



Government procurement provisions in CARIFORUM EPA and lessons for other ACP states

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Summary of conclusions

- The economic benefits from international rules on government procurement flow mostly from increased specialisation and competition within national markets as well as more efficient purchasing. Cross border supply of procurement markets is limited even within the EU, which has comprehensive rules.
- In government procurement, as in other policy areas, economic gains from reform can be achieved through unilateral measures. Most ACP states have initiated reform of government procurement based on international guidelines such as the UNCITRAL Model Law on Procurement of Goods, Services and Works.
- From an ACP point of view, inclusion of government procurement in the Economic Partnership Agreements (EPAs) may be beneficial if this helps to maintain the momentum of the existing domestic reform processes or promotes open procurement markets in the ACP regions. There are unlikely to be gains from trade for most ACP economies.
- Given the limited size of their national markets and capacity of their manufacturing and service sectors to supply EU procurement markets, the priority for most ACP states is likely to be opening the regional ACP procurement markets before making commitments to open to the EU.
- For the ACP states the potential costs of including provisions on procurement in the EPAs come in two forms. First, any commitments on national treatment (liberalisation) will prohibit the use preferences for national suppliers as a policy instrument. Second, there will be costs complying with framework (transparency) rules.
- The only EPA to include substantive provisions on procurement is the CARIFORUM – EC text. This provides for national treatment commitments, but leaves the decision on which procurement will be covered by such commitments to the Joint CARIFORUM – EC Council. The costs of complying with the framework rules in

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CARIFORUM – EC text would not be excessive for any country that is already committed to serious unilateral reform.

- According to its 2006 Global Europe policy statement the focus of the EU’s offensive interests in public procurement lies in ‘emerging markets’ rather than poorer developing countries. But the EU is still seeking transparency or framework rules in the comprehensive EPAs.

Introduction

During the course of 2008 the African Caribbean and Pacific (ACP) states and the EU will be negotiating comprehensive Economic Partnership Agreements (EPAs) to complement any interim EPAs agreed at the end of 2007. One of the issues in these negotiations will be trade related questions including government procurement. Most ACP negotiators adopt a defensive position on the inclusion of government procurement and other ‘Singapore issues’ in any trade agreements. The EU seeks to include government procurement and justifies this primarily on the grounds of promoting better purchasing practices in the ACP, although there are clearly also EU offensive interests in some ACP government procurement markets. To date however, there has been little discussion of the costs and benefits of including government procurement in comprehensive EPAs. This short paper is intended to provide an outline of the general costs and benefits of including government procurement. It draws on the text of the CARIFORUM – EC EPA (henceforth ‘the EPA text’), which is the only EPA to date that includes such rules and discusses the implications of adopting similar rules in other ACP regions or countries. A full assessment of the costs and benefits requires detailed study of specific countries and regions. The paper also suggests a number of ways in which provisions on government procurement might be shaped in such a way as to further both their inclusion in the EPAs and the development aims of the ACP states.

Background

Government procurement² remains one of the few areas of state involvement in the economy not covered by any multilateral agreement. It was explicitly excluded from the GATT 1947 and the subsequent Government Purchasing Agreements (GPAs) of 1979 and 1994 were only plurilateral agreements. While some developing countries participated in the negotiation of these GPAs only Hong Kong and Singapore signed. No ACP state has signed the 1994 GPA and even some OECD countries, such as Australia and New Zealand declined to do so. Reasons for opposing such rules on procurement vary, but include; a belief that the compliance costs are excessive, a reluctance to engage in the bilateral reciprocity negotiations on liberalisation (see below), a desire to retain preferences in procurement as an industrial/development policy instrument and resistance from vested interests benefiting from closed procurement markets. At the 1996 Singapore ministerial meeting WTO Members agreed to a compromise in which only ‘transparency’ in government procurement would be included in the WTO work programme. After the 2003 Cancun WTO Ministerial even this was removed from the Doha Development Agenda (DDA) mainly as a result of developing country opposition to its inclusion.

Government procurement markets are important. They account for an average of 7 to 8 % of GDP, which is equivalent to 30% of world merchandise trade. Developed economies account for most government procurement by value, with the OECD countries accounting for nearly

² Government purchasing will be used throughout although public procurement is a rather more inclusive term as it covers also procurement by parastatal and public utilities.

90%.³ The GPA covers nearly all the major procurement markets. Only the major emerging markets are not included. As a general rule one third of government procurement is made by central government, one third by state and local government and one third by parastatal bodies or public utilities or enterprises, although these shares vary significantly between countries. In large developing countries with federal government or with significant public enterprise, central government procurement is likely to account for much less than one third of all expenditure.

Although most ACP procurement markets are relatively unimportant for EU exporters, procurement can represent a very significant share of government expenditure for the countries concerned. For example, 70% of public expenditure in Tanzania takes the form of public procurement. (World Bank, 2003) Therefore the proper, economic use of such funds is a vital element in development and small savings can release considerable funds for other development objectives.

The first question for ACP governments, and developing countries (DCs) in general, is therefore not whether efficient, economic, transparent and fair procurement practices is the aim, but whether the external discipline resulting from the inclusion of rules on government procurement in trade agreements such as the EPAs will contribute towards this aim? Second, will such procurement rules preclude the use of preferences to pursue key domestic economic, development and social policies? Third, will the inclusion of procurement rules facilitate the development of open regional procurement markets in the ACP regions? Forth, are the compliance costs tolerable given the expected benefits? To date most ACP states outside of CARIFORUM have maintained a defensive position on procurement and are sceptical of the EU's motives for including it in the EPAs.

All governments have laws and rules on government purchasing, though some are more effectively implemented than others. Over the years a form of best international practice has emerged. This is codified in the UNICTRAL Model Law on Procurement of Goods, Works and Services (UNICITRAL, 1994) and World Bank Guidelines. The 1994 GPA is broadly in line with the UNCITRAL Model Law, but is binding where the UNCITRAL text is entirely non-binding. Recent bilateral free trade agreements negotiated by the EU, US and other countries have effectively extended the GPA model through FTAs.⁴ Despite the absence of binding multilateral rules in the WTO therefore a *de facto* international norm is emerging. In the longer term ACP states must therefore also assess the costs and benefits of aligning their domestic rules with this emerging norm.

On the second question, the 'EPA text' introduces binding framework rules on procurement procedures (what has been broadly called transparency in the WTO debate), but defers the issue of 'liberalisation,' or binding commitments to national treatment. The 'EPA text' states that The Joint CARIFORUM – EC Joint Council *may* take decisions on liberalisation. On paper this leaves the ACP scope to choose when and how to liberalise, but many ACP negotiators see agreeing to the inclusion of procurement on these terms as a 'wedge in the door' of liberalisation that the EU will push them through before they are ready.

Finally, a stated aim of the EPAs is to promote regional integration among the ACP states. The 'EPA text' establishes the creation of regional procurement markets as a key objective in the first substantive article (167(1)) on procurement. At issue however, is the sequencing of the creation of regional procurement markets in the ACP regions and opening to the EU.

³ Recent cross-country comparisons on the importance of government procurement are not readily available. The latest comprehensive data dates from a 2001 publication based on 1998 data (OECD, 2001).

⁴ Table 1 summarizes and compares the UNCITRAL, GPA and CARIFORUM – EC provisions.

Liberalisation, transparency and policy reform in government procurement

In the debate since the 1996 Singapore WTO Ministerial meeting, a distinction has been made between ‘liberalisation’ and ‘transparency’ of government procurement.⁵ In this ‘liberalisation’ can be taken to mean the extension of national treatment to government purchasing and thus the prohibition of explicit, *de jure* preferences for national or local suppliers. Many ACP states - as well developing countries in general and even some developed economies - provide such preferences as an instrument of industrial or development policy. Preferences are provided for specific classes of local suppliers, such as small and medium sized companies, or as instruments in infant industry-type policies. The preference generally takes the form of a price preference. In other words the contract is given to preferred national/domestic suppliers that bid for the contract unless their price is ‘x’ percent higher than the competing foreign bid. Alternatively price and other policy objectives, such as the promotion of the ‘emerging economy’ in South Africa, will each be given a weighting in contract award procedures.

In practice such *de jure* preferences are less important than the *de facto* preferences. *De facto* preference occurs when local suppliers are favoured by opaque or complex contract award procedures, or the use of discretion by tender boards or politicians to award contracts to favoured suppliers. ‘Transparency’ in government procurement is the means of addressing such *de facto* preferences and can be as - if not more - important in terms of promoting competitive procurement practices as any formal national treatment commitment.⁶ In other words ‘transparency’ rules can result in market opening as much as the prohibition of *de jure* preferences in what is called ‘liberalisation.’

Empirical evidence suggests that the main effect of the procurement rules in *developed economies* has been to increase competition within national procurement markets rather than increase cross-border supply and thus trade.⁷ The introduction of clear procurement rules based on economic criteria can also result in efficiency gains in the use of scarce public funds. In these circumstances transparency in government procurement results in economic gains for states that adopt clear, objective rules. However, it is not clear that smaller *developing countries* can reap similar gains. With fewer national suppliers there is likely to be less scope for gains from increased competition and specialisation *within* national economies and more likelihood of an opening to competition in procurement resulting in increased imports. If this is broadly correct, transparency rules may well have the effect of opening ACP procurement markets more than EU markets. As ACP development aims include the promotion of domestic suppliers there may therefore be a case for an explicit development exception in any EPA procurement rules. (See below).

The wider context

The ‘EPA text’ includes rules on government procurement that, in terms of their scope, fall in between the very modest provisions in previous EU North-South FTAs and the 1994 GPA. The Trade Development and Cooperation Agreement (TDCA) with South Africa contained

⁵ For a summary of the debate within the WTO see the reports of the Working Group on Transparency in Government Procurement especially WT/WGTGP/W/03 3 Oct 2002.

⁶ *De facto* preferences are certainly more important than *de jure* preferences in developed economies and help to explain why there is relatively little cross border supply of public procurement markets despite the prohibition of *de jure* preferences by the GPA. *De jure* preferences remain more important as a policy instrument in developing countries.

⁷ Evenett (2004). This general finding tallies with experience within the EU, where cross border supply is still modest despite fairly stringent procurement rules.

one short article favouring the mutual opening of procurement markets.⁸ Likewise the early Euro-Med agreements, such as the EU-Egypt Association Agreement contained only a one short article (Art 38) setting out the aim of progressively opening procurement markets. On the other hand the EU, like the United States has sought and achieved GPA equivalent provisions in the FTAs it has negotiated with countries such as Mexico and Chile.⁹ EU FTA negotiations with (South) Korea are likely to involve only possible extensions to sector coverage as both are signatories to the 1994 GPA. In line with the Global Europe strategy of October 2006, which included the aim of opening procurement markets for EU exporters, the EU is seeking inclusion of procurement in the FTAs it is negotiating with 'emerging countries'.¹⁰ The EU even envisages taking action to ensure reciprocity in cases of countries that do not wish to open their procurement markets when the EU retains open procurement markets. This kind of reciprocity is however, excluded in the case of 'poorer developing countries' for the 'sake of consistency with the (EU's) development policy.'¹¹ The poorer ACP countries therefore appear to be excluded from aggressive offensive measures by the EU. The EU is however, clearly seeking transparency or framework rules in the negotiations on comprehensive EPAs with the ACP states.

The key provisions in the CARIFORUM –EC EPA on government procurement

Transparency rather than liberalisation

The EPA negotiated between CARIFORUM and the EU is an agreement on transparency and does not (yet) require liberalisation. Article 167 requires national treatment in procurement by the purchasing entities covered by the agreement¹² (see below), but Art 167 (3) states that a decision of the Joint CARIFORUM-EC Council *may* specify which procurement by each party is covered by national treatment. Unlike the 1994 GPA there is therefore no liberalisation. The wording (*may*) is also fairly weak. But Art 167 clearly envisages progressive liberalisation based on positive listing of types of procurement to be covered.¹³ See table 1 for a comparison of the provisions on procurement in the CARIFORUM text with the UNCITRAL Model Law and the GPA.

In line with the stated aim of the EPAs to promote regional integration among ACP countries, the EPA text encourages (but does not oblige) national purchasing entities in the CARIFORUM states to provide national treatment for other regional suppliers. There is only best endeavour wording here, so the EPA does not by itself oblige CARIFORUM states to offer national treatment to each other. The creation of an open procurement market in the region (or any other ACP region) will of course require concerted action by the CARIFORUM states at the regional level. The stress on developing regional procurement

⁸ The Parties agree to cooperate to ensure that access to the Parties' procurement contracts is governed by a system which is fair, equitable and transparent. (Article 45(1) TDCA). The Cooperation Council shall periodically review the progress made in this matter. (Article 45(2))

⁹ See for example Articles 136 to 162 of the EU Chile Association Agreement along with annexes XI and XII of 2000. In the case of EU-Mexico agreement the EU commitments are essentially those of the 1994 GPA and Mexico's those of NAFTA.

¹⁰ See European Commission (2006).

¹¹ European Commission (2006) pg 8

¹² Coverage is determined by schedules of purchasing entities, see annex 6 of the agreement.

¹³ Positive listing is generally preferable for developing countries.

markets does however, provide an opportunity for sequencing of liberalisation that envisages first an opening of the regional market and then an opening to EU suppliers.

Coverage of central government only

CARIFORUM parties to the EPA list only central government ministries (see the annex 6 schedules), whereas the coverage of EU procurement entities is as in the 1994 GPA. For the EU this means coverage of procurement by EU Member State central governments (type I using the GPA classification), sub-central governments (type II) and other entities (type III) apart from some key utilities. In the case of small Caribbean states central government is likely to be more important than in larger ACP states. Covering only central government purchasing in larger, federal states or where public ownership or parastatals are still important would mean that the majority of purchasing would be excluded. For such states there may be a case for going beyond the CARIFORUM commitments, at least as an objective, because it is at the sub-central government level that government purchasing is least transparent. Central government procurement is generally more open and transparent. On the other hand, starting with central government in the first instance and working down through other levels of purchasing would make sense in terms of compliance costs.

By offering ACP 'access' to (nearly) all procurement in the EU's GPA schedule the EU is effectively offering the ACP states asymmetric access to the EU market, but with the important exception of the key utilities. These have probably been withheld for reasons of retaining bargaining leverage when it comes to negotiations on reciprocal 'liberalisation' commitments. But for 'poorer' ACP states this is at odds with the EU's declared policy of excluding such countries from the assertive use of reciprocity to open procurement markets.

Thresholds for procurement rules are set in order to ensure that economically important contracts are covered, whilst minimising compliance costs by excluding lots of smaller contracts where following detailed procedures would be costly and time consuming. On thresholds the EPA text in Annex 6 is slightly more generous to the CARIFORUM parties than to the EU in that the thresholds are set slightly higher for the CARIFORUM parties thus reducing compliance costs. The EU has simply adopted the same thresholds it has for the 1994 GPA. Without detailed figures on the typical size of central government contracts in CARIFORUM, it is not possible to say how much of a difference this makes, (or would make in other ACP states) but it is a contribution to reduced compliance costs. One means of providing further asymmetrical benefits for the ACP parties to comprehensive EPAs would be for the EU to offer lower thresholds than at present thus helping to open smaller contracts to competition from ACP suppliers. This would create a preference for the ACP suppliers, but would mean increased compliance costs for EU purchasers.

Exceptions

As in all trade agreements there are exceptions for national security reasons. Thus security related purchasing is excluded from the transparency obligations and will be excluded from any future liberalisation. Defence contracts will therefore not be subject to the same rules on transparency. Whilst this provides a large loop hole in any rules, there is no pressure to remove this standard exception because the EU Member States also wish to be able to have a free hand in defence contracts.

Transparency provisions¹⁴

¹⁴ The definition of transparency used here is narrower than that used in the WTO debate on 'transparency in government procurement', which includes the rules on procedures that following in the debate in this text.

The EPA text requires the publication of all laws, regulations, decisions, as well as all administrative and judicial rulings relating to procurement covered by the agreement in a designated publication. The EPA text also requires the provision of information on individual procurement opportunities, in other words calls for tender must be advertised, again a designated publication. The ACP states are also encouraged to have the purchasing entities in their government publish future procurement plans in order to enable potential suppliers to plan ahead, but there is no binding obligation to do so. As all governments have rules on procurement and provide information on contracts in one form or another, this does not seem to be a very onerous provision. Countries that are introducing UNICTRAL type provisions will not incur significant additional compliance costs. But as many ACP states have not completed the domestic reforms based on the UNCITRAL model there will be compliance costs. Transition periods are provided for in the 'EPA text' of up to five years for lesser developed countries.

Technical specifications

Rules on procurement often seek to ensure that technical specifications or standards are not drawn up in such a fashion that only preferred suppliers can comply. This form of preference was widely used by EU Member States and developed country purchasing entities in the past. The EPA text requires the use of agreed international standards where these exist. As there are too few international standards, the option of national standards is seen as second best and preferable to the use of firm specific or design standards. The EPA provisions also require the use of performance standards when no agreed standards exist. In this respect the EPA text follows that of the 1994 GPA. In practice this means that some form of discretion will still remain, because purchasers must decide whether existing international or national standards are adequate.

Procurement methods

Agreements on government procurement seek to find a balance between granting the purchasing entities sufficient flexibility to be able to complete the work required on time, and rules that reduce the scope for *de facto* preference and/or corruption. The selection of procurement methods constitutes part of this balance. For example, whilst *open tendering* based on price alone may be suitable for standard items bought in large numbers, such as equipment for schools, more complex projects, such power plants, dams or complex service contracts can only be successfully carried out by qualified suppliers. *Selective tendering* with a list of qualified suppliers is used for these more complex contracts. There are therefore rules on how companies get onto the list of qualified suppliers, because this selection clearly provides an opportunity for the use of discretion and thus covert preference for certain suppliers. Compliance costs can be contained by enabling purchasing entities to set a limit on the number of qualified suppliers on a list. Finally, purchasing entities generally also favour retaining the option of *limited tendering* in which the purchaser approaches a specific supplier or suppliers. This is also called shopping and is seen as necessary by purchasing entities when there are no bids from suppliers, in cases of urgency or when the purchaser wishes to have a specific architect design a building for artistic reasons.

In the provision for open, restricted and limited tendering the EPA text appears to be little different from the 1994 GPA, even though the wording is different. There is naturally a trade-off here between competition and compliance costs, but provided there is scope for new suppliers to qualify, the risk of collusive practices or bid rigging between a group of favoured suppliers can be contained.

On limited tendering the EPA text also largely follows the 1994 GPA approach. But with one major difference, namely the absence of any requirement for the purchasing entity to report on each contract awarded using limited tendering. This reduces compliance costs, but also

the ability to monitor how such practices are being used. Although there are no explicit reporting requirements for limited tendering as is the norm in other agreements, Art 179 on bid challenge (see below) requires purchasing entities to retain sufficient records of all contract award procedures in order to enable a review of the decision.

Finally, the use of *negotiation* in contracts provides rather a lot of scope for abuse and corruption. Again purchasing entities seek this power in order to be able to respond flexibly to circumstances that arise during a contract. But admitting negotiation allows for suppliers to put in low bids in order to win a contract and then negotiate on the terms. The risk of abuse of such practices is why the UNCITRAL Model Law contains generally stricter provisions than in the GPA. The EPA text like the GPA allows negotiation provided there are certain safeguards to ensure competition. For example, other bidders must be informed of the negotiations and allowed to resubmit offers at the same time as the bidder involved in the negotiation.

Contract Award Criteria and the option of not awarding a contract

The flexibility in procurement rules is again illustrated in contract award criteria. Virtually all international agreements including the EPA text allow for both 'lowest offer' and 'the most advantageous' offer. The latter allows purchasing entities to choose suppliers who offer better overall packages even if the price may not be the lowest. The EPA text like the GPA also allows purchasing entities not to award a contract. The issue here is whether the non-award of a contract is because there are no suitable bids, or because there are no national or local bids. Retaining the ability not to award the contract to any bidders therefore leaves another loophole in the rules.

Post contract award transparency

Information on who has won a contract and why other bidders have not won is seen as a means of monitoring implementation of rules. The GPA therefore requires considerable post-contract award information as well as the provision of statistics. The UNCITRAL Model Law and World Bank guidelines also place emphasis on the provision of such information. The EPA text requires purchasing entities to specify why bids have been rejected, but does not appear to require the provision of statistics. This reduces compliance costs for the CARIFORUM government departments and other purchasing entities.

Bid challenge

The ability for suppliers who believe they have been unfairly treated to challenge contract award procedures is seen as an important means of ensuring compliance. Rules on government procurement adopted in the 1970s that had no bid challenge or compliance measures were not well implemented and had little impact on procurement markets or competition. The 1994 GPA provisions on bid challenge were modelled on those of the US – Canada FTA of 1998 and the subsequent EU's compliance directive. These require independent administrative or judicial review of contract award procedures and effective, rapid interim measures to correct breaches in the rules.

Here again the EPA text adopts broadly the same approach as the GPA. In so doing it goes beyond what developing countries were willing to consider in the WTO discussions on transparency. In the WTO Working Group on Transparency in Government procurement the developing countries argued that enforcement provisions, such as bid challenge, should not be applied to transparency measures but only to 'liberalisation' measures.

Special and Differential Treatment

The 1994 GPA provides special and differential treatment in the form of scope for an exception to non-discrimination on the grounds of; balance of payments difficulties, to support the establishment or development of domestic industries, or for regional preferential agreements (GPA Art V 1-7). Developing countries may also negotiate offsets such as local content rules or other conditions attached to the award of a contract (which are otherwise banned under Art XV, GPA) at time of accession (Art XVI GPA). The problem with these GPA provisions from a developing country point of view is that they appear to be based on negotiation rather than being offered unconditionally. Developing countries rejected the GPA in part because of the way coverage is negotiated bilaterally, which gave the developed OECD countries considerable asymmetric leverage. Developing countries have therefore not seen the special and differential treatment provisions in the GPA as very valuable.

The EPA text contains no equivalent special and differential treatment provisions. There is no explicit exemption from national treatment commitments on development grounds. The EPA text therefore appears to be less generous than GPA in this regard. Although it might be argued that the ACP signatories may choose which procurement to 'liberalise' and may thus retain preferences that are important for developmental reasons, this would again be subject to negotiation not unconditional.

Technical Assistance

Work in the WTO Committee on Transparency in Government Procurement did not lead to an agreement on the need for WTO rules, but there was a consensus on the value of transparency in procurement. There was also a consensus on the need to provide developing countries with adequate support and assistance to implementing transparency rules. (WTO, 2003)

The EPA text is thin on technical cooperation. Article 182 provides for exchanges of experience, the establishment of appropriate systems to ensure compliance and the creation of an online facility at a regional level (presumably at the ACP regional level although this is rather vague) to provide information on contracts. But the provisions on technical assistance are otherwise weak. Most of the surveys of policy reform in developing countries' government procurement conclude that probably the major reason for lack of progress has been the lack of a trained purchasing professionals. (Hunja, 2004) If the EU wishes to promote open competitive practices in the ACP regions support for training of ACP purchasing officials would seem to be important.

Institutions

Finally, the EPA text does not establish a specific committee to deal with government procurement. In this respect it differs from the 1994 GPA, which has such a committee. As noted above, decisions on the application or extension of the procurement rules, such as the listing of procurement covered by national treatment are to be made by the Joint CARIFORUM – EC Council. The CARIFORUM Trade and Development Committee is to review the functioning of the provisions on procurement after three years and make recommendations to the Joint Committee.

Implications for development

The costs and benefits for development will depend very much on whether ACP governments give preference to retaining support domestic suppliers or the efficiencies from more open and competitive procurement. In other words there is a broad choice between interventionist or liberal policies.

The CARIFORUM EPA text envisages commitments on national treatment in the future that will mean the loss of the right to retain *de jure* preferences for national suppliers. In many cases the provision of preferences for certain categories of national suppliers is seen as an important development instrument. For example, South Africa provides preferences for suppliers from ‘the emerging economy’ as a means of trying to redress the imbalance between the emerging small and medium sized companies and the large companies established before 1995. All ACP states have similarly important policy objectives they pursue with the help of preferences in procurement. It should be stressed that this is a potential future cost because Article 167 (3) states that such commitments to national treatment will require a decision of the Joint Council. But there is no explicit development exemption in the EPA text, something that is provided albeit conditionally in the GPA. For some this may be a positive step forward away from the failed S&DT of the past, for others it will be seen as an illustration of the emphasis on establishing rules and neglect of development aims.

In the case of compliance costs the ‘EPA text’ on procurement appears to be less onerous than the framework rules in the GPA agreement. For example, there are higher thresholds for ACP purchasing entities, more explicit scope to limit selective tendering and less onerous provisions of things like statistics. The bid challenge rules can also use existing administrative and judicial reviews.

Another potential cost would be a loss of flexibility in the use of procurement. This does not seem to be a major problem in that the EPA text provisions are if anything more flexible than the already fairly flexible GPA rules. Indeed, it might be argued that some aspects of the rules are too flexibility, such as on negotiation of contracts, and thus open up the possibility of abuse.

From an ACP point of view inclusion of rules on procurement in the EPAs is most likely to provide a benefit if they provide the right sort of external discipline to help maintain the momentum of the domestic reform and thus result in savings in public expenditure on procurement through better value for money and more efficient and open procurement markets. As noted above most gains from procurement rules come in the form of increased competition and thus specialisation *within* national markets. But most ACP economies are small and may not have enough firms able to supply procurement markets.

There are unlikely to be benefits from access to the EU market as most suppliers are not (yet) in a position to supply government procurement markets in the EU. The ACP markets are also generally small compared to the EU and other industrialised country procurement markets. Public procurement reform in the ACP, except in a few large countries, cannot be expected to have any real benefit for EU exporting interests outside of a few sectors.

If the inclusion of procurement rules in EPAs can help bring about open regional procurement markets in the ACP regions, the potential benefits for ACP states could be greater because of the greater scope for competition and thus gains from specialisation within the larger regional markets. EPAs are of course supposed to promote regional integration in the ACP regions and the EPA text on procurement *encourages* the creation of regional procurement markets. But the creation of open regional procurement markets requires action by the ACP governments in the region. Including procurement rules in an EPA might help by requiring the adoption of common rules on procurement across the region, which generally do not now exist. This is after all how the EU has gone about its efforts to create a common EU procurement market.

Implications for subsequent negotiations

The fact that the EPA text refers to future liberalisation commitments will mean the CARIFORUM parties will come under pressure to make commitments on national treatment. If the above assessment is correct and the benefits of procurement rules are most likely to come from improved procurement procedures and/or from the growth of regional procurement markets, the CARIFORUM parties (and any other ACP governments that include procurement rules in the EPAs) should only make commitments on liberalisation once the transparency provisions have been fully implemented and after the regional procurement market has been established.

The fact that the CARIFORUM has negotiated a text including rules on procurement has clear implication for other ACP regions and countries. The CARIFORUM – EC EPA text will represent a significant precedent for any future regional rules.

The negotiations on the EPAs must also be seen in the context of negotiations in other fora. With transparency in government procurement off the DDA agenda, the EU has, as noted above, been pressing for inclusion of procurement in FTAs. The USA has been doing the same and has, as in other policy areas, adopted a standard approach based on the NAFTA model. This inclusion of procurement in FTAs means that more and more countries are effectively adopting GPA-type rules. Together with the accession of China to the GPA this suggests that the GPA is emerging as the *de facto* norm. This leaves the ACP states the option of adopting a defensive position or a more mixed (defensive and cooperative) approach to negotiations on procurement and other trade related topics. Whilst a defensive position is consistent with the developing countries' opposition to inclusion of procurement in trade negotiations, this means the ACP states will not be able to influence any emerging international norm.¹⁵ Adopting a more cooperative approach, whilst defending ACP interests, would provide an opportunity of shaping rules on procurement to suit the interests of the ACP states, but runs the risk of finding there is a foot in the door and a powerful negotiator pushing from the other side.

Proposed modifications

There are a number of possible modifications on the CARIFORUM – EC text that might make inclusion of procurement more attractive to other ACP regions and countries.

First, there could be an explicit link between the creation of ACP regional procurement markets and the liberalisation commitments *vis-à-vis* the EU. Such a link could for example, take the form of sequencing liberalisation *vis-à-vis* the EU only 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.

Second, a specific development exemption, similar to that provided already in Article V of the 2007 revision of the GPA, would provide scope for ACP states to retain preference schemes that serve *clearly defined* development aims. This would provide the 'policy space' many ACP governments still seek, while inclusion of transparency rules would help further the policy reform process in procurement. Such an exemption should be conditional on clearly defined development aims not on negotiated reciprocal access.

¹⁵ There may be lessons here from other policy areas. For example, in investment *de facto* norms for investment were developed in the 1980s through bilateral investment treaties and applied in FTAs during the 1990s. Thus when developing countries came to negotiate bilateral FTAs with the USA that included investment they were faced with accepting the dominant norm or miss out on the foreign direct investment that such agreements might attract.

Third, the EPA text on procurement could provide firm commitments on technical assistance. One of the major reasons for a lack of progress in the existing procurement reforms is the lack of sufficient professional and qualified officials in many ACP countries, especially at the sub-central government level. The EPA text at the moment offers little in terms of specific support. 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.

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 some type III (public enterprise) procurement. There is also some asymmetry in the thresholds determining coverage. This grants the CARIFORUM parties a higher threshold of 150,000 SDRs for goods and services and 6 million SDRs for works contracts. The EU could also consider offering ACP suppliers a lower thresholds than its existing GPA thresholds of 130,000 and 5 million respectively. This may help the smaller ACP exporters access the EU market and offer a preference for the ACP compared to the GPA. 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.

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Table 1 Summary of provisions in the CARIFORUM – EC EPA compared to other agreements

Element of rule	UNCITRAL Model Law	1994 Government Procurement Agreement	CARIFORUM – EC EPA
Coverage			
Type of purchasing	goods, services and construction	goods (supplies), services and construction (works)	goods, services and construction
Entity coverage	central government	central (type I) and sub-central (type II) govt. levels and other entities (type III)	central govt. entities only listed in annex 6
Thresholds	no reference	130k SDRs for goods and services and 5million SDR for construction	150k SDR for goods and services and 6.5m for construction
De jure preferences	preference for national or local suppliers allowed but must be explicit	prohibition of preference through obligation to apply national treatment to foreign suppliers (Art III) shall not discriminate according to degree of foreign affiliation or country of production of goods or services Art III (2) a	national treatment will prohibit de jure preference when Joint Committee decides Art 167 (1)(3 and 4) best <i>endeavour</i> commitment not to discriminate according to degree of foreign affiliation or country of production of goods or services Art 167 (2) shall <i>endeavour</i> to offer national treatment to other CARIFORUM suppliers Art 167(2)(a)
Exceptions	envisages exceptions on the grounds of national security and other national interests	exclusion of procurement essential for national security, public morals and of production by firms employing handicapped persons and prison labour Art XXIII	exceptions for range of government activities that are not subject to competition Art 167 (3)
Transparency			
laws and rules	all relevant laws to be published	laws, decisions, regulations, administrative rulings and judicial decisions to be published	all laws, decisions, regulations, judicial decisions and administrative rulings to be published in a designated publication; information to be made available electronically Art 168
individual procurement opportunities	procurement opportunities to be advertised	all information necessary to permit suppliers to tender Art XII (2)	all information in a designated publication Art 168 with advanced notice if possible 168(3)
Technical specifications	specifications should not create an unnecessary obstacle to trade	as in UNCITRAL use of international, national or 'performance' standards Art VI	use of performance standards, international standards, or national standards Art 173
Methods of procurement			
'open' or selective tendering	open tendering preferred	open, selective or limited procurement Art VIII	open, selective or limited Art 169
with selective tendering calls for bids go only to qualified suppliers	selective tendering possible but criteria must be specified from outset	detailed provisions for selective tendering and national treatment obligation on conditions Arts VIII, IX	somewhat less detailed rules for selective tendering; no national treatment obligation; Art 170 and 174

<p>rules can set out how decisions on qualification are made</p> <p>Limited tendering</p> <p>purchaser invites bids from a single or a few potential suppliers</p>	<p>permits limited tendering</p>	<p>and X</p> <p>maximum number of tenderers consistent with 'efficient procurement' Art X</p> <p>scope for limited tendering in certain cases e.g. no adequate bid, urgency, additional supplies Art XV</p>	<p>can limit number of tenderers Art 170 (2); opt out from detailed rules in cases of 'complex' bids Art 174 (7)</p> <p>limited tendering under predetermined conditions as in GPA (Art 169(2) and 171), but unlike the GPA there is no obligation to prepare a report on each contract awarded using limited tendering</p>
<p>Negotiations</p> <p>these can be pre or post contract award;</p> <p>open to abuse if not regulated</p>	<p>discouraged</p>	<p>allowed if intent specified in call for tenders</p> <p>all bidders to be treated equally, i.e. losing bidder has right to resubmit bid Art XIV</p>	<p>allowed if intent specified in call</p> <p>all bidders can resubmit Art 175</p>
<p>Opening and awarding of contracts</p> <p>rules here seek to ensure fairness</p> <p>price or other criteria for awarding a contract</p>		<p>detailed rules on opening and handling of bids</p> <p>lowest or most advantageous bid Art XIII(4) b</p>	<p>procuring entity must guarantee fairness</p> <p>lowest or most advantageous tender Art 176</p>
<p>Time limits</p> <p>provide predictability in bids</p>	<p>reasonable time periods</p>	<p>detailed time limits and deadlines for most procedures</p>	<p>no specific time limits Art 178</p>
<p>Post contract award transparency</p> <p>means of monitoring compliance</p>	<p>The Guidelines on Application of UNCITRAL rules stress importance</p> <p>records to be provided on request</p>	<p>information on winning bid Art XVIII</p> <p>reasons for rejection of a bid to be given</p> <p>detailed statistics to be provided</p> <p>government of aggrieved bidder may request information Art XIX</p>	<p>information on successful bids to be provided as in GPA Art 177</p> <p>reasons for rejecting a bid to be given upon request Art 177(2)</p>
<p>Bid Challenge</p> <p>provides opportunity for aggrieved bidder to challenge procedures main means of enforcement</p>	<p>no provision</p>	<p>obligation to provide an independent body to review challenges Art XX</p> <p>detailed rules providing unsuccessful bidders to challenge decisions</p>	<p>parties may create or designate an existing independent administrative or judicial review body</p> <p>reviews must be transparent, timely, impartial and effective</p>

		effective interim measures must be available and may include suspension of bids	effective, rapid interim measures to correct breaches
Technical cooperation and special and differential treatment		<p>non-binding provisions</p> <p>developed signatories to help LDCs and DCs with bids Art V 8-11</p> <p>DCs have option to limit coverage of rules</p> <p>LDCs may apply for modification of a schedule listing covered entities</p>	<p>exchange of experience and best practice</p> <p>online dissemination of results Art 188</p>
Institutional arrangements		Government Purchasing Committee established to monitor agreement	<p>CARIFORUM Trade and Development Committee to review every three years</p> <p>decisions on increased scope of chapter including the application of national treatment to be made by the Joint CARIFORUM-EC Committee</p> <p>two or five year implementation period</p>