a consensus on the value of transparency in government procurement. But differences remained that precluded any agreement on inclusion on transparency in public procurement in the DDA. In the run-up to the Cancun Ministerial in 2003 the EU’s view was that the case for transparency had been accepted by all, reiterating that developing countries would still be able to retain (de jure) preferences. The EU further argued that many countries already had rules on transparency in place so that the compliance costs for any WTO rules would not be insurmountable. Compliance costs could be reduced by the use of thresholds and technical assistance would be forthcoming. The EU is making similar arguments for the inclusion of procurement in the comprehensive EPAs.

India and Brazil accepted that transparency in public procurement was a good thing, but argued that the case for a WTO agreement had not yet been made and that the scope of any agreement on transparency remained too unclear for negotiations to begin. (World Trade Organization, 2003) As is well know, transparency in public procurement was effectively removed from the DDA negotiating table at the WTO Cancun ministerial meeting in 2003.

**Procurement in US FTAs**

The FTAs negotiated by the USA after the Uruguay Round have used the GPA model (both the framework and liberalization elements) in agreements with emerging
markets (Mexico and Chile) as well as a string of developing countries (Peru, Morocco, Bahrain, Oman etc). The NAFTA agreement with Mexico (negotiated before the 1994 GPA) did not include any category II entities (state or provincial government purchasing). Procurement at the sub-federal level is worth more than the federal government procurement in each of the three countries. NAFTA also included only 53 US central government entities compared to the 79 listed in category I in the GPA.

The 2003 US-Singapore FTA was, in contrast, more or less identical to the GPA coverage. Both the US and Singapore were signatories to the GPA, so the FTA had no real impact. The US – Chile FTA (2003) on the other hand extended the GPA to Chile.\(^\text{15}\) The thresholds for category I and II purchasing were also set somewhat lower in the US – Chile FTA than in the GPA, thus opening rather more of the respective purchasing markets to competition. This provides an interesting model for asymmetric coverage in FTAs. The full GPA framework was applied in the US – Peru FTA even though Peru is a less developed country. But the entity coverage offered by the US was less than that in the GPA, with only 7 entities in category I (compared to 78 federal agencies in the GPA) and 9 in category II (compared to 37 states in the GPA) covered. The US also excluded purchasing by US ports from category III. The thresholds for Peru were a little higher than the GPA thus providing some form of asymmetry. Similarly the US – Morocco FTA (2006) included the full GPA framework agreement, but the coverage of entities offered by the US was less than the GPA. Although category I coverage was equivalent to the GPA, only 23 US states were covered under category II compared to the 37 in the GPA. Purchasing by US ports was again excluded. This illustrates how coverage of FTA provisions on procurement follow the reciprocity based approach of the GPA, just as the framework rules were broadly those of the GPA.

The US FTAs with Bahrain and Oman (2006) also provided for the full application of the GPA framework. In these two cases however there was no coverage of category II (state-level purchasing) at all by the US. Finally, the US – Korea FTA involves two signatories to the GPA so again the FTA made no real difference to the procurement sector.
EU and EFTA FTAs

The EU has also adopted the GPA framework rules for its FTAs with emerging markets, but in its earlier FTAs with developing countries it included less extensive rules. For example, the EU – Morocco FTA has only one short article (Art 41) that sets out the aim of progressive liberalisation of procurement markets. This will have no effect until the EU – Morocco Association Council takes specific action to add some flesh to the provisions. This approach to developing countries was established with the Trade Development and Cooperation Agreement (TDCA) between the EU and South Africa negotiated in 1995. In Article 45 (1) of the TDCA the Parties agree to cooperate to ensure that access to the Parties' procurement contracts (are) governed by a system which is fair, equitable and transparent.’ The same is true for the EU – Egypt Euromed Association agreement of 2003, which has just the one short article (Art 38) setting out liberalisation as an objective. Such provisions have little or no effect without implementing provisions.

The EU – Mexico FTA (2000) is both NAFTA and GPA consistent in that Mexico used the NAFTA text and coverage on procurement, which although similar to the GPA is not the same, while the EU has used the GPA text and coverage. Indeed, Mexico is not a signatory of the GPA.

The EU – Chile FTA (2003) on the other hand applies the full GPA framework to the procurement practices of the two parties. Coverage is somewhat GPA – minus however, in that the EU offers fewer category III (public enterprises and utilities) entities than under the GPA. In its coverage the EU has been rather more generous than the US in terms of providing asymmetric coverage, but it has still retained some sectors for reasons of reciprocity. As will be shown below the EU used the same approach in the CARIFORUM –EC agreement.

The EU approach to procurement in the EPA text is therefore in between the full GPA type agreement of the EU – Chile FTA and the very simple provisions in earlier North – South FTA. The EPA text resembles the GPA in terms of the framework, but diverges when it comes to liberalization commitments.
There is little difference between the EU and EFTA provisions in their respective FTAs. The EFTA agreements negotiated with Mexico and Chile are the same as the EU agreements. In the case of the FTA with Chile, the EFTA parties exclude electricity entities from its list for category III entities. EFTA agreements with developing countries such as Morocco have, like the EU, simply included one short article (Art 15 in the case of Morocco) that states the aim of progressive liberalisation. EFTA has also negotiated FTAs with Korea (2006) and Singapore (2003). As both these countries are signatories to the 1994 GPA the FTAs simply refer to the existing obligations of the parties under that agreement.

**Other FTAs**

In Asia both Japan and Singapore are signatories to the GPA. Japan has followed the same pattern as the EU and EFTA in its FTA with Mexico. In other words Japan has used the GPA framework rules and offered the same coverage as for the GPA and Mexico has used the NAFTA text. This has clearly been done with the intention of avoiding Mexico having to implement two slightly different provisions in its national law.

In the FTA between Japan and Singapore there is simply reference to the GPA obligations in terms of procedures, compliance, bid challenge etc. But the two agreed to somewhat lower thresholds than those in the GPA, so the agreement could be said to be slightly GPA plus. The same is true for the Singapore – Korea FTA agreed in 2006.

When it comes to agreements with less developed countries Japan accepted the FTA with Malaysia (2006) without any reference to public procurement. In the case of Singapore’s agreement with Jordan provisions on procurement were left out pending Jordan’s negotiation of accession to the GPA. So both Japan and Singapore appear to be rather more flexible in leaving procurement off the agenda of FTAs than the EU or EFTA that seek inclusion, or the US which seeks a full GPA equivalent approach.
The general trend in procurement rules

As should be clear from the above, the exclusion of transparency in government procurement from the Doha Development Agenda (DDA) of the WTO has not meant the issue is off the trade agenda. The aim of widening the number of countries applying rules on procurement is effectively being pursued through the adoption of GPA type provisions in the FTAs negotiated by the major WTO Members. This combined with the negotiation of accession to the GPA of more countries, most notably China, means that a de facto regime for public procurement is emerging. Brazil, India, South Africa and some of the bigger ASEAN countries remain the major emerging markets that are still to agree to GPA type rules on procurement. The EU is of course negotiating an FTA with India in which it hopes to include procurement provisions. In the case of Brazil, procurement was one of the sticking points in the EU-Mercosur negotiations. EU is also aiming to negotiate region to region agreements with ASEAN and SADC (thus South Africa) that include procurement. The US has now concluded FTAs with procurement provisions equivalent to the GPA with Mexico, Chile, Australia and even developing countries such as Morocco.

Most of the FTAs to date also follow the GPA model in that they combine liberal framework rules covering transparency, contract award procedures and criteria and bid challenge etc. that promote international best practice, with mercantilist, complex bilaterally negotiated schedules based on reciprocity. Broadly speaking developing countries have been ready to accept the case for transparency, but have declined to enter into bilateral negotiations on coverage.

The framework provisions that enhance transparency in public procurement are likely to improve contract award procedures and enhance competition. Thus inclusion of transparency rules in FTAs does not constitute a significant regional preference vis-à-vis third countries as all bidders get better access to information. Liberalisation commitments do, however, provide preferential access for FTA partners.

As noted above there is evidence that procurement rules tend to benefit the national economy of the country applying them by promoting competition and specialisation within the national market and thus the more efficient use of public funds. The benefits
for other signatories or third parties in terms of enhanced market access have been limited. This is even true at the regional level in the case of the EU. In other words the intra-EU supply of public procurement markets is limited to around 5-6% on average of contracts. Clearly some of the increase in competition in the national markets comes from foreign suppliers who have established themselves in the host market. In other words international competition has most probably increased through investment rather than through cross border supply. This is important for developing countries for a number of reasons. First they have smaller markets so there is less scope for gains from increased domestic competition. Second, developing country companies are less likely to be able to establish a presence in the larger procurement markets and are thus less likely to gain effective market access.  

Effects of EPA text on the ACP states

To date only the CARIFORUM – EC EPA has included provisions on procurement. This section therefore analyses the ‘EPA text’ on procurement in the CARIFORUM –EC text and discusses the likely impact on ACP states were other ACP regions or states to adopt a similar text. Table 2 provides a comparison of the ‘EPA text’ with other agreements

Policy space

EPA rules based on the CARIFORM – EC EPA text model would have two broad effects; one resulting from the framework rules on procurement procedures and transparency; and one from the liberalisation provisions envisaged in Article 167. The Article 167 provisions on national treatment will, when applied, reduce the ‘policy space’ available to use preferential procurement for development or infant industry strategies. Most developing countries use some form of preferential purchasing to favour specified categories of producers. Such preferences usually take the form of price preference for any contract. In other words contracts are awarded to national suppliers or a specific category of preferred suppliers unless the price is more then ‘x’ percentage (the preference) above the foreign offer. Categories of suppliers can be small and medium sized companies, companies owned by disadvantaged groups in society or suppliers that comply with certain employment criteria. These policies are often of considerable political and economic importance for ACP governments. For example, preference in
government procurement was introduced by South Africa to promote the ‘emerging economy’. This is described in the case study on South Africa below. (World Bank, 2003) Botswana also uses preferential government purchasing to promote economic empowerment. (Lionjanga, 2003) Other ACP states use preferential purchasing to favour small or medium sized companies, such as in the case of Uganda also discussed below.

More generally, governments will use preferential purchasing to favour national producers over foreign competition as part of industrial development strategies. A distinction should be made here between *de jure* preferences based on specific criteria and *de facto* preferences for local suppliers based on the use or abuse of discretion in contract award procedures. 17 *De jure* preferences based on objective development criteria can be seen as a legitimate policy tool. Discretion that provides scope for *de facto* preferences is easily abused and is more likely to result in uneconomic and costly procurement.

The EPA text in Article 167 envisages commitments on national treatment that will remove ‘policy space’ to provide preferences, but not yet. Article 167 (3) of the CARIFORUM – EC text states that ‘liberalisation’ commitments on national treatment *may* be made by the Joint Committee. Decisions of the Joint Committee are based on consensus. The EPA text clearly raises expectations of national treatment commitments, which means ACP governments open themselves to negotiating pressure from the EU by signing such a provision.

The EPA text actively encourages the extension of national treatment to other CARIFORUM states, in other words the promotion of a regional procurement market. Indeed, this is the first substantive article in the chapter on procurement. See annex I for the text of the CARIFORUM – EC chapter on procurement. There is no binding obligation to offer national treatment within CARIFORUM region. This would clearly require a decision at the regional level. But Art 167 seems to clear the way for regional preferences.
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<th>Coverage</th>
<th>1994 GPA</th>
<th>EU-Chile</th>
<th>CARIFORUM- EC text</th>
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<td>Cat I central govt. supplies and works - ve listing. Thresholds supplies a 130k SDR, works 5m SDR</td>
<td>central, sub-central govt. and utilities as per the GPA for the EU and equivalent for Chile Annexes XI and XII</td>
<td>central government only for CARIFORUM, central, sub-central and public enterprise the EU (but not key utilities) (Annex 6)</td>
<td>Central government;</td>
<td></td>
</tr>
<tr>
<td>Cat II sub national govt. ‘voluntary’ upon first sub-national level no local govt. Thresholds supplies and services 200k SDR and works 5m SDR</td>
<td>Goods, services and works covered</td>
<td>goods, services and works covered</td>
<td>goods, works and services</td>
<td></td>
</tr>
<tr>
<td>Cat III Other entities e.g. Utilities</td>
<td>thresholds; central govt. supplies 130k SDR, works 5m SDR Sub central 200k and 5m SDR and utilities 400k and 5m SDRs (as GPA 1994)</td>
<td>thresholds; as per GPA 1994 for the EU and For CARIFORUM 150k for goods and services and 6..5 mill SDR for works</td>
<td>no reference</td>
<td></td>
</tr>
</tbody>
</table>

| National treatment commitments | national treatment and MFN for signatories | national treatment and non-discrimination | Joint Committee may decide entities and procurement to be covered (Art 167 (3)) | preference for national or local suppliers allowed but must be explicit |

| Transparency | information to be provided on national procurement laws and rules; contracts to be advertised to facilitate international competition; | provision of information sufficient to enable effective bids (Art 142); statistics on contracts to be provided only when a party does not comply effectively with objectives of the agreement (Art 158) | provision of information sufficient to enable effective bids no requirement on statistics | all relevant laws, regulations and decisions must be publicised individual procurement contracts to be advertised |
| Transparency | information of why bids unsuccessful on request Art 154 | no reference | no reference | Guidelines on Application of UNCITRAL rules stress importance |

| Contract award procedures | option of open, restricted or single tendering; | open and selective (i.e. restrictive). Single tendering possible for exceptional cases (Art 143 –146) | open, restricted or limited/ single tendering | open tendering preferred, selective tendering possible but criteria for selection must be clearly set out |

| Contract award criteria | lowest price or most economically advantageous bid | lowest price or most advantageous bid based on previously determined criteria | lowest price or most advantageous bid based on previously determined criteria | lowest-price or most advantageous bid based on previously determined criteria |

| Technical specifications | use of international standards encouraged; performance standards prefer to design standards | performance rather than design or descriptive standards (Art 149); international, national or recognised standards to be used, but exceptions possible | performance rather than design standards; use of international standards or recognised national standards | specifications should not create an unnecessary obstacle to trade |

| Regulatory safeguard | public interest exception (Art XXIII) | government may decline to award contract | government may decline to award a contract on national interest grounds | |

| Bid | bid challenge introduced | bid challenge (Art 155) | bid challenge (Art 179) | no reference |
The texts of the various agreements are available on the respective WTO, EU and UNCITRAL websites.

**Compliance costs**

Another effect on national procurement policies will be in terms of compliance costs. This flows from the likely framework rules in the EPA. Compliance costs can be important especially for ACP states that have only limited administrative capacity and in particular those (most) that are short of an adequate professional cadre of procurement officials. Having said this, the EPA text seeks to limit compliance costs and is less costly to implement than the GPA framework rules. The precedent set by the ‘EPA text’ excludes sub-central government procurement and thus procuring entities that account for more than half of all public procurement. Thresholds are also higher than in the GPA, transparency rules are not excessively complex, selective contract award procedures can limit the number of suppliers, and limited tendering is possible as is negotiation. There is
also no requirement to supply statistics. The bid challenge provisions should allow for the use of existing administrative or judicial reviews and there is flexibility when it comes to deadlines and timing.

Virtually all ACP states have moved to reform government procurement in recent years and most have based these reforms on established international practice as reflected, for example, in the UNCITRAL Model Law and Guidelines on government procurement. This means that the existing national procedures, at least on paper, already do much of what is included in the EPA framework provisions. Therefore although there will clearly be compliance costs these will not result from bringing national laws and regulations in line with the EPA framework, but from the full implementation of the national laws and regulations, because in most cases ACP states are still to fully implement national reform programmes.

*Impact on domestic reform*

One rationale for agreeing to include procurement in EPAs is that the external pressure resulting from the commitment implied by signature will help to maintain the momentum for existing national reforms. Until the introduction of reforms in the late 1980s and 1990s many developing countries, like the developed economies of the EU, had outdated government procurement regimes. These were often based on concepts of central supply rather than competitive bidding. In many African states government purchasing was based on systems inherited from colonial days in which procurement was regulated by ministerial directives rather than a comprehensive procurement code. This often resulted in fragmentation and complexity. Failing standard procurement rules, the systems became progressively weaker and thus provided scope for abuse and inefficiencies. (Hunja, 2003)

From the late 1980s onwards there was recognition of the importance of government procurement and most ACP states introduced reforms. These reforms had the objective of creating competitive, efficient and transparent government procurement. Reforms were supported by the World Bank, which recommended the use of international best practice in procurement. These reforms generally consisted of adopting a general policy and code for government procurement, the establishment of more effective implementation, the introduction of standard procurement rules and documentation, transparency and
better enforcement using either judicial or administrative reviews. But reform of government procurement is a continuous process and the momentum for reform in African ACP states has not infrequently been lost. In some cases reform agendas were not completed for political reasons. In other cases the full implementation of reforms has failed due to a lack of enough trained professionals or resistance from vested interests. In other words there is some evidence that procurement reform will be at least slower without external pressure. This provides then one rationale for including procurement in the EPA agreements, especially if these provide sufficient flexibility for the ACP states to phase liberalisation so that it fits with their development policies and the compliance costs are not excessive.

**Trade and economic effects**

The economic effects of signing up to ‘hard’ international rules on procurement have not been subject to any systematic study. (Evenett and Hoekman, 2005) Given the importance of government procurement in many developing countries small percentage savings can result in hundreds of millions of dollars being freed for vital development spending. But systematic analysis is in short supply and the studies that have looked at the economic effects of market access and transparency rules in procurement do not have conclusive findings on welfare effects. (Evenett and Hoekman, 2004) There does however seem to be some (quantitative) evidence that the impact of rules on procurement is through increased competition within the national market rather than increased cross border provision. (Evenett and Hoekman, 2005) This is the case in the EU despite the rigor of the EU procurement regime. These kinds of gains are likely to be smaller for ACP states where there is less scope for increased domestic competition. So the main economic effects for ACP states would therefore appear to be in the form of potential savings in government expenditure that flow from more effective procurement.
Regional effects

This brings us to the potential regional effects of signing procurement rules in the EPAs. If individual ACP national markets are not big enough to reap the gains from increased competition between national suppliers, there may be scope for such gains from the creation of regional procurement markets. Differences in national procurement rules or opaque rules, along with *de jure* and *de facto* preferences for local suppliers all stand in the way of the establishment of competitive regional procurement markets. The adoption of common procurement rules in the shape of EPA rules on procurement across an ACP region would reduce *de facto* preferences, and offering national treatment to regional suppliers would remove *de jure* preferences. Art 167(2)(a)) of the ‘EPA text’ *encourages* (but does not require) such regional national treatment within CARIFORUM and thus offers a means of establishing a regional procurement market.

Of course the potential economic gains from a competitive regional procurement market can be achieved by other means. A number of ACP regions already have plans to act on government procurement. If these regional initiatives are effective there would be no need for external discipline from signing up to EPA rules. Equally, it may be possible to reap the economic gains from more competitive procurement markets by adopting a ‘soft law’ approach such as the progressive application of rules suggested in the UNCITRAL Model Law and Guidelines. (Evenett and Hoekman, 2005).

Case study of South Africa

In order to illustrate the potential impact of commitments to provisions equivalent to those included in the text of the CARIFORUM- EC EPA text, this section considers the case of South Africa.\textsuperscript{19}

*Only about 40% of South African procurement entities would be covered by an EPA – text type of agreement*

South African government procurement accounts for 13% of GDP or $14bn in 2003. There is also a further additional $5bn (2003) or so in procurement by state owned
enterprises, making 17% of GDP in total. Of the government procurement (excluding state owned enterprises) central government accounts for 39%, provincial government 46% and local government 15%. An agreement equivalent to the ‘EPA text’ in which the CARIFORUM states only agreed to include central government, would therefore exclude more than half of government procurement in South Africa. Provincial and local government procurement as well as that by state owned enterprises would not be covered. In South Africa central government procurement is essentially well organised and carried out according to the established rules. It is at the provincial level, where provincial tender boards have remained in place despite the reforms, that there is a question of conflicts of interest due to the fact that the majority of tender board members are from the private sector.

The use of thresholds would also mean that smaller contracts below the 150,000 SDRs would be excluded from the scope of the agreement anyway.

Reform of government procurement was initiated by the first post-Apartheid government in 1995 with the establishment of a Government Procurement Task Force. This led to the articulation of clear policy objectives in a 1997 Green Paper on Public Sector Procurement Reform. The Green Paper called for national policy objectives to be established in legislation in a National Procurement Framework. This framework was to promote fair, competitive, transparent and cost effective procurement in line with international best practice. To this end the criteria and procedures for policy were to be established. The Task Force recommended the establishment of a National Procurement Compliance Office to replace the existing system of central and provincial tender boards. Government procurement was also to be used to pursue certain clearly defined policy objectives in particular the promotion of historically disadvantaged groups in order to bring about an integration of the ‘emerging economy’ of small black owned and run companies into the existing mainstream economy. Finally, there was a clear message that corruption would not be tolerated. South African procurement policy therefore seeks to ensure contracts are awarded fairly and in a transparent fashion, as well as serve important development policy objectives through the use of preferences for certain
groups of suppliers. The aim of promoting fair and transparent procurement set out in the South African reform of government purchasing is clearly in the spirit of the EPA text on procurement. The next section looks at whether the use of preferences would be prohibited by South Africa agreeing to include procurement in any EPA.

*De jure preference schemes might -in the long term- require a formal exemption from EPA-type rules*

The Green Paper recommendations were not fully implemented. In the place of comprehensive legislation there were a number of legislative measures adopted. For preferential procurement the most important of these was the 2000 Preferential Procurement Framework Act. This introduced a weighting system according to which 10 points (out of 100) were based on whether the bidder satisfied specified criteria relating to the promotion of the emerging economy. The remaining 90 points were based on commercial criteria. In the case of smaller contracts the weighting is 20:80. The ‘EPA text’ would not (yet) prohibit such a preference scheme. Only commitments on national treatment would result in such a scheme being ruled out and it would require a decision of the Joint ACP-EC Council to specify which procurement is covered by such a national treatment commitment. The expectation might however, be that such a scheme would be phased out when if it is no longer needed. South Africa may therefore come under pressure to make national treatment commitments that affect its ability to use such preferences in the future.

South Africa has a second scheme that makes use of *de jure* provisions in the shape of the Industrial Participation Program (IPP). This obliges successful foreign bidders for large goods and equipment contracts (above $10m) to invest in South Africa for at least 7 years a sum equivalent to 30% of the contract value. This investment can take the form of sub-contracting or a joint venture, and may constitutes a form of ‘offset’ as defined in the EPA text. (see annex I) The IPP has been criticised by the World Bank as not being cost effective and in recent years the government has moved to limit the use of the scheme in such sectors as aerospace, transport and shipbuilding. Unlike the GPA, which clearly prohibits offsets, the EPA contains no separate, specific prohibition of offsets, but depending on the application of the South African IPP it may be seen as inconsistent with Article 167.1 (2) b(i) which states that ‘each
Signatory shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party.’ The focus here is on the origin of goods or services not any link with investment as such and in any case the clause uses the word endeavour rather than shall. Art 167.1 (2) b (ii) of the EPA text states that Parties ‘shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory.’ This is binding and is intended to ensure that affiliates of foreign companies bidding for government contracts are not discriminated against. This is rather different to the IPP, which imposes performance requirements on foreign contractors, but only after they have won a contract.

South Africa’s policies that use procurement to promote development and industrial investment would therefore not be immediately challenged by rules equivalent to the ‘EPA text’. But the expectation must be that there would be pressure to phase out the use of such de jure preferences. South Africa and other ACP states signing EPAs with comprehensive provisions on government procurement might therefore wish to consider seeking formal exemptions for preferences used to promote clearly defined development policies. There is a precedent for this in Article V of the GPA, (see Special and Differential treatment in table 2). But the GPA does not appear to offer an unconditional right for developing countries to opt for such exclusions. In the GPA text before the 2007 review of that agreement it was clearly stated that any development exceptions would have to be negotiated. The revised text of 2007 is less explicit on this. Similarly there is a precedent for developing countries being offered exceptions for offsets (in Article XVI of the GPA), but the GPA exception is clearly not unconditional and must be negotiated. This implies parties to such a negotiation may withdraw commitments in their ‘liberalisation’ schedules in such cases.

Existing South African practice on transparency is consistent with EPA text rules

South Africa publishes laws and regulations relating to government purchasing. In terms of procurement opportunities, all central government calls for tender are published in a weekly state tender bulletin, which is also available electronically. This is in line with the rules in the EPA text that are designed to ensure that contracts are advertised in a way
that facilitates competition. Some South African provinces only advertise in the local press. This is inconsistent with open procurement rules because it is often used to provide an advantage for local suppliers. However, if South Africa were to follow the EPA text, provincial government purchasing would not be covered so there would be no obligation on provincial government to advertise contracts in the weekly state tender bulletin.

One of the shortcomings of South African procurement identified in the 2003 World Bank Country Procurement Assessment Report was the lack of sufficient data and statistics on contracts awarded. (World Bank, 2003) This is post contract transparency and facilitates monitoring and implementation. As noted in table 2 this is something the World Bank and UNCITRAL codes stress. (World Bank, 2003) The EPA text does not require extensive post contract award statistics, so this is an area in which the EPA text would not lead to more transparency in South African procurement.

Signing procurement rules in an EPA would promote the use of standard purchasing procedures and bidding documentation

The Green Paper on Public Sector Procurement Reform envisaged the introduction of standardised procurement procedures. Although some legislative measures have been taken the full framework of rules on procurement was not adopted. This has resulted in new regulations being added without them replacing existing practices. As a result the reforms have added to the complexity of procurement rules and documentation. There are for example, no standardised bidding documents. External pressure to apply standardised procedures resulting from commitments in an EPA would therefore work with the grain of the existing reform process. Beyond the use of standardised procedures and documentation the EPA text, like the GPA, provides for considerable flexibility in terms of contract award procedures, such as the use of selective and limited tending. Existing South Africa procedures are therefore unlikely to be required to change. The practices that are likely to be inconsistent with EPA rules tend to be at the provincial level, which would not be covered if the CARIFORUM – EC precedent is followed. This is an area where greater external discipline might have benefits for South Africa. For example, the intention of the Green Paper was to move responsibility from the central and provincial tender boards to the ‘organs of the state’ (i.e. official bodies). This was considered especially desirable with regard to the provincial tender boards because private
companies had majorities in most provincial tender boards raising concerns about conflicts of interest. The World Bank report also identified other questionable practices at the provincial level, such as allocation of consultancy contracts by rotation to consultants that pay fees to a local professional body rather than on the basis of competition and a lack of transparency in contract procedures, such as not reading out prices when bids are opened. Here then one has perhaps another example of where an ‘EPA text’ does not go far enough.

*Existing review provisions in South Africa should satisfy bid challenge requirements in the EPA text*

Under the South African system the Auditor General has powers to review the application of procurement procedures. The Green Paper also envisaged the establishment of a National Procurement Compliance Office. Either of these options for aggrieved parties seeking redress should satisfy the fairly general requirements for bid challenge in the ‘EPA text’.

*Conclusions on South Africa*

This brief discussion of South Africa suggests that the main impact on South Africa of signing an EPA-text type of agreement would be to raise questions about the ability of South Africa to use preferential purchasing to promote development and industrial objectives in the long term. As binding commitments on national treatment would require a political decision of a Joint Council, there is no immediate impact on this ‘policy space.’ In order to ensure its ability to continue with *de jure* preferences for small and medium sized companies, South Africa would have to seek the inclusion of an explicit exemption for clearly defined development objectives.

In terms of the framework rules on procurement procedures in an EPA-text type of agreement, there do not appear to be excessive compliance costs for South Africa. Limiting coverage to central government means that the rules would only apply to procurement that is in any case conducted more or less according to international standards. Compliance costs would increase however, if provincial and local government or state-owned enterprises were ever included in coverage. It is thus, on the one hand, in
South Africa’s interests to limit coverage of any rules to central government. On the other hand, it is at the provincial and local levels of procurement that reform is in need of the added momentum that external commitments might provide.

**The Case of Uganda**

Uganda has faced a major challenge in introducing fair and transparent government procurement. Reforms that began in the late 1990s and were codified in the Public Procurement and Disposal of Public Assets Act of 2003 and subsequent Regulations have gone a long way towards establishing laws and rules in line with international best practice, but these are still in the process of being implemented. The aims of the Ugandan rules are to establish fair, competitive, transparent and economic public procurement at all levels of government. A Public Procurement and Disposal of Public Assets Authority (PPDA) has been established to coordinate and implement this policy. Uganda is similar to other African countries in that reforms envisage replacing ineffective and sometimes corrupt procurement practices based on central and local tendering boards, with rules based on the UNCITRAL model law.

*The most challenging part of government procurement would not be touched by EPA-text rules*

As in other countries procurement by central government in Uganda constitutes less than half of all government procurement. The national laws and regulations envisaged in the reform cover all procurement central, local and in parastatal bodies. Again in line with the experience in many other smaller, less resourced countries, reform has started at the centre and is now being pushed into the local level. The local level of procurement in Uganda has been especially non-transparent and inefficient. The reforms therefore include the replacement of existing local and district tender boards, whose members are politically appointed, with professional contract committees made up of purchasing officials. But there has been opposition to the replacement of district tender boards for political reasons as well as the vested interests of the tender board members. The politically important councillors at district level have had an important say in selecting local tender boards. In some cases tender board members have clearly been in a conflict of interest and have awarded contracts to themselves. (World Bank, 2003)
contract committees have been established there have been conflicts between them and the existing district tender boards. The implementation of reform at the local level is therefore a key priority of the current policy. A CARIFORUM EPA- text type of agreement would exclude non-central government procurement. One rationale for including procurement rules in EPAs is to provide the external push to ensure reform takes place. But in the case of Uganda, as in the case of South Africa and one must assume many other African ACP countries, the real challenge for reform is at the sub-central government level.

The coverage of domestic programmes exceeds the scope of any likely EPA rules

According to the World Bank, government purchasing accounts for 70% public expenditure in Uganda, this is more or less the figure given of similar countries such as Tanzania. (World Bank 2003)\textsuperscript{20} Regardless of the accuracy of the 70% figure, there can be little doubt therefore that public procurement is a very important element in government expenditure. The EPA would only cover a minority of procurement contracts. In addition to covering all levels of procurement the national rules in Uganda include small contracts. The EPA – text on procurement envisages thresholds of 150,000 SDRs. Ugandan regulations use thresholds to specify the type of contract award procedure that should be used for a given contract. These thresholds are much lower. For example, ‘large’ contracts of over $US 35,000 (SDR 21,000) have to use an open procedure. These national thresholds probably reflect the normal value of contracts, so that an EPA threshold of 150,000 SDR would catch only a few large contracts. This combined with an exclusion of local and district government procurement would mean any EPA rules on procurement would have limited impact.

An explicit development exemption from national treatment commitments in the EPA text would promote the use of more transparent de jure preferences in Uganda

De facto preference for local suppliers has been more important than de jure preferences in Uganda. Past practice has clearly been to provide preferences for local suppliers by means of opaque procedures and an absence of competitive tendering. Section 173 of the 2003 Regulations provides for the use of merit points when awarding contracts. These
appear to provide a 10% preference margin for local suppliers. (Government of Uganda, 2003) But this preference has not been applied in a very transparent way and there are currently plans to introduce more objective criteria for the use of preferences in procurement for small and medium sized companies. (Highlights, 2007). As noted in the case of South Africa the ‘EPA text’ does not require commitments on national treatment that would preclude the use of national preferences without a decision by a joint ACP – EU Council. A comprehensive EPA that included procurement would therefore not prohibit the use of preferences for development or industrial policy ends. But the fact that Uganda is developing criteria for preferences as part of its reform of government procurement shows there will be a need to provide the policy space to allow for the use of preferences in the future. Many ACP states are still defining their policies. The key point here is that if preferential purchasing is to be used it is better for this to be based on clear and objective development needs, rather than the whim or possibly vested interests of members of a tender board. The Ugandan case therefore confirms the need for an explicit development exception from national treatment commitments in any EPA text based on objective development criteria. This would strengthen the case for objective, *de jure* preferences geared to real development needs rather than the continuation of opaque *de facto* preferences for local suppliers that precludes competition and facilitates corruption.

_EPA text type rules would promote a little more transparency_

In Uganda the laws and regulations adopted by the central government are all available on the PPDA website ([www.PPDA.go.ug](http://www.PPDA.go.ug)) along with the relevant standard documentation that has been developed thus far. In this and in other respects Uganda follows the UNCITRAL model law. But there is no dedicated procurement gazette in Uganda where potential bidders can find all tender notices. Notices, even for relatively large contracts requiring open international competition are placed in newspapers and local contract notification is likewise not centralised. The EPA-text requires a central notification of contracts and would therefore enhance transparency. In this respect there may be some additional compliance costs. In the case of CARIFORUM a transitional period was included to give smaller states more time to adopt such measures.
The EPA text does not require the collection of post contract award statistics, although there is a requirement to maintain records of contract awards. This is another area where the EPA does not appear to be very ambitious. Although the absence or rules requiring the collection of data would reduce compliance costs, such data is probably essential if those awarding contracts are to be held to account. However, in the case of Uganda and other similar states the key challenge is again at the local level.

Finally, on transparency the EPA text (Art 168 (5)) encourages purchasing entities to provide notices concerning their future procurement plans. This is something that is seen as best practice as it facilitates economies of scale in purchasing and efficient allocation of resources. Ugandan regulations also seek to promote the use of rolling programmes by the newly established decentralised purchasing bodies in order to ensure that decentralisation does not result in lost economies of scale. This is however, one of the areas requiring fuller implementation.

**Existing Ugandan rules are consistent with EPA-type rules on contract award procedures**

In line with international practice Uganda differentiates between open, restricted and limited or single tendering procedures. Ugandan regulations seek to promote open tendering although selective procedures have continued to dominate. When it comes to selective procedures some practices in Uganda, such as the use of rotation rather than competitive tendering may be inconsistent with the rules contained in the EPA-text. The extensive use of negotiation in open contracts that also occurs in Uganda is not in line with international best practice as it provides too many opportunities for abuse. The ‘EPA – text’ provides for negotiated contracts, but only in clearly defined circumstances. Broadly speaking the Ugandan national laws and regulations are consistent with international practice and the framework rules in the EPA text. It is the practice not the rules in Uganda that is not yet in line with either the national or international norms.

**Existing review provisions are in line with EPA bid challenge requirements**

The Ugandan legislation places responsibility for the implementation of policy with the PPDA. As in South Africa the Auditor General can also investigate complaints about the
use of public finances. In Uganda there is also an Inspector General of Government who can hear complaints on public administration. Together these options for review may satisfy the provisions in the EPA-text to have an independent review body.

_Uganda illustrates the need for focused technical cooperation_

The Ugandan case confirms that one of the major bottlenecks in policy reform is the lack of adequate professional staff. The Ugandan reform involved a decentralisation of procurement in contract committees to replace the tender board(s). This means that for the reform to work there is a demand for numerous suitably trained professional purchasing officials. This need has been recognised and various donors, such as the World Bank, DfID, UNDP and European Union, have contributed to capacity building in the form of training of officials. There is also currently discussion on the establishment of an Institute of Procurement and Supply Chain Management to promote the establishment of a professional cadre of officials. Despite support for various donors there remains a great need for more trained officials, especially if the Contract Committees in local government are to establish their credibility.

_Conclusions on Uganda_

The case of Uganda illustrates the progress that has been made towards more transparent and competitive government procurement due to reform at the national level. The statutes and regulations introduced are generally in line with international best practice as set out in the UNCITRAL model law. The letter of the law and regulations is therefore compatible with the framework rules of the ‘EPA text’ and signing up to EPA text type rules would not result is significant compliance costs. But in Uganda - as in many developing ACP states - the rules have not yet been fully implemented. So there will be compliance costs in signing up to EPA commitments, but generally not much more than would be entailed in implementing national rules fully.

On the question of policy space Uganda is still developing coherent criteria for preference schemes as part of its policy reform. The expectation must be that other developing ACP states will likewise include preferences in their policy reforms. The inclusion of an explicit development exemption from national treatment commitments in
an EPA text could therefore be used to promote the introduction of preferences that are based on objective, development criteria.

**How might EPA rules on procurement be made more compatible with ACP interests?**

This analysis of the ‘EPA text’ and the two case studies provides a basis for suggesting a number of possible modifications to the CARIFORUM – EC text that might make inclusion of procurement more attractive to other ACP regions and countries.

First, an explicit, unconditional development exemption, similar to that already provided in Article V of the 2007 revision of the GPA, would provide scope for ACP states to retain preference schemes that serve *clearly defined and objective* development aims. This would provide the ‘policy space’ many ACP governments seek to allow preference programmes in their reforms of public procurement. Including an explicit exemption will further the use of transparent *de jure* rules based on objective criteria over the use of opaque *de facto* preferences that can so easily be abused and result in wasteful, inefficient and possibly corrupt practices. The provision of an explicit exemption will address the concern that many ACP governments have about agreeing to any provisions on procurement. Even if the ‘EPA – text’ does not require immediate ‘liberalisation’ (i.e. national treatment commitments) ACP governments see any inclusion of procurement rules as ‘a foot in the door’ that will be used to force them to make future commitments that are inconsistent with their development aims. Allowing such a development exemption could facilitate agreement on framework rules that can support existing national reform process in the ACP and make procurement generally more transparent and competitive.

Second, the sequencing of liberalisation should start with ACP regional procurement markets and then precede with wider liberalisation commitments. In other words liberalisation measures vis-à-vis the EU would only come after the ACP parties have made commitments within their region. This would be in line with the EU’s aim of promoting regional integration as a means of development in the ACP. It would also clearly signal that the EU is interested in building regional capacity and not favouring more selfish market access for EU exporters. The Global Europe strategy clearly
excludes poorer developing countries from the pursuit of offensive EU interests in opening procurement markets. (European Commission, 2006)\textsuperscript{21}

Third, the EPA text on procurement could provide firm commitments on technical assistance. The case studies confirm that a major reason for a lack of progress in the existing procurement reforms in ACP states and other developing countries is not the lack of rules \textit{per se}, but an inability to effectively implement national rules that are more or less in line with UNCITRAL and thus EPA text type framework rules. Poor implementation has in turn a number of causes, but the studies of procurement in developing countries suggest - and the case studies of South Africa and Uganda – appear to confirm that the main cause has been a lack of sufficient professional and qualified officials, especially at the sub-central government level. The EPA text at the moment offers little in terms of specific support for building professional purchasing cadres in the ACP states. The inclusion of targeted commitments to help establish a cadre of professional purchasing officers in the ACP states would arguably do more to promote open, competitive and objective procurement procedures than anything else. The EU has provided some support for such capacity building, such as in Uganda, but much more could be done.

Forth, in the EPA text the EU is offering asymmetric access to its procurement market for ACP suppliers in that it has adopted its GPA schedule for coverage. This includes central government purchasing of the Member States as well as sub-central government procurement and most type III (public enterprise) procurement. There is also some asymmetry in the thresholds determining coverage with the CARIFORUM parties having a higher threshold of 150,000 SDRs for goods and services and 6 million SDRs for works contracts than the EU, which uses its GPA thresholds. This reduces compliance costs. The EU could also consider offering ACP suppliers a lower threshold than its existing GPA thresholds of 130,000 and 5 million respectively. This may help the smaller ACP exporters access the EU market and offers a preference for the ACP compared to the EU’s GPA partners. The EU might also offer unconditional access to the utilities excluded from the EPA text for ‘poorer’ ACP states. This would be in line with its policy of not seeking reciprocity with these countries.
Conclusions: a rationale for including procurement rules in EPA agreements

This paper must be seen as a first assessment of the potential impact of ‘EPA text’ type rules on procurement on ACP state procurement policies and practices. It argues that the trade effects of including procurement in the EPAs will be limited. Most economic gains from more open and transparent procurement practices come from increased domestic competition and specialisation rather than from trade. The trade effects for ACP states are in particular unlikely to be very positive. Most ACP states do not have the capacity to supply EU procurement markets with goods or services. Open procurement policies in the ACP states are also likely to result in more contracts being filled by foreign suppliers than in the developed EU markets were there are more domestic suppliers able to compete for contracts. The creation of ACP regional procurement markets before opening to competition from EU producers would help the ACP states to redress this inbuilt disadvantage and gain from the trade effects of reform of procurement.

Most ACP states have engaged in unilateral reform of procurement policies within the last decade. These national policies have used international codes such as the UNCITRAL Model Law as the basis for laws and regulations, which are therefore broadly in line with what is contained in the EPA text. In most cases however, the regulations are still to be fully implemented. Many ACP states have had difficulties completing the reform of government procurement, especially at the sub-central level. This means that ACP states would not face significant compliance costs signing up to ‘EPA – type’ rules that go beyond the costs of implementing existing national regulations. The gap between adoption of rules and implementation also means that the problem is not the absence of rules per se but difficulties implementing rules that promote open, transparent and competitive procurement.

The strongest case for including procurement in comprehensive EPAs is that this may help maintain the momentum of the ongoing domestic reform. Whilst such an external discipline may help the ‘EPA text’ only covers central government procurement. There are obvious reasons for starting with central government procurement, such as to limit any compliance costs. But the real challenge facing ACP reform of procurement is at the sub-central government level. This would be excluded from the scope of EPA provisions that follow the CARIFORUM – EC precedent. Effective implementation of policy
reforms at the sub-central government level can best be promoted by establishing a professional cadre of purchasing officials. This will require further targeted assistance for training programmes that do not feature in the technical assistance provisions of the EPA text.

ACP governments in Africa remain very suspicious of the EU motives for including procurement in comprehensive EPAs and fear that this will limit their ‘policy space.’ Including an explicit exception for the use of preferences based on clearly defined and objective development criteria would go some way to easing the fears of ACP governments. Such an exception would also help to ensure that preferences are transparent and based on objective criteria rather than opaque and based on discretionary powers that are open to abuse. Open, effective and competitive procurement does require ACP states to adopt and implement clear rules on transparency in government procurement, but a policy aimed at introducing such rules is more likely to get the requisite support in the ACP if it clearly recognises that ACP governments should also have scope to use public procurement to pursue legitimate development objectives.
Bibliography


Highlights of the 7th Procurement Sector Review Workshop 2007 [www.ppda.go.ug](http://www.ppda.go.ug)


Endnotes

1 A draft of this paper was presented at the High Level Technical Meeting: EPAs: The Way Forward for the ACP Cape Town, South Africa, 7-8 April 2008

2 There is a need for caution with these figures. What counts is public procurement that is potentially subject to competition. The salaries of government employees, which may for example, be included in some figures, is clearly not subject to international competitive bidding. One is concerned with contracts for goods, services and construction.

3 There were earlier efforts to open procurement markets both within the GATT and at a regional level in the EU during the 1970s, but these were not effective.

4 The World Bank produces Country Procurement Assessment Reports that assess progress in policy reform. These are available on the World Bank website www.worldbank.org

5 Public procurement is a rather broader concept than government procurement because it includes procurement by bodies that may come under the influence of the government, such as parastatal bodies or public enterprise, but which are not part of central or sub-central government.

6 Framework rules are used here because they cover more than transparency as such. But the framework rules are more or less what were under discussion in the WTO under the heading of ‘transparency in government procurement.’

7 India, Jamaica, Nigeria and Korea participated in the negotiations but did not sign the 1979 GPA on the grounds that it would be too costly to implement and that liberalisation was based on bilateral reciprocal negotiations which favoured the developed economies.

8 Since 1994 a number of countries have acceded to the GPA. Most notably China negotiated access in 2007.

9 In the WTO discussions a number of developing countries led by India, with the support of Malaysia, Pakistan and Egypt have consistently questioned the benefit of including any form of rules on PP in the WTO. See Report of Meeting of 4 May 2001 WT/WGTGP/M/12.

10 This was confirmed in the Doha Ministerial Declaration that launched the Doha Development Agenda (WTO, 2001)

11 See also Reports of the Working Group on Transparency in Government Procurement especially WT/WGTGP/W/03 3 Oct 2002.

13 It is perhaps no coincidence that ‘weaknesses’ in procurement such as the risk of corruption are typically greatest at the sub-national level. More and more developing countries have good purchasing practices at the central government level.

14 See Minutes of the Meeting of 13 June 2003

15 In a US – Chile FTA of course an agreement on public procurement establishes a preference for the US and Chilean exporters to each others markets. In reality however, the degree of preference is not very great. Much of the GPA framework rules concerns promoting transparency and best practice in public procurement. If national purchasing is carried out in a transparent fashion following best regulatory practices there is unlikely to be discrimination between different suppliers, let alone between different foreign supplies. In other words the same purchasing procedures are often used regardless of the origin of the bid.

16 One can however, envisage circumstances in which developing country contractors would be very competitive in certain public works contracts thanks to lower labour costs.
The purpose of this paper is not to argue for or against the use of such policy instruments, but to point out the likely implications of an EPA text on policy space.

The World Bank Country Procurement Reports provide information on these reforms and reflect the World Bank approach.


Again caution is called for with regard to these figures, because not all public procurement is open to competition.

ACP states that fall into the category of emerging markets, such as South Africa, might be seen by the EU as targets for more offensive market access objectives.
Chapter 3 of the CARIFORUM –EC EPA covering government procurement

Article 165
General objective
The Parties recognize the importance of transparent competitive tendering for economic development with due regard being given to the special situation of the economies of the CARIFORUM States.

Article 166
Definitions
For the purposes of this Chapter:

(1) “government procurement” means any type of procurement of goods, services or a combination thereof, including works, by procuring entities listed in Annex 6 for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale, unless otherwise specified. It includes procurement by such methods as purchase or lease, or rental or hire purchase, with or without an option to buy.

(2) “procuring entities” means the entities of the Signatory CARIFORUM States and the EC Party listed in Annex 6 that procure in accordance with the provisions of this Chapter.

(3) “suppliers” means any natural or legal person or public body or group of such persons or bodies of a Signatory CARIFORUM State or the EC Party which can provide goods, services or the execution of works. The term shall cover equally a supplier of goods, a service provider or a contractor.

(4) "qualified supplier" means a supplier that a procuring entity recognises as having satisfied the conditions for participation.

(5) "eligible supplier" means a supplier who is allowed to participate in the public procurement opportunities of a Party or Signatory CARIFORUM State, in accordance with domestic law and without prejudice to the provisions of this Chapter.

(6) "multi-use list" means a list of suppliers that a procuring entity has determined satisfy the conditions for participation in that list, and that the procuring entity intends to use more than once.

(7) “legal person” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

(8) “legal person of a Party” means any legal entity duly constituted or otherwise organised under the law of the EC Party or of the Signatory CARIFORUM States. Should such a legal person have only its registered office or central administration in the territory of one of the Signatory CARIFORUM States or the EC Party, it may not be considered as a legal person of a Party, unless it is engaged in substantive business operations in any such territory.

(9) a “natural person” means a national of a Member State of, respectively, the Community or a Signatory CARIFORUM State according to their respective
legislation.

(10) Services include construction services unless otherwise specified.
(11) "in writing" or "written" means any expression of information in words, numbers or other symbols, including electronic means, that can be read, reproduced and stored.
(12) "Notice of intended procurement" means a notice published by a procuring entity inviting interested suppliers to submit a request for participation, a tender, or both.
(13) "Open" tendering procedures are those procedures whereby any interested supplier may submit a tender.
(14) "Selective" tendering procedures are those procedures whereby, consistent with the relevant provisions of this Chapter, only those qualified suppliers invited by the procuring entity may submit a tender.
(15) "Limited" tendering procedures are those procedures whereby the procuring entities may consult the suppliers of their choice and negotiate the terms of contract with one or more of them.
(16) "technical specifications" means a specification which lays down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by the procuring entities covered by this Chapter.
(17) "offsets" in government procurement means any conditions or undertakings that encourage local development or improve balance of payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action.

Article 167

Scope

The provisions of this Chapter apply only to those procuring entities listed in Annex 6 and in respect of procurements above the thresholds set out in that Annex. The Parties and the Signatory CARIFORUM States shall ensure that the procurement of their procuring entities covered by this Chapter takes place in a transparent manner according to the provisions of this Chapter and the Annexes pertaining thereto, treating any eligible supplier of either the Signatory CARIFORUM States or the EC Party equally in accordance with the principle of open and effective competition.

Article 167.1 - Supporting the creation of regional procurement markets

1. The Parties recognize the economic importance of establishing competitive regional procurement markets.
2. (a) With respect to any measure regarding covered procurement, each Signatory CARIFORUM State, including its procuring entities, shall endeavor not to treat a supplier established in any CARIFORUM State less favorably than another locally established supplier.
   (b) With respect to any measure regarding covered procurement, the EC Party and the Signatory CARIFORUM States, including their procuring entities:
(i) shall endeavour not to discriminate against a supplier established in either Party on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of either Party;
(ii) shall not treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation to or ownership by operators or nationals of any Signatory CARIFORUM State or of the EC Party.

3. Subject to paragraph 4 below, each Party, including its procuring entities, shall with respect to any measure regarding covered procurement, accord to the goods and services of the other Party and to suppliers of the other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers.

4. The Parties shall not be required to provide the treatment envisaged in paragraph 3 unless a decision by the Joint CARIFORUM-EC Council to this effect is taken. That decision may specify to which procurements by each Party the treatment envisaged in paragraph 3 would apply, and under which conditions.

**Article 167.2 - Valuation rules**

Procuring entities shall not choose a valuation method, or divide procurement, with the aim of avoiding the application of this Chapter. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions, and interest.

**Article 167.3 – Exceptions**

1. Nothing in this Chapter shall be construed as preventing a Signatory CARIFORUM State or the EC Party from imposing or enforcing measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.

2. This Chapter does not apply to:
   (a) the acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
   (b) non-contractual agreements or any form of assistance that a Party or Signatory CARIFORUM State provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
   (c) the procurement or acquisition of fiscal agency or depositary services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
   (d) the acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;
   (e) arbitration and conciliation services;
   (f) public employment contracts;
   (g) research and development services;
(h) the procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
(i) intra-governmental procurement;
(j) procurement conducted:
(i) for the direct purpose of providing international assistance, including development aid;
(ii) under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation of a project by a Party or Signatory CARIFORUM State with a non-Party;
(iii) in support of military forces located outside the territory of the Party or Signatory CARIFORUM State;
(iv) under the particular procedure or condition of an international organisation, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent with this Chapter.

Article 168

Transparency of government procurement

1. Subject to Article 180(4), each Party or Signatory CARIFORUM State shall promptly publish any law, regulation, judicial decision and administrative ruling of general application, and procedures, regarding procurement covered by this Chapter, as well as individual procurement opportunities, in the appropriate publications referred to in Annex 7 including officially designated electronic media. Each Party or Signatory CARIFORUM State shall promptly publish in the same manner all modifications to such measures, and shall within a reasonable time inform each other of any such modifications.

2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities provide for effective dissemination of the tendering opportunities generated by the relevant government processes, providing eligible suppliers with all the information required to take part in such procurement. Each Party shall set up and maintain an appropriate on-line facility to further the effective dissemination of tendering opportunities.
(a) Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders.
(b) Where entities do not offer free direct access to the entire tender documents and any supporting documents by electronic means, entities shall make promptly available the tender documentation at the request of any eligible supplier of the Parties.

3. For each procurement covered by this Chapter, procuring entities shall, save as otherwise provided, publish in advance a notice of intended procurement. Each notice shall be accessible during the entire time period established for tendering for the relevant procurement.

4. The information in each notice of intended procurement shall include at least the following: (a) name, address, fax number, electronic address (where available) of the procuring entity and, if different, the address where all documents relating to the procurement may be obtained; (b) the tendering procedure chosen and the form of the contract; (c) a description of the
intended procurement, as well as essential contract requirements to be
fulfilled; (d) any conditions that suppliers must fulfil to participate in the
procurement; (e) time-limits for submission of tenders and, where applicable,
any time limits for the submission of requests for participation in the
procurement. (f) all criteria to be used for the award of the contract; and (g) if
possible, terms of payment and other terms.

5. Procuring entities are encouraged to publish as early as possible in each fiscal
year a notice regarding their future procurement plans. The notice should
include the subject-matter of the procurement and the planned date of the
publication of the notice of intended procurement.

6. Procuring entities operating in the utilities may use such a notice regarding
their future procurement plans as a notice of intended procurement provided
that it includes as much of the information set out in paragraph 4 as available
and a statement that suppliers should express their interest in the procurement
to the entity.

Article 169
Methods of procurement

1. Without prejudice to the method of government procurement used in respect
of any specific procurement, procuring entities shall ensure that such methods
are specified in the notice of intended procurement or tender documents.

2. The Parties or the Signatory CARIFORUM States shall ensure that their laws
and regulations clearly prescribe the conditions under which procuring entities
may utilise limited tendering procedures. Procuring entities shall not utilise
such methods for the purpose of restricting participation in the procurement
process in a nontransparent manner.

3. When conducting procurement by electronic means, a procuring entity shall:
(a) ensure that the procurement is conducted using generally available and
interoperable information technology products and software, including those
related to authentication and encryption of information; and (b) maintain
mechanisms that ensure the integrity of, and prevent inappropriate access to,
requests for participation and tenders.

Article 170
Selective tendering

1. Whenever selective tendering procedures are employed, procuring entities
shall:
(a) Publish a notice of intended procurement;
(b) In the notice of intended procurement invite eligible suppliers to submit a
request for participation;
(c) Select the suppliers to participate in the selective tendering procedure in a
fair manner; and
(d) Indicate the time limit for submitting requests for participation.

2. Procuring Entities shall recognize as qualified suppliers all suppliers which
meet the conditions for participation in a particular procurement, unless the
procuring entity states in the notice or, where publicly available, in the tender
documentation, any limitation on the number of suppliers that will be permitted to tender and the objective criteria for such limitation.

3. Where the tender documentation is not made publicly available from the date of publication of the notice referred to in paragraph 1, procuring entities shall ensure that those documents are made available at the same time to all the qualified suppliers selected.

Article 171
Limited tendering

1. When using the limited tendering procedure, a procuring entity may choose not to apply Articles 168, 169 paragraphs 1 and 3, 170, 173 (1), 174, 175, 176 and 178.

2. Procuring entities may award their public contracts by limited tendering procedure, in the following cases:
   (a) when no suitable tenders have been submitted in response to an open or selective tendering procedure, on condition that the requirements of the initial tender are not substantially modified;
   (b) when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the contract may be performed only by a particular supplier and no reasonable alternative or substitute exists;
   (c) for reasons of extreme urgency brought about by events unforeseen by the procuring entity, the products or services could not be obtained in time by means of open or selective tendering procedures;
   (d) for additional deliveries of goods or services by the original supplier where a change of supplier would compel the procuring entity to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services procured under the initial procurement and such separation would cause significant inconvenience or substantial duplication of costs to the procuring entity;
   (e) when a procuring entity procures prototypes or a first product or service which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development;
   (f) when additional services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseen circumstances, become necessary to complete the services described therein. However, the total value of contracts awarded for the additional services shall not exceed 50 per cent of the amount of the original contract;
   (g) for new services consisting of the repetition of similar services which conform to a basic project for which an initial contract was awarded following an open or selective procurement method, and for which the procuring entity has indicated in the notice of intended procurement that a limited procurement method might be used in awarding contracts for such new services;
   (h) for products purchased on a commodity market;
(i) in the case of contracts awarded to the winner of a design contest; in the case of several successful candidates, successful candidates shall be invited to participate in the negotiations as specified in the notice or the intended procurement or the tender documents; and

(j) for purchases made under exceptionally advantageous conditions which only arise in the very short term in the case of unusual disposals such as arising from liquidation, receivership or bankruptcy and not for routine purchases from regular suppliers.

Article 172
Rules of origin

The EC Party and the Signatory CARIFORUM States for the purposes of this Chapter shall not apply rules of origin to goods or services imported from or supplied by the EC Party and the Signatory CARIFORUM States as the case may be that are different from the rules of origin applicable at the same time in the normal course of trade to imports or supplies of the same goods or services from the same Signatory CARIFORUM State or the EC Party.

Article 173
Technical specifications

1. Consistent with the objectives of this Chapter, procuring entities shall ensure that technical specifications applied or intended for application to procurement covered by the Chapter are set out in the notices of intended procurement and/or tender documents.

2. A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement.

3. In prescribing technical specifications for the goods or services being procured, a procuring entity shall, where appropriate:
   (a) specify the technical specifications, in terms of performance and functional requirements, rather than design or descriptive standards; and (b) base the technical specifications on international standards, where such exist; otherwise, on national technical regulations, recognized national standards or building codes.

4. Where design or descriptive characteristics are used in the technical specifications, a procuring entity shall, where appropriate, include words such as “or equivalent” in the technical specifications and consider tenders that demonstrably meet the required design or descriptive characteristics and are fit for the purposes intended.

5. A procuring entity shall not prescribe technical specifications that require or refer to a particular trademark or trade name, patent, copyright, design or type, specific origin, producer or supplier, unless there is no other sufficiently precise or intelligible way of describing the procurement requirements and provided that, in such cases, words such as “as equivalent” are included in the tender documentation.
Article 174
Qualification of suppliers

1. For procurement covered by this Chapter, procuring entities shall ensure that any conditions and criteria for participating in a public contract award procedure are made known in advance in the notice of intended procurement or the tender documents. Any such conditions and criteria shall be limited to those which are essential to ensure that the potential supplier has the ability to execute the contract in question.

2. The Signatory CARIFORUM States and the EC Party shall not impose the condition that, in order for a supplier to participate in procurement, the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the relevant territory. This paragraph does not apply for procurements in respect of social impact surveys and studies.

3. The procuring entity shall base its assessment of the financial, commercial and technical abilities of a supplier on the conditions that it has specified in advance in notices or tender documentation.

4. Nothing in this Article shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for serious crime.

5. Procuring entities may maintain a multi-use list provided that a notice inviting interested suppliers to apply for inclusion on the list is:
   (a) published annually; and
   (b) where published by electronic means, made available continuously in one of the appropriate media listed in Annex 7.

6. Procuring entities shall ensure that suppliers may apply for qualification at any time through the publication of a notice inviting suppliers to apply for inclusion on the list containing the following information:
   (a) a description of the goods and services, or categories thereof, for which the list may be used;
   (b) the conditions for participation to be satisfied by suppliers and the methods that the procuring entity will use to verify a supplier's satisfaction of the conditions;
   (c) the name and address of the procuring entity and other information necessary to contact the entity and obtain all relevant documents relating to the list; and
   (d) the period of validity of the list and the means for its renewal or termination, or where the period of validity is not provided, an indication of the method by which notice will be given of the termination of use of the list. Procuring entities shall include in the list all qualified suppliers within a reasonably short time.

7. Where a non-qualified supplier submits a request for participation, and all required documents relating thereto, within the time-limit, a procuring entity, whether or not it uses a multi-use list, shall examine and accept the supplier's request for participation, unless, due to the complexity of the procurement, the entity is not able to complete the examination of the request. Procuring entities shall also ensure that a supplier having requested to be included in the list shall be informed of the decision in this regard in a timely fashion.
8. Procuring entities operating in the utilities may use a notice inviting suppliers to apply for inclusion on a multi-use list as a notice of intended procurement and may exclude requests for participation from suppliers not yet qualified in respect of the procurement on the grounds that the procuring entity has insufficient time to examine the application.

Article 175

Negotiations

1. The Signatory CARIFORUM States and the EC Party may provide for their procuring entities to conduct negotiations:
   (a) in the context of procurements in which they have indicated such intent in the notice of intended procurement; or
   (b) where it appears from the evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notice of intended procurement or tender documentation.

2. A procuring entity shall:
   (a) ensure that any elimination of suppliers in negotiations is carried out in accordance with the evaluation criteria set out in the notice of intended procurement or tender documentation; and
   (b) when negotiations are concluded, provide a common deadline for the remaining suppliers to submit any new or revised tenders.

Article 176

Opening of tenders and awarding of contracts

1. All tenders solicited under open or selective procedures by procuring entities shall be received and opened under procedures and conditions guaranteeing the fairness and transparency of the process.

2. Unless a procuring entity decides that it is not in the public interest to award the contract, it shall award the contract to the supplier who has been determined, on the basis of the information presented, to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notice or tender documentation is determined to be the most advantageous. Awards shall be made in accordance with the criteria and essential requirements specified in the notice of intended procurement or in the tender documentation.

Article 177

Information on contract award

1. The Parties and the CARIFORUM Signatory States shall ensure that their procuring entities provide for effective dissemination of the results of government procurement processes.

2. Procuring entities shall promptly inform suppliers of decisions regarding the award of the contract and, on request, in writing. Upon request, procuring entities shall inform any eliminated supplier of the reasons for the rejection of its tender and of the relative advantages of the successful supplier's tender.
3. Procuring entities may decide to withhold certain information on the contract award where release of such information would interfere with law enforcement or be otherwise contrary to the public interest, would prejudice the legitimate commercial interests of suppliers, or might prejudice fair competition between them.

4. Subject to Article 180(4), no later than seventy two (72) days after the award of each contract covered by this Chapter, a procuring entity shall publish a notice in the appropriate paper or electronic media listed in Annex 7. Where only an electronic medium is used, the information shall remain readily accessible for a reasonable period of time. The notice shall include at least the following information:
   (a) a description of the goods or services procured; (b) the name and address of the procuring entity; (c) the name and address of the successful supplier; (d) the value of the successful tender or the highest and lowest offers taken into account in the award of the contract; (e) the date of the award; and (f) the type of procurement method used, and in cases where a limited tendering procedure was used, a description of the circumstances justifying the use of such procedure.

Article 178
Time limits

1. In determining any time limits to be applied to procurement covered by this Chapter, procuring entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement and the normal time for transmitting tenders.

2. The Parties and the Signatory CARIFORUM States shall ensure that their procuring entities shall take due account of publication delays when setting the final date for receipt of tenders or of request for participation or for qualifying for the supplier’s list. Such time limits, including any extension, shall be common for all interested or participating suppliers.

3. Procuring entities shall clearly set out the time limits applicable to any specific procurement in the notice of intended procurement and/or the tender documents.

Article 179
Bid challenges

1. The Parties and the Signatory CARIFORUM States shall provide transparent, timely, impartial and effective procedures enabling suppliers to challenge domestic measures implementing this Chapter in the context of procurements in which they have, or have had, a legitimate commercial interest. To this effect, each Party or Signatory CARIFORUM State shall establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.

2. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge as from the time when the basis of the challenge become known or reasonably should have become known to the supplier. This
paragraph does not preclude Parties or Signatory CARIFORUM States from requiring complainants to lodge their complaints within a reasonable period of time provided that duration of that period is made known in advance.

3. Procuring entities shall ensure their ability to respond to requests for a review by maintaining a reasonable record of each procurement covered under this Chapter.

4. Challenge procedures shall provide for effective rapid interim measures to correct breaches of the domestic measures implementing this Chapter.

Article 180
Implementation period

1. In order for the Signatory CARIFORUM States to bring their measures into conformity with any specific procedural obligation of this Chapter, they shall have an implementation period of two years from the entry into force of this Agreement.

2. Should a review by the CARIFORUM-EC Trade and Development Committee at the end of the implementation period reveal that one or several Signatory CARIFORUM States need one more year to bring their measures into conformity with the obligations of this Chapter, the CARIFORUM-EC Trade and Development Committee may extend the implementation period referred to in paragraph 1 by one more year for the individual Signatory CARIFORUM States concerned.

3. By way of derogation from paragraphs 1 and 2, Antigua and Barbuda, Belize, The Commonwealth of Dominica, Grenada, The Republic of Haiti, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines shall benefit from an implementation period of five (5) years.

4. The requirements stipulated in Article 168(1) and the last sentence of paragraph 2, in Article 170(1)(a) and in Article 177(4) will only come into effect for the Signatory CARIFORUM States once the requisite capacity to implement them has been developed, but not later than 5 years after the entry into force of this Agreement.

Article 181
Review clause

The CARIFORUM-EC Trade and Development Committee will review the operation of this Chapter every three years, including with regard to any modifications of coverage, and may make appropriate recommendations to the Joint CARIFORUM-EC Council to that effect, as appropriate. In carrying out this task, the CARIFORUM-EC Trade and Development Committee may, without prejudice to Article 182, also make appropriate recommendations regarding the Parties' further cooperation in the procurement field and the implementation of this Chapter.
Article 182
Cooperation

1. The Parties recognize the importance of cooperating in order to facilitate implementation of commitments and to achieve the objectives of this Chapter.

2. Subject to the provisions of Article 7, the Parties agree to cooperate, including by facilitating support and establishing appropriate contact points, in the following areas:
   (a) Exchange of experience and information about best practices and regulatory frameworks;
   (b) Establishment and maintenance of appropriate systems and mechanisms to facilitate compliance with the obligations of this Chapter; and
   (c) Creation of an on-line facility at the regional level for the effective dissemination of information on tendering opportunities, so as to facilitate the awareness of all companies about procurement processes.