REGIONAL COOPERATION IN PUBLIC PROCUREMENT: A SOUTH AFRICAN PERSPECTIVE

Stephen P Le R De La Harpe*
Associate Professor, Faculty of Law, North-West University

Abstract

One of the major challenges in the regionalisation of public procurement, especially in the developing world, is the achievement of countries' socio-economic objectives and how to balance this with the liberalisation of regional trade in the public procurement sphere. From the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement of Goods, Services and Construction, the General Procurement Agreement of the World Trade Organization (WTO), and the South African law, it is clear that effective measures are available for states to achieve their socio-economic objectives. However, the necessary safeguards need to be put in place to ensure that the generally acceptable principles of public procurement also apply to these measures. The mere fact that countries need to achieve their socio-economic objectives should not be an obstacle in the regionalisation process or in the deeper integration of public procurement in a region. In fact, governments should lead by example and strive to deepen regional integration in public procurement. Therefore, it will be necessary for the individual country to find the balance between realising its socio-economic objectives and the need to allow all states in the region to access its internal public procurement market.

I Introduction

In order to fulfil their obligations to their citizens, all governments need to carry out a variety of functions. In fulfilling these functions, one of the major economic activities all governments are involved in is the purchasing of goods and services.[1] Such goods and services can be provided either domestically, i.e. "in-house",[2] or by purchasing them from outside entities. Because of the wide variety and huge volume of goods and services needed by governments, they generally have to meet their needs by means of procurement from private parties. *Public procurement* refers to this last-mentioned activity.[3]

One of the major challenges in the regionalisation of public procurement, especially in the developing world, is the achievement of countries' socio-

* BA (UP), BCom (UNISA), LLB (UP), LLM (UP), LLD (UNISA).

1 KV Thai 'Public procurement re-examined' (2001) *Journal of Public Procurement* 1–50. The four major activities governments are involved in are (a) providing the legal framework for all economic activities; (b) redistributing income through taxation and spending; (c) providing public goods and services freely available to the public such as national defence, public safety, education, and infrastructure (bridges and roads); and (d) purchasing goods, services and capital assets.

2 This entails that the government provide the services themselves, e.g. legal services through the state attorney's office, or produce goods themselves, e.g. by means of a state-owned factory producing military equipment.

3 Sue Arrowsmith *The Law of Public and Utilities Procurement* 2 ed (2005) 1 (hereafter Arrowsmith 2005); S Arrowsmith S & A Davies (eds) *Public Procurement: Global Revolution – Volume 8* (1998) 3 (hereafter Arrowsmith & Davies 1998); Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) 1 (hereafter Bolton 2007).

economic objectives and how to balance this with the liberalisation of regional trade in the public procurement sphere.[4] In order to seek solutions to this challenge, I will briefly discuss how the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement of Goods, Services and Construction, the Government Procurement Agreement (GPA) of the World Trade Organization (WTO), and the South African law address the achievement of socio-economic objectives in public procurement. The Model Law is used because many developing countries – including some in Africa – base their procurement regime on the Model Law. Although very few developing countries are signatories to the GPA, this instrument makes specific provision for the different treatment of developing countries in the quest to harmonise public procurement. Both the Model Law and the GPA are benchmarks in the public procurement industry. The South African law will provide an example of how an individual country addresses socio-economic goals. This will enable a comparison with the position in the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA). Some remarks will be made in conclusion.

For a proper understanding of regional cooperation in public procurement, it is necessary to first, in brief, discuss the general principles applicable to public procurement, the socio-economic objectives of public procurement, the importance of public procurement in regional economic development, and the need to address public procurement in regional cooperation.

II Principles applicable to public procurement

(a) Primary objectives

Generally speaking, the primary objective of public procurement – save, of course, to obtain the goods and services – is to obtain value for money.[5] However, it should be kept in mind that other factors are relevant when public procurement is compared with private procurement, which necessitates special consideration. Some of these factors are the need for accountability by the state, fair treatment of suppliers, avoidance of corrupt practices, and the need to avoid secondary motives like political gain or national preference.[6] The effect hereof is that, although the main objective of procurement may be to obtain value for money, this is not as simple in the case of public procurement, as the above and other considerations are of importance.

It can also be stated that the primary function or objective of public procurement is to serve the legitimate interests of the state (the procuring entity), the ordinary citizen (in whose interest the procurement is done and who pays for the procurement), and the private sector (who provides the goods

[4] A distinction must be made between *direct* procurement, for instance building housing for the poor, and *indirect* measures through public procurement, for instance allowing a margin of preference for minority or disadvantaged groups in order to achieve socio-economic objectives. What will be discussed here are the indirect measures.

[5] Sue Arrowsmith defines the primary objective as the acquisition of goods or services fulfilling a particular function on the best possible terms; Arrowsmith (2005) op cit note 3 at 799.

[6] Arrowsmith (2005) op cit 5 – 6.

and services), taking into account the economy of the country. Arrowsmith defines the primary objective of public procurement as –[7]

> … the acquisition of goods or services fulfilling a particular function on the best possible terms.

She identifies the following objectives as shared by most systems:[8]

> … value for money, integrity, accountability, fair treatment, and social/industrial development, all of which must be implemented through a cost-efficient process.

In the South African context, section 217(1) of the Constitution requires a system which is fair, equitable, transparent, competitive and cost-effective. These requirements can also be broadly distinguished to relate to the economic aspects of public procurement, in particular value for money; the right of the public that public money is spent in an accountable and responsible way; and fairness towards entities contracting with the state.

As part of a system, these objectives or principles in many instances overlap and are interconnected, interrelated, interacting and interdependent. They should be viewed as a whole and not as distinct, stand-alone requirements. The weight attached to each requirement will depend on the particular circumstances. A balance between the competing principles should be sought when determining if they have been complied with.

(b) The secondary objectives of public procurement

There can be no doubt that public procurement is widely used by all governments to achieve its socio-economic policies.[9] These socio-economic objectives can relate to various aspects, for example, job creation, alleviation of poverty, alternative energy, environmental conservation, HIV and AIDS, water, housing, medical services, land redistribution, and the protection of vulnerable industries.

There will always be a tension between the achievement of such secondary objectives and the primary objectives of public procurement. This is because the achievement of socio-economic objectives can have a direct influence on the primary interest spheres of public procurement, namely the general public, private entities who are potential participants in the procurement process, and the economy in general. The secondary objectives of public procurement need to be achieved whilst taking due consideration of the primary objective of value for money and the principles generally applicable to public procurement.

Public procurement will always remain an important instrument, particularly in developing countries, for the successful implementation of socio-economic policies. The need to address socio-economic issues is often the reason why public procurement is not included in economic cooperation on a regional level.

---

7 Arrowsmith (2005) op cit 1225.

8 S Arrowsmith 'Public procurement: An appraisal of the UNCITRAL Model Law as a global standard' (2004) *ICLQ* 18 (hereafter Arrowsmith 2004).

9 See R Caranta & M Trybus (eds) *The Law of Green and Social Procurement in Europe: European Procurement Law Series vol 2* (2010); S Arrowsmith & P Kunzlik *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009).

III The influence of and the need for public procurement in regional cooperation

Through the years, the importance of procurement in the modern state has grown exponentially. The WTO estimates that, at present, public procurement amounts to between 10 and 15 per cent of the gross domestic product (GDP) of developed countries, and up to 25 per cent and more of the GDP of developing countries.[10] The International Monetary Fund estimates that South Africa's GDP amounted to US$261 897 million in 2010, of which 33.26 per cent was spent on public procurement.[11] In the COMESA region, it is estimated that public procurement accounts for approximately 60 per cent of government expenditure.[12] The estimates for sub-Saharan Africa are that spending on public procurement amounts to between US$30 and US$43 billion a year.[13]

Being a significant part of trade in national economies, public procurement has also become an important factor with the advent of free trade between states. It forms a vital and substantial part of international trade. Worldwide, public procurement has become a very important socio-economic factor and has been described by academics such as Arrowsmith and Davies as a *procurement revolution*.[14] Public procurement is also noteworthy because of its potential influence on human rights, including aspects like the alleviation of poverty, the achievement of acceptable labour standards and environmental goals, and similar issues.[15]

Public procurement's importance in international trade and regional integration is twofold. First, it forms a substantial part of trade – with the related economic implications; secondly, governments use it as an instrument with which to address socio-economic issues. The regionalisation of public procurement has both advantages and disadvantages, of course. The possible advantages[16] are that, through increased competition, better value for money may be obtained by the procuring entity. This can relate both to the price and the quality of the product. The possibility for skills and technology transfer to different countries within the region will be enhanced. An increase in trade within the region means that business confidence and investment flows will increase. The export of goods and services could lead to further economic growth in the countries concerned. A regional regulatory framework

---

[10] World Trade Organisation document S/WPGR/W/39 12 July 2002 (02 – 3883); Working Party on GATS Rules referring to the Size of Government Procurement Markets; offprint from (March 2002) 1(4) *OECD Journal on Budgeting.*

[11] See *http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/weorept.aspx?sy=2010&ey=2010&scsm=1&ssd=1&sort=country&ds=.&br=1&c=199&s=NGDP_R%2CGGX_NGDP&grp=0&a=&pr1.x=62&pr1.y=10*, accessed on 15 August 2012.

[12] See *http://programmes.comesa.int/index.php?option=com_content&view=article&id=21&Ite mid=23&lang=en*, accessed on 15 August 2012.

[13] WA Wittig *Building Value through Public Procurement: A Focus on Africa* Unpublished paper presented at the 9th International Anti-Corruption Conference; available at *http://9iacc.org/papers/day2/ws2/d2ws2_wwittig.html*, accessed on 15 August 2012.

[14] Arrowsmith & Davies (1998) op cit note 3 at 3.

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

[16] See *http://www.comesa.int*, accessed on 15 August 2012.

for public procurement will have to be established which will deepen and improve regional integration. It will build capacity in various fields, including the supply chain field. Transparency in public procurement will increase in the region as a whole as the collective pressure to adhere to the principles of transparency will carry much weight. Furthermore, a regional regulatory framework will improve capacity in the supply chain management for many countries in the region. Such a framework could also lead to infrastructure in the region improving, as governments will probably start joint infrastructural projects to enhance economic activities across borders.[17] An example is the COMESA Airspace Integration Project, which entails a regional approach for unified airspace management and the transition from the existing ground-based navigation system to a satellite-based system.[18]

The possible disadvantages[19] of regionalising public procurement are that premature trade and regional agreements with regard to the integration of public procurement may make it difficult to reverse policies in future. Regional requirements for development may conflict with national priorities. Any sensitive industries in a particular country may be put at risk because of the increased competition. Local service providers may be crowded out by more competitive providers from a neighbouring country. Difficulties may arise with regard to regulatory issues because of a lack of harmonisation of the different countries' legal systems or legal regulation in a specific field. In addition, a more developed and economically stronger partner may dominate other countries in the region.

COMESA, SADC and the East African Community (EAC), three regional trading blocs in Africa, are negotiating the establishment of a Free Trade Area (FTA).[20] The FTA is envisaged being underpinned by robust infrastructure programmes designed to consolidate the regional market through interconnectivity facilitated by all modes of transport and telecommunications so as to promote competitiveness.[21]

The FTA seeks to establish a tariff- and quota-free market, exemption and coordination of industrial and health standards, combating of unfair trade practices and import surges, and the use of peaceful and agreed dispute settlement mechanisms. This will have important implications for public procurement as the success of such an FTA will, to some extent, depend on whether the governments are prepared to open up public procurement for

---

17 See *http://programmes.comesa.int/index.php?option=com_content&view=article&id=21&Itemid=23&lang=en*, accessed on 15 August 2012.

18 A Oumarou, A Mbeshererubusa, A Rugamba et al. *COMESA Airspace Integration Report: Project Appraisal Report June 2010* (2010); available at *http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Multinational%20(COMESA)%20-%20AR%20-%20COMESA%20Air%20Space%20Integration%20Project%20(2)%5B1%5D.pdf*, accessed on 15 August 2012.

19 See *http://www.comesa.int*, accessed on 15 August 2012.

20 The FTA negotiations were launched at the second Tripartite Summit held on 12 June 2011 in Johannesburg South Africa.

21 See *http://www.comesa-eac-sadc-tripartite.org/*, accessed on 15 August 2012. See also Derk Bienen 'The Tripartite Free Trade Area and its implications for COMESA, the EAC and SADC' (2001) 1 *Trade and Development Discussion Paper*; K Dawar & S Evenett 'Government procurement' in JP Chauffour & JC Maur (eds) *Preferential Trade Agreement Policies for Development: A Handbook* (2011) (hereafter Dawar & Evenett 2011).

competition. This is not only because of the huge amounts spent on such procurement, but also because the private sector can hardly be expected to participate in regionalisation if the governments involved are not prepared to do the same and to set an example.

However, socio-economic goals in a country can hamper opening up public procurement between states. It is necessary, therefore, to find a balance between the achievement of socio-economic activities and access to public procurement by all states in a particular region.[22]

IV How socio-economic issues are dealt with in the Model Law, THE GPA, and in South Africa

One of the major obstacles to regional integration in public procurement is that such integration could limit or jeopardise a government's attempts to achieve its socio-economic goals through public procurement. This problem is recognised and addressed in international instruments like the Model Law and the GPA.

(a) The Model Law

The UNCITRAL Model Law on the Procurement of Goods and Construction and Services was adopted in 1994.[23] The Model Law was designed to assist states in reforming and modernising their laws on procurement procedures. It contained systems aimed at achieving the principles of competition, transparency, fairness and objectivity in the procurement process, thereby increasing economy and efficiency in procurement.[24] The Model Law has been used as the basis for many national statutes in countries with economies in transition, including countries in Central and Eastern Europe, the former Soviet Union, and Africa.[25]

As part of its tasks, the UNCITRAL Working Group I[26] investigated possible improvements to the 1994 Model Law. Its work culminated towards the end of 2010 in a proposed Revised Model Law. At its 19th session, Working Group I agreed on the text for the Revised Model Law on Public Procurement. This revision was formally accepted by the Commission on 1 July 2011.[27] As

---

22 See, in general, Dawar & Evenett (2011) op cit note 21.

23 Available at *http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf*, accessed on 15 August 2012.

24 On the origin, mandate and composition of UNCITRAL, see *www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure*, accessed on 15 June 2009.

25 Arrowsmith (2004) op cit note 8 at 20. See also *http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html*, accessed on 15 August 2012, where the following countries are listed: Afghanistan, Albania, Armenia, Azerbaijan, Bangladesh, Croatia, Estonia, Georgia, Ghana, Guyana, The Gambia, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi, Mauritius, Moldova, Mongolia, Nepal, Nigeria, Poland, Romania, Rwanda, Slovakia, Tanzania, Uganda, Uzbekistan and Zambia.

26 UNCITRAL has six working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Each of the working groups is composed of all member states of the Commission. Working Group I deals with public procurement. See *http://www.uncitral.org/uncitral/en/about/methods.html*, accessed on 23 February 2010.

27 See *http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html*, accessed on 1 February 2012.

in the 1994 Model Law, different provisions in the 2011 Model Law enable the state to achieve its socio-economic objectives.[28] The 2011 Model Law is dealt with herein. The remainder of the discussion that follows concentrates on the 2011 Model Law, and all references to Model Law, unless otherwise indicated, refer to the 2011 revision.

The Model Law recognises the importance for states to use public procurement to advance their socio-economic policies. Provision is made in article 2(n) for the enacting state, when adopting the Model Law, to exclude certain procuring entities from the operation of the Model Law.[29] In this way, sensitive or strategic industries can be protected. Certain types of procurement can also be excluded by issuing regulations to this effect.[30] This enables states to protect vulnerable industries or sectors of the community from foreign competition.

Socio-economic policies are defined in article 2(o).[31] These include environmental, social and economic policies. In a note to this article, it is mentioned that these policies may be expanded by the enacting state.[32] This enables states to ensure that policies with regard to certain industries, certain sectors of the economy or other resources that are important to them can be afforded unique treatment in the procurement process in that country's interests. According to the proposed Guide to Enactment,[33] the provisions are intended to ensure that socio-economic policies are not determined at an ad hoc basis by public procuring entities, but are applied across the board by all such entities and to prevent such policies from being misused. Article 25(1)(i) provides that, if socio-economic policies were considered in the procurement, the procuring entity is obliged to include in the record of proceedings any information relating to such policies and the manner in which they were applied. This will assist in ensuring transparency and fairness towards tenderers, in that they will know before tendering what the correct position is. This will serve as an aid in preventing arbitrary action by the procuring entities.

---

28 In the case of the 1994 Model Law, these are articles 1(2), 2(b), 8, 27(v), 34(4)(d) and 39(2); and in the case of the 2011 Model Law, they are articles 2(n), 3, and 11(4) and (5).

29 In article 1(2), the Model Law provides for the possibility to exclude certain sectors from its operation, while article 2(b) provides for the exclusion of procuring entities.

30 Article 1(2)(c).

31 In the proposed Guide to Enactment A/CN.9/731/Add.1, in its comments on par 3, examples of such policies are stated to be policies for specific industrial sector development, the development of small- and medium-scale enterprises, minority enterprises, small social organisations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors such as balance-of-payment position and foreign exchange reserves.

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

33 Proposed Guide to Enactment A/CN.9/731/Add.1, comments on par 3.

Single-source procurement is allowed subject to the approval of the designated organ of state, following appropriate public notice and adequate opportunity to comment if this is deemed necessary in order to implement a state's socio-economic policy, provided that procurement from other suppliers is not capable of promoting such policy.[34] All these provisions are designed to minimise the possibility of the misuse of single-source procurement. In particular, the requirement that public notice and opportunity to comment be given will go a long way towards ensuring transparency and blocking any opportunity of misuse.

Deference is further given to states' obligations in terms of regional and other international agreements.[35] These international obligations – for instance, loan agreements with specific provisions with regard to procurement and the procurement directives of regional bodies – prevail over the provisions of the Model Law to the extent that they are inconsistent with it. One of the reasons for this provision is that many donor institutions and countries prescribe certain requirements with regard to procurement in order to ensure that procurement through donor funds is done optimally and complies with the general objectives of public procurement, such as obtaining value for money. However, the requirements prescribed by donor institutions or countries, e.g. by prescribing certain criteria that favour industries in the donor country, can have the effect that the maximum benefit of the assistance is not derived by the receiving country. This provision is also important in that it allows countries that adopt the Model Law and, without amending the law, fulfil their obligations in terms of regional trade and other agreements. The Model Law should, therefore, not be an obstacle to regional integration, as regional and other international agreements will prevail in the case of a conflict with the Model Law.

Discrimination based on nationality is also allowed on condition that the procuring entity does so on the grounds specified in the procurement regulations or other provisions of the Model Law.[36] Many safeguards are

---

[34] Article 30(5)(e).

[35] Article 3 reads as follows: 'To the extent that this Law conflicts with an obligation of this State under or arising out of any:
(a) Treaty or other form of agreement to which it is a party with one or more other States, [or]
(b) Agreement entered into by this State with an intergovernmental international financing institution [or]
[(c) Agreement between the federal Government of [*name of federal State*] and any subdivision or subdivisions of [*name of federal State*], or between any two or more such subdivisions,] the requirements of the treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Law'.

[36] Article 8(1) provides as follows: 'Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations or other provisions of law of this State'.

incorporated into this provision to ensure that it is not misused.[37] In particular, there is a provision that the procuring entity is required, on request by any member of the public, to provide reasons for limiting the participation of suppliers or contractors. This latter provision will assist in ensuring that arbitrary decisions are not made.

In the Model Law, provision is made for a margin of preference to be allowed in favour of domestic suppliers and contractors, or for domestically produced goods or other forms of preference provided for in the regulations.[38] It entails that the procuring entity can, for example, award a tender to a more expensive local tenderer or for more expensive locally produced goods, as long as the price difference between the local tenderer and the lowest tender falls within the margin of preference. The effect of this is that it allows the procuring entity to favour local suppliers and contractors and locally manufactured goods, without simply excluding foreign competition.

The Model Law adequately provides for states to pursue their socio-economic objectives through public procurement. Nonetheless, many safeguards are provided to ensure that public procurement is not misused in the process. The public procurement regimes of states that have adopted the Model Law will also not present an obstacle for regional integration, as it specifically provides that the provisions of such regional agreement will prevail in the event of a conflict. In light of the above, and given that the Model Law is based on and ensures adherence to generally recognised principles applicable to public procurement such as transparency, accountability, value for money, fair treatment of suppliers, and the avoidance of corrupt practices, harmonising the public procurement regimes of states that have adopted the Model Law is feasible on a regional basis.

---

[37] Article 8(2) – (5) provides as follows:

'(2) Except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether the participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.

(4) A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.

(5) The procuring entity shall make available to any member of the public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article'.

[38] Articles 11(3)(b) and (5)(b), which read as follows:

'11(3) In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include:

(a) ….

(b) A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations.

(5) The procuring entity shall set out in the solicitation documents:

(a) …

(b) All evaluation criteria established pursuant to this article, including the price and any margin of preference; …'.

(b) The GPA

The second half of the 20th century witnessed a liberalisation of international trade. One of the most prominent and important instruments influencing this liberalisation was the General Agreement on Tariff and Trade (GATT) of 1947.[39] The present-day World Trade Organisation (WTO)[40] was established in 1995 and builds on the former GATT.[41]

During the discussions in 1946 which led to the GATT, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT were based, including that of non-discrimination. No consensus could be reached on the issue, however, and government procurement was excluded from GATT.[42] Discussions on including government procurement under GATT were kept alive nonetheless, particularly through the work of the Organisation for Economic Co-operation and Development (OECD).[43] The discussions culminated in the first Government Procurement Agreement (GPA), which was signed in 1979 and entered into force in 1981. This agreement formed the basis of the GPA in effect today.[44]

The present GPA was negotiated in parallel with the Uruguay Round[45] in 1994, and entered into force on 1 January 1996.[46] Although the GPA falls under the umbrella of the WTO, it does not form part of the single undertaking which constituted the WTO in January 1995. The present GPA includes a commitment to further negotiations, in order to improve and update the GPA in view of developments in information technology and procurement methods, to extend the coverage of the GPA, and to eliminate remaining discriminatory measures.[47] In December 2006, the text of the Revised GPA was conditionally agreed upon.[48] It is subject to a legal check and a mutually satisfactory outcome on an expansion of coverage.[49] To date the Revised GPA has not become operational.

---

39 AF Lowenfeld *International Economic Law* (2008) 21 (hereafter Lowenfeld 2008).

40 For a general background on the WTO, see M Matsushita, TJ Schoenbaum & PC Mavroidis *The World Trade Organisation Law Practice and Policy* (2006) (hereafter Matsushita, Schoenbaum & Mavroidis 2006); Lowenfeld (2008) op cit note 39.

41 F Ortino *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (2004)1.

42 P Trepte *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2005) 369 (hereafter Trepte (2005)).

43 Trepte (2005) op cit 370.

44 Ibid.

45 The WTO was established on 1 January 1995 by the Uruguay round of negotiations which commenced in 1983 and lasted until 1994. See Matsushita, Schoenbaum & Mavroidis (2006) op cit note 40 at 6 – 9.

46 See *http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm*, accessed 15 June 2009. South Africa is not a signatory to the GPA.

47 GPA article XXIV:7(b) and (c).

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

49 See *http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm*, accessed on 15 June 2009.

The GPA is a plurilateral[50] agreement and is exclusively concerned with the trade in goods and services for government consumption. It determines a framework for the national procurement regime which governs the procurement practices of a signatory's government entities identified in the agreement, subject to agreed value thresholds.[51] The applicable threshold depends on the category of the subject of procurement and on the procuring entity's position in the governmental structure.[52] The commitments undertaken under the GPA are solely determined by the GPA itself and only extend to GPA members.[53] The GPA does not replace national procurement systems, but such systems are required to conform to the principles contained in the GPA.[54]

The objective of the GPA is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement. It is envisaged that this will achieve greater liberalisation and expansion of world trade, and improve the international framework for its conduct.[55] Preferential treatment of own suppliers and products is expressly prohibited.[56] However, there are exceptions[57] applicable to developing countries.[58]

In the preamble to the GPA, recognition is given to the need to take into account the development, financial and trade needs of developing countries, in particular those of least-developed countries. Already in article I:1, which defines the scope of the application of the GPA, provision is made that the agreement only applies to the entities set out in appendix 1 to the agreement. This entitles states to exclude specific entities from the effect of the agreement. Article I:4 also allows parties to set monetary thresholds for the applicability of the agreement. In this way, lower-valued procurement can be excluded from foreign competition.

---

50 Trepte (2005) op cit note 42 at 374: 'A "plurilateral" agreement in the context of the GATT/WTO is an agreement which imposes obligations only on a subset of WTO/GATT Members, while a "multilateral" agreement sets out disciplines which are applicable to all Members'. On the origin of these terms, see A Reich 'The new GATT Agreement on Government Procurement – The pitfalls of plurilateralism and strict reciprocity' (1997) *Journal of World Trade* 165.

51 The following WTO members are covered by the GPA: Canada; China; the European Communities, including its 27 member states; Hong Kong; Iceland; Israel; Japan; Korea; Liechtenstein; the Kingdom of the Netherlands with respect to Aruba; Norway; Singapore; Switzerland and the United States. Twenty WTO members have observer status in the Committee on Government Procurement. These are Albania, Argentina, Armenia, Australia, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Georgia, Jordan, the Kyrgyz Republic, Moldova, Mongolia, Oman, Panama, Sri Lanka, Chinese Taipei, and Turkey. In addition, four intergovernmental organisations, namely the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Trade Centre (ITC), also have observer status in the Committee.

52 M Dischendorfer 'The existence and development of multilateral rules on government procurement under the framework of the WTO' (2000) *PPLR* 1 – 38.

53 Ibid.

54 GPA articles VII:1 and XXIV:5.

55 Preamble to the GPA. See also Trepte (2005) op cit note 42 at 368; VG de Lima e Silva 'The revision of the WTO Agreement on Government Procurement: To what extent might it contribute to the expansion of current membership?' (2008) *PPLR* 61.

56 GPA article lll.

57 GPA article V.

58 South Africa, like most developing countries, is not a signatory to the GPA, but it will probably come under pressure to sign in future. See *Green Paper on Public Sector Procurement Reform in South Africa* (1997).

Provision is made for developing countries to negotiate for exclusions from the rules on national treatment with respect to entities, products or services that are included in its coverage lists. Developing countries participating in regional or global arrangements may also negotiate exclusions to its lists.[59] Moreover, coverage lists may be modified having regard to a developing country's development, financial and trade needs.[60]

At the time of accession, developing countries may also negotiate conditions for the use of offsets.[61] *Offsets* in government procurement are defined in the GPA to mean measures used to encourage local development or improve the balance-of-payment accounts by means of domestic content, licensing of technology, investment requirements, counter-trade, or similar requirements.[62] These conditions for the use of offsets may not be used as criteria for the awarding of the contract, however: they may only be used to qualify prospective suppliers to participate in the procurement process. It is further provided that these conditions are to be objective, clearly defined and non-discriminatory.[63]

In the Revised GPA, the position of developing countries is extensively dealt with in article IV. A developing country, upon accession to the GPA, may adopt certain transitional measures during a transitional period, based on its development needs.[64] These measures are a price preference programme,[65] offsets,[66] the phased-in addition of specific sectors,[67] and a threshold that is higher than its permanent threshold.[68] The delay of the implementation of any specific obligation may be negotiated; in the case of least-developed countries the delay can total a period of five years, and in other developing countries the limit is three years.[69]

The GPA does address some of the concerns of developing countries, but there is still a reluctance to be legally bound by the GPA. Some of the reasons are that many developing countries believe acceding to the GPA will limit their ability to use public procurement as a policy tool; they are afraid of the effect on their balance of payments; they are wary of the costs involved; they believe that developed countries will be the beneficiaries and developing countries the losers; and they do not see clear benefits for themselves.[70] Sceptics even

---

59 GPA article V:4.

60 GPA article V:5. This must be done in accordance with the provisions of article XXIV(6). It may also request the Committee on Government Procurement to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists.

61 GPA article XVI.

62 GPA.

63 Article XVI also states that the conditions must be set out in the country's appendix I.

64 GPA article IV:3.

65 GPA article IV:3(a).

66 GPA article IV:3(b).

67 GPA article IV:3(c).

68 GPA article IV:3(d).

69 GPA article IV:4. In terms of Article IV:6, the developing country may request that the transition period be extended or that new transitional measures be implemented.

70 See the discussion on the economic benefits of transparency in public procurement by SJ Evenett & BM Hoekman 'Government procurement: Market access, transparency, and multilateral trade rules' (2005) *European Journal of Political Economy* 163 – 83.

believe that some developing countries are reluctant to accede to the GPA as it will limit corruption.[71]

The challenge of acceding to the GPA probably also lies with the history of developing countries' exploitation by developed countries, and a deeply rooted mistrust this has caused – as is evident from the protracted Doha negotiations.[72] Before the economic benefits for developing countries are not apparent, their accession to the GPA will remain limited. It remains to be seen whether developing countries will be less reluctant to accede to the Revised GPA than to the present GPA.

(c) South Africa

Section 217(1) of the Constitution of the Republic of South Africa requires a public procurement system which is fair, equitable, transparent, competitive and cost-effective. These requirements can be broadly distinguished to relate to the economic aspects of public procurement;[73] the right of the public that public money is spent in an accountable and responsible way;[74] and fairness towards entities contracting with the state.[75] As part of a system, these objectives in many instances overlap and are interconnected, interrelated, interacting and interdependent.[76] They should be viewed as a whole and not as distinct, stand-alone requirements. When evaluating any action under the public procurement regime, the weight attached to each objective will depend on the circumstances concerned.

In South Africa, the Constitution itself provides for secondary objectives to be obtained through public procurement.[77] Thus, section 217(2) and (3) provides as follows:

> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that section from implementing a procurement policy providing for –
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

---

71 R Hunja 'Obstacles to public procurement reform in developing countries' in S Arrowsmith & M Trybus (eds) *Public Procurement: The Continuing Revolution* (2003) 17; S Arrowsmith 'Transparency in public procurement: The objectives of regulation and the boundaries of the World Trade Organisation' (2003) *Journal of World Trade* 286. See also J Linarelli 'Corruption in developing countries and economies on transition: Economic and legal perspectives' in Arrowsmith & Davies (1998) op cit note 3 at 125 – 37; V Mosoti 'The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for development in the poor world?' (2004) *University of Pennsylvania Journal of International Economic Law* 593.

72 See, in general, the Third World Network (TWN) website, *http://www.twnside.org.sg/index.htm*, accessed on 26 March 2008, where various articles appear that echo these sentiments. See in particular the article by M Khor 'Government procurement in FTA's: An examination of issues', available at *www.twnside.org.sg/title2/twr182-183.htm*, accessed on 28 March 2008. See also J Kelsey 'Investment, competition and government procurement at the WTO', presentation prepared for AFTINET seminar on Alternatives to the WTO, Sydney, 8 November 2002.

73 Particularly the requirements of competitiveness and cost-effectiveness.

74 Particularly the requirements of a system that is transparent, fair and equitable.

75 Particularly the requirements of a system that is transparent, fair and equitable.

76 *System* is defined in the *Concise Oxford Dictionary* 10 ed (1999) as 'complex whole, set of connected things or parts, organized body of material or immaterial things'.

77 For a general discussion of the use of procurement as a policy tool in South Africa, see Bolton (2007) op cit note 3 at 251 – 307.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.

The Preferential Procurement Policy Framework Act[78] was enacted to give effect to the constitutional provisions contained in section 217(3). The Act provides a framework for the preferential procurement policies of organs of state.[79] Section 2(1), for example, provides that organs of state[80] are to determine and implement their preferential procurement policies within the framework of the Act. Bolton is of the opinion that this implies that organs of state are obliged to implement a preferential procurement policy, as opposed to only a procurement policy which does not include the collateral goals provided for in section 217(2).[81] If regard is had to the definition of *preferential procurement policy* in the Act, namely a procurement policy contemplated in section 217(2) of the Constitution (which is not compulsory) and the wording of the section, this provision is open to a different interpretation as well: it could mean that only in the event of an organ of state's wishing to determine and implement such a policy does it need to be done within the framework of the Act. The use of the word '*must*' does not necessarily imply that organs of state are obliged to implement the policies per se, but only that if they wish to do so they are obliged to do so in terms of the Act.

The framework provided by the Act requires that a preference point system is to be followed.[82] For contracts above R1 000 000,[83] a maximum of 10 preference points may be awarded for specific goals.[84] The lowest acceptable tender is awarded 90 points for price. Contracts below R1 000 000 can be awarded a maximum of 20 preference points for a specific goal, and 80 points for price.[85] The lowest acceptable tender is awarded 80 points for price. Acceptable tenders that are higher in price are required, on a pro rata basis, to score fewer points.[86] The goals referred to above may include[87] contracting with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability. They may further include implementing the programmes of the Reconstruction and Development Programme.[88] These goals are to be measurable, quantifiable

78 No 5 of 2000.

79 The Act gives effect to the provisions of Section 217(2) and (3) of the Constitution of the Republic of South Africa (1996).

80 *Organ of state* is defined in section 1(iii) of the Act.

81 Bolton (2007) op cit note 3 at 269.

82 Section 2(1)(a).

83 This is provided for in the *Preferential Procurement Regulations* (GN R501 in *GG* 34350 of 8 June 2011) issued in terms of section 5 of the Preferential Procurement Policy Framework Act, 2000 (No 5 of 2000) (hereafter *Preferential Procurement Regulations* 2011). In *Barry Kotze Inspections CC t/a Bis in Joint Venture with Pugubye Investments (Pty) Ltd v City of Johannesburg* 2004 3 BCLR 274 (T), it was decided that the amount had to be an estimate.

84 Section 2(1)(b)(i).

85 Section 2(1)(b)(ii).

86 The formula in terms of which this needs to be done is prescribed in the *Preferential Procurement Regulations* (2011) op cit note 83.

87 Section 2(1)(d).

88 As published in *GG* 16085 of 23 November 1994.

and monitored for compliance.[89] No preferencing outside of the point system provided for in the Act is permitted.[90]

The contract is then awarded to an acceptable tenderer who scores the highest points – unless there are objective criteria[91] in addition to the specific goals which justify awarding the bid to another tenderer.[92] An '*acceptable'* tender is defined as one which complies in all respects with the specifications and conditions set out in the tender document.[93]

The term *objective criteria* has been dealt with in *First Base Construction CC v Ukhahlamba District Municipality & Others*,[94] where experience and expertise were held to be objective criteria which justified the award to a tenderer who did not obtain the highest score in terms of the prescribed formula. An organ of state may on request be exempted from the provisions of the Act if it is in the national or public interest, or if the likely tenderers are international suppliers.[95]

The latest regulations,[96] issued in terms of section 5[97] of the Act, provide for how the preference point system in the evaluation of tenders should be implemented.[98] Provision is made for points to be calculated for the price of a specific tender. Further points are then awarded to a tenderer for attaining a certain level of broad-based black economic empowerment (BBEE).[99] It further provides for the possibility to evaluate tenders on functionality.[100] Provision is also made for local production and content to be taken into account.[101] In accordance with specific directives issued by National Treasury for this purpose, taking the preference point system into account is required

89 Section 2(2).

90 See the decision of De Villiers J in *Grinaker LTA Ltd, Ulusha Projects (Pty) Ltd v The Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T).

91 *Objective criteria* are not defined in the Act. In the matter of *Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others*, the court held with regard to section 2(1)(f) of the Preferential Procurement Policy Framework Act that those were criteria over and above those contemplated in par (*d*) and (*e*).

92 Section 2(1)(f). See also *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 4 SA 346 (T).

93 Section 1(i). See also *JFE Sapela Electronics (Pty) Ltd v Chairperson: Standing Tender Committee* [2004] 3 All SA 715 (C) and *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] JOL 15567 (SCA).

94 [2006] JOL 16724 (E) par 29 and 30.

95 Section 3, Act 5 of 2000.

96 GN R502 in *Regulation Gazette* 9544 in *GG* 34350 of 8 June 2011.

97 It provides as follows: 'The Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act'. An argument can be made out that some of the Regulations do not relate to the objectives of the Preferential Procurement Policy Framework Act.

98 Regulations 5, 6 and 7.

99 This was done to bring the use of procurement to address the imbalances created by apartheid in line with the Broad-Based Black Economic Empowerment Act, 2003 (No 53 of 2003).

100 Regulation 4.

101 Regulation 9.

in designated sectors,[102] whereas for non-designated sectors it remains optional.[103]

A distinction is made between tenders with a rand value of or above R30 000 and up to a rand value of R1 000 000, including taxes,[104] and tenders with a rand value above R1 000 000 including taxes.[105] In the first instance, points to a maximum of 20 may be allocated to a tenderer for attaining the BBEE status level as set out in the prescribed table and as provided for in the regulations, as well as 80 points for price. In the case of tenders above R1 000 000, a maximum of 10 points as set out in the prescribed table may be awarded for attaining a particular BBEE status level and 90 points for price.

Points are not permitted to be awarded for a BBEE status level if the tenderer indicates that more than 25 per cent of the value of the contract is to be subcontracted to any other enterprise that does not qualify for at least the same points as the tenderer, save if it is an exempted micro enterprise. A tenderer awarded a contract may also not subcontract more than 25 per cent of the value of the contract to any other enterprise that does not have an equal or higher BBEE status level unless it is an exempted micro enterprise.[106]

Invitations for tenders in respect of services, works or goods that have been designated for local production and content[107] are obliged to contain a specific condition that only locally produced goods, services or works or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered. In terms of the National Treasury Instruction Note on the Amended Guidelines in respect of Bids that Include Functionality as a Criterion for Evaluation, only the applicable technical specifications approved by the South African Bureau of Standards are permitted to be used to calculate local content, and the formula[108] for such calculation has to be disclosed in the tender documentation.

Where there is no designated sector, a specific condition, namely that only locally produced goods, services or works or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered, may be prescribed in the tender invitation. Such condition and prescribed threshold(s) are required to be in line with the specific directives issued for this purpose by the National Treasury in consultation with the

---

[102] *Designated sector* is defined in Regulation 1(i) to mean 'a sector, sub-sector or industry that has been designated by the Department of Trade and Industry in line with national and development and industrial policies for local production where only locally produced services, works, or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content'.

[103] See, in general, the National Treasury's Implementation Guide: Preferential Procurement Regulations, 2011, pertaining to the Preferential Procurement Policy Framework Act, 2000 (No 5 of 2000) of 1 December 2011. In terms of National Treasury Circular Cir1/2/1/2/2 dated 8/12/2011, the implementation of par 7 and 12 of the Guide that relates to local production and content has been suspended until further notice.

[104] Regulation 5.

[105] Regulation 6.

[106] Regulation 11(8) and (9).

[107] See Regulation 1(i) for the definition of *designated sector.*

[108] LC = 1- (x÷y) x 100, where *LC* = local content, *x* = imported content, *y* = bid price, excluding value added tax (VAT). Prices referred to in the determination of *x* need to be converted to rand (ZAR) by using the exchange rate published by the South African Reserve Bank at 12:00 on the date, one week (seven calendar days) prior to the closing date of the bid.

Department of Trade and Industry.[109] A tenderer who has been awarded a contract in relation to a designated sector is not permitted to subcontract in such a way that the local production and content of the overall contract is reduced to below the threshold.[110]

South Africa also employs offsets[111] to achieve its secondary goals by means of public procurement. Specific provision for the use of offsets in public procurement in South Africa is made in the National Industrial Participation Programme introduced by the Department of Trade and Industry.[112]

The measure of allowing a preference in public procurement is used by South Africa to address the imbalances created by the apartheid regime. This is done by allowing a preference based on the principles of black economic empowerment. Although such measures are indisputably necessary, it is unfortunate that provision is not also made to address other socio-economic issues by allowing a margin of preference. Other measures allowed in the South African regime are those relating to the requirement of local content and the use of offsets through the National Industrial Participation Programme.

V The position in COMESA

The history of COMESA began in December 1994 when it was formed to replace the former Preferential Trade Area (PTA) which had existed from the early 1980s.[113] COMESA was established as an organisation of free, independent, sovereign states that have agreed to cooperate in developing their natural and human resources for the good of all their peoples. As such, the organisation has a wide range of objectives which necessarily include in its priorities the promotion of peace and security in the eastern and southern African regions.

COMESA's main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers faced by individual states. COMESA's current strategy can be summed up in the phrase *economic*

[109] *National Treasury Instruction Note on the Amended Guidelines in Respect of Bids that Include Functionality as a Criterion for Evaluation* par 7.2.

[110] Regulation 11(10).

[111] *Offsets* are described in the GPA as measures used to encourage local development or to improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. See Article XVI of the GPA.

[112] Industrial Participation (IP) became obligatory on 1 September 1996 in terms of *Cabinet Memorandum 10/1996*. Cabinet endorsed the IP Policy and its operating guidelines on 30 April 1997; available at *http://www.ccma.org.za/UploadedMedia/SCM-Bid%20documents%20SBD%205.pdf*, accessed on 15 June 2009. IP Programmes have been used by many countries in the past to offset major state purchases by requiring a quid pro quo of the percentage value of the order to be reinvested in some way in the purchasing country's economy. This allows the purchasing country to moderate the impact of large purchases in foreign-dominated currencies, stimulate local industries, develop new industries, receive assistance in finding new markets, and benefit from skills and technology transfers. IP can also strengthen national industrial development strategies, for instance, by directing investment into areas where risk may be slightly higher because the terrain is new or uncharted. This has the further benefit of diversifying the country's manufacturing sector in terms of both products and spatial distribution.

[113] The COMESA Treaty, entered into on 5 November 1993 in Kampala, Uganda, and ratified a year later in Lilongwe, Malawi, on 8 December 1994.

prosperity through regional integration. With its 19 member states,[114] its combined population of over 389 million, an annual import bill of around US$32 billion, and an export bill of US$82 billion, COMESA forms a major marketplace for both internal and external trading. Its geographical area covers 12 km2.[115]

In terms of article 151.2(d) of the COMESA Treaty, member states agree to provide an enabling environment for the private sector to take full advantage of the common market. In this regard, member states undertake to encourage governments and parastatals to source purchases within the eastern and southern African regions. It is estimated that public procurement accounts for approximately 60 per cent of government expenditure in COMESA, making public procurement one of its most important sectors.

Due to the importance of this sector, in 2002 COMESA established the COMESA Public Procurement Reform Project. This Project aims to harmonise public procurement rules and regulations as well as build the capacity of national procurement systems in the eastern and southern African regions.[116] Harmonisation or standardisation will allow users of the systems to understand and have certainty with regard to tender bidding processes, selection or adjudication methods, and the manner in which tenders are awarded. Harmonisation will also mean having a similar interpretation on important principles such as competition, fairness, transparency, non-discrimination, accountability, professionalism, rights of appeal, economy, and efficiency.

Also in 2002, with the support of the African Development Bank, COMESA conducted a baseline survey of the procurement rules and practices of its member states. The results of this survey were used to develop a COMESA public procurement strategy, which includes the basic requirements for the reform of national public procurement laws and practices.[117] Furthermore, the COMESA Secretariat established a regional public procurement centre to provide capacity-building for its member states. The Centre includes a procurement information system with access to most member states' procurement agencies.

The COMESA Public Procurement Regulations were issued during June 2009 in terms of article 10(1) of the COMESA Treaty.[118] The objectives of these Regulations include promoting the harmonisation of public procurement law and practices for the enhancement of intra-COMESA trade.[119] The Regulations provide for, and are based on, the general procurement principles

[114] Burundi; Comoros; Democratic Republic of the Congo; Djibouti; Eritrea; Ethiopia; Kenya; Madagascar; Malawi; Mauritius; Mozambique; Rwanda; the Seychelles; Sudan; Swaziland; Tanzania; Uganda; Zambia; and Zimbabwe.

[115] See NJ Kamau 'The impact of regional integration on economic growth: Empirical evidence from COMESA, EAC and SADC trade blocs' (2010) 1(2) *American Journal of Social and Management Sciences*150 – 63.

[116] See SR Karangizi 'The COMESA public procurement reform initiative' (2005) 3 *Public Procurement Law Review* 51 – 61.

[117] In this regard, see World Bank *COMESA Public Procurement Reform and Capacity Building Projects Project Performance Evaluation Report* (February 2012).

[118] COMESA *Official Gazette* 15(3) of 9 June 2009, Legal Notice 3 of 2009.

[119] Article 3(d).

of competition and openness, fairness, transparency and disclosure of relevant information, accountability and value for money.[120]

In addition, the Regulations provide for international, regional and national competitive bidding.[121] They apply to all regional competitive bidding, namely public procurement within COMESA.[122] Member states may specify in their domestic legislation the category of goods, services or works they wish to exclude or render subject to modified rules of procurement.[123] Individual member states are required to set thresholds for regional competitive bidding.[124] The utilisation of thresholds can be used as a means of protecting member states' internal markets from competition. The ability of individual member states to decide on the applicable threshold could be used as a serviceable tool for ensuring that a portion of a state's procurement is reserved for local suppliers. However, member states are required by the Regulations to work towards establishing a common financial threshold for the eastern and southern African regions within five years from the date the Regulations are adopted.[125] It remains to be seen whether the member states will be able to agree on a threshold within the prescribed five years.

Certain exceptions are also provided for. The rules of donor or funding organisations, which are not public bodies, prevail in so far as they are in conflict with the Regulations.[126] For these purposes, member states may, in their domestic legislation, specify the category of goods, services or works to be excluded or subjected to modified rules and procedures of procurement.[127] For example, procurement for state security, military-related production, defence or international relations to protect the public interest may be excluded from the application of the Regulations.[128] The Regulations also do not prevent any member state from adopting or maintaining measures necessary to protect public morals, order or safety; human, animal or plant life or health; intellectual property; and small- and medium-scale enterprises. Furthermore, they do not prevent any member state from adopting or maintaining measures relating to goods, services or works produced or rendered by disabled persons, philanthropic institutions or prison labour.[129]

Moreover, provision is made that, in international competitive bidding,[130] procuring entities are to apply a preference in favour of regional bidders and that a margin of preference for goods, services or works manufactured or

---

[120] Article 4.
[121] Article 1.
[122] Article 2(1).
[123] Article 2(7).
[124] Article 6(1). In terms of Article 1, *regional threshold* means a threshold set by a member state for public procurement within the Common Market and limited to regional bidders; *regional competitive bidding* means any public procurement procedure that is within the threshold set by a member state for procurement within the Common Market.
[125] Article 6(5).
[126] Article 2(2) and (3).
[127] Article 2(7).
[128] Article 2(6).
[129] Article 2(10).
[130] Article 1 defines it as follows: '"international competitive bidding" means bidding open to all bidders, including nationals, local and foreign bidders or suppliers'.

performed within the common market[131] should be granted. However, only the principle of allowing a margin of preference is provided for in the Regulations: the details of the application thereof are left open.

The principle of national and most-favoured-nation treatment is provided for in the Regulations as well.[132] A further stipulation is made that rules of origin are not permitted to be applied differently or inconsistently to suppliers of other member states in comparison with the manner in which they are applied to suppliers in the normal course of trade in the particular member state concerned.[133]

Various measures in the Regulations enable member states to pursue their socio-economic policies. The member states themselves decide on the details thereof, e.g. what the monetary threshold and margin of preference will be. These efforts by COMESA can serve as an example for other regions on how to address regionalisation in the public procurement sphere.

VI The position in SADC

SADC has been in existence since 1980, when it was formed as a loose alliance of nine majority-ruled states in southern Africa known as the Southern African Development Coordination Conference (SADCC), whose main aim was to coordinate development projects in order to lessen their economic dependence on the then apartheid South Africa. SADC's current members are Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe.[134]

The transformation of the organisation from a Coordinating Conference into a Development Community took place on 17 August 1992 in Windhoek, Namibia, when the Declaration and Treaty were signed at the Summit of Heads of State and Government, thereby giving the organisation a legal character.

The SADC vision is one of a common future within a regional community that will ensure economic well-being; improve standards of living and quality of life, freedom and social justice; and offer peace and security for the peoples of southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist amongst the peoples of southern Africa. The signatories of the SADC Treaty agree that underdevelopment, exploitation, deprivation and backwardness in southern Africa will only be overcome through economic cooperation and integration.

No provision is at present made in the SADC Treaty or other SADC instruments for the integration of public procurement in the region. Of the present member states, only Madagascar, Malawi, Mauritius and Zambia have based their public procurement regimes on the Model Law.[135] In view of

[131] Article 1 defines *common market* to mean 'the Common Market for Eastern and Southern Africa (COMESA) established by Article 1 of the Treaty'.
[132] Article 8.
[133] Article 9.
[134] The founding member states are Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe.
[135] This presents a firm base from which to explore deeper integration of public procurement.

the interdependency of SADC member states' economies, the trade bloc they present, and the benefits that can be derived from opening up their boundaries for competition in the sphere of public procurement, the possibility of deeper integration in public procurement needs to be given more attention. Although integration in this sphere will not happen overnight, the steps taken by COMESA can be used as an example of how this can be achieved. In particular, the importance of proper planning for such integration – as illustrated by COMESA's Public Procurement Reform Project – cannot be underestimated.

VII Conclusion

Public procurement constitutes an important part of trade in any country and even more so in developing countries. As economic cooperation usually forms the basis of regional cooperation, public procurement is an important part of such cooperation. It would be strange if governments sought closer economic cooperation between and among each other, but were not prepared to open up their own procurement markets in the process. However, there are legitimate reasons to limit free trade in public procurement, one being that governments need to achieve their own national socio-economic goals through public procurement. This is recognised in public procurement instruments like the COMESA Procurement Regulations, the Model Law, and the GPA. South Africa is an example of a country that specifically utilises public procurement to achieve its socio-economic goals.

What is clear from the comparison of the different procurement regimes discussed above is that all are based on principles fundamental to public procurement. These include principles such as value for money, transparency, accountability, dissemination of information, fairness, integrity, efficiency, competition, and measures to combat fraud and corruption.[136] Ample provision is made in all the procurement regimes discussed above for countries to realise their socio-economic objectives without sacrificing the general principles applicable to public procurement.

The measures provided for can be summarised as follows: the Model Law enables the attainment of national socio-economic objectives by –

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

[136] See Dawar & Evenett (2011) op cit note 21 at 369, where they identify the following principles: (a) Efficiency (value for money); (b) Equality of opportunity to compete for state contracts (non-discrimination); (c) Transparency (control of corruption; accountability); and (d) Encouragement of investments and partnerships (public – private partnerships).

The GPA provides for states parties to exclude procuring entities from the list of entities to which the GPA applies; monetary thresholds; differential treatment for developing countries; the possibility of negotiating exclusions from the rules of national treatment; modification of the coverage list; and the possibility of negotiating offsets at the time of accession to the agreement. The Revised GPA provides for a price preference programme; offsets; the phased-in addition of specific sectors to appendix I; a threshold that is higher than the permanent threshold; and the delay of the implementation of an obligation in terms of the GPA.

The South African procurement regime provides for a preference point system linked with its BBEE programme. Specific allowance is made for the use of offsets in the National Industrial Participation Programme introduced by the Department of Trade and Industry. Provision is also made for local production and content to be taken into account.

The COMESA Procurement Regulations provide for the realisation of socio-economic policies through the possibility of applying a margin of preference when the procurement is open to competition from outside the COMESA area. However, this preference is obliged to be made available to the whole common market, and not only to the particular state. Specific provision is further made for measures relating to small- and medium-scale enterprises, the disabled, philanthropic institutions, or prison labour to be adopted by member states. Thresholds can also be used to protect member states' internal markets from competition.

What is clear from all the procurement regimes is that, with all the measures available for achieving socio-economic objectives, the necessary safeguards need to be put in place to ensure that the generally acceptable principles of public procurement also apply to such measures. In instances where measures for achieving socio-economic objectives are used, such measures should be published; the reasons for their use should be provided; they should not be used on an ad hoc basis but need to be of general application; and they should only be used as set out in the procurement regulations so as to eliminate the possibility of abuse. In the procurement regimes discussed – save for the one adopted in South Africa, as is to be expected[137] – only a broad framework is set out within which individual countries are required to determine the detailed application of these measures. The individual countries themselves are left to specify the socio-economic objectives they wish to pursue,[138] and the extent to which assistance will be provided to achieve such goals.[139] This is to be expected, as the circumstances in countries will differ. However, in the end, it will still be necessary for individual countries to establish how to balance the realisation of their national socio-economic objectives with their need to allow other member states access to their internal public procurement market. To achieve this balance will clearly not be easy, and various factors

[137] This is to be expected, as the South African procurement regime focuses on its own socio-economic goals and provides in detail for them, whilst other such regimes leave it to the individual countries to determine the detail of their socio-economic goals within the set frameworks.

[138] The individual countries can, for instance, determine what sectors of the economy should be excluded.

[139] The individual countries can determine the thresholds that will apply.

will influence it. Enough scope for individualisation does exist, however, and if the long-term benefits are taken into account, it will be to the various member states' benefit to find common ground in this regard. The dynamics in a particular region and the dynamics of the individual member states will also dictate how to balance reaching national socio-economic objectives as well as regionally integrate public procurement. If the political will exists, as is evident in COMESA, it is possible to strengthen regional integration in public procurement whilst allowing a margin of appreciation for member states to achieve their national socio-economic objectives through public procurement.

It is accepted worldwide that public procurement is a legitimate way for governments to achieve their socio-economic objectives. However, countries' desire to reach these objectives need not hinder the regionalisation process and the deeper integration of public procurement in a trade bloc. Although regional integration may negatively affect certain socio-economic objectives in a particular country, these effects can be managed and ameliorated by the use of remedial measures. Thus, governments should lead by example and strive to deepen regional integration in public procurement.