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SOPE WILLIAMS-ELEGBE

**A comparative analysis of public procurement reforms  
in Africa: challenges and prospects**

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# A comparative analysis of public procurement reforms in Africa: challenges and prospects

*Sope Williams-Elegbe\**

## I. Introduction

In the new millennium, a wave of public procurement reform swept across the African continent. From north to South Africa, countries engaged in extensive legal, institutional and organizational reform of their procurement framework to make the procurement system fit for purpose, transparent, accountable and less prone to corruption, fraud and mismanagement. Apart from reform at the country level, Africa also witnessed the regionalization of procurement regulation,<sup>1</sup> with the aim of providing regional coherence and uniformity in procurement regulation towards the better integration of common markets in Africa.

This paper will compare and highlight the approaches to procurement reform adopted by selected African countries in the west (Ghana), the south (South Africa), north (Tunisia) and the east (Kenya), to examine the commonalities in relation to procurement reform in Africa, and to determine whether it can be said that there is a move towards the harmonization and congruence of procurement norms and practices in the African context. The paper will then examine the regional approaches to procurement harmonization to examine the development of this approach to procurement regulation and examine its possibilities and the challenges it presents.

It will be seen that although much has been done in relation to legal procurement reform in Africa, challenges still remain in relation to institutional and organizational reform. In addition, although regional approaches might be useful in fast-tracking domestic changes, the reliance on procurement to achieve local policy goals, power relations, differing legal systems, the intractable practice of tied-aid and a lack of willingness to give up sovereignty is likely to hamper the full realization of regional initiatives.

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\* Research Fellow and Deputy Director, African Public Procurement Regulation Research Unit, Stellenbosch University, South Africa; Senior Lecturer in Law, Faculty of Law, University of Lagos, Nigeria.

<sup>1</sup> Aboubakar Fall and Marc Frilet, "Public Procurement in Francophone Africa" in Roberto Hernandez Garcia (ed), *International Public Procurement: A Guide to Best Practice* (Globe Law and Business, London, 2009).

The paper will commence with a summary of the main pillars or components of procurement reform in Africa, which differ significantly from procurement reform efforts in the West. Next the paper will look at country perspectives of procurement reform- namely Ghana, Kenya, South Africa and Tunisia. Next the paper will examine regional procurement harmonization measures by analyzing the approach of the West African Monetary Union (WAEMU) and the Common Market for Eastern and Southern Africa (COMESA). The paper will then conclude with an assessment of the future of procurement reform in Africa, examine how Africa may truly integrate its procurement markets, whilst highlighting the commonalities and the challenges facing procurement reform in Africa.

It will be seen that regional integration of procurement across the continent will be challenging, but will bring a plethora of benefits to the continent, including improved trade facilitation, improvement in domestic procurement systems and economic growth through increased support of regional industries.

## II. What does procurement reform look like in Africa?

As was stated in the introduction, procurement reform in Africa is intended to make procurement fit for purpose and less prone to corruption, fraud and mismanagement. The ultimate aim, however, is to assist countries to better manage resources to meet developmental outcomes given the research that illustrated the scale of funds lost to corruption in public procurement as well as the unwillingness of donors to continue to provide budget support or fund developmental projects where it was thought that African governments were abusing or manipulating their procurement processes for illegitimate ends.<sup>2</sup>

It has been stated that the components of an effective procurement system in developing countries include an adequate legal framework; a consistent policy framework; defined institutional arrangements; a professional civil service; adequate resources to support the procurement function as well as laws that prevent fraud and corruption, increase transparency and the inclusion of civil society.<sup>3</sup> In addition, one may add an efficient procurement watchdog and functional remedial system.

There has been much debate on the necessary accompaniments for and obsta-

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<sup>2</sup> Benon Basheka, "Public Procurement Reforms in Africa: A tool for effective governance of the public sector and poverty reduction" in Khi V. Thai (ed) *International Handbook of Public Procurement* (Taylor & Francis, Boca Raton, 2009) 131, 133.

<sup>3</sup> Robert Rothery, "Understanding Public Procurement" (2002) 3 The Governance Brief 1.

cles to procurement reform in Africa.<sup>4</sup> Nevertheless, there is agreement that a fully functional procurement system is in essence, one that is “governed by a clear legal framework establishing the rules for transparency, efficiency and mechanisms for enforcement, coupled with an institutional arrangement that ensures consistency in overall policy formulation and implementation.”<sup>5</sup>

Thus to distill this further, procurement reform in Africa often takes the following form:

- a. The development of new, integrated procurement legislation or the expansion or amendment to previous legislation to bring coherence into the legal framework, require the use of mandatory competitive bidding procedures, create new institutions, and create new or strengthen existing offences and remedies for breaches of the legislation. Countries that have done this include Nigeria, Ghana, Botswana, Uganda, Kenya, Tanzania and South Africa to name a few. It may be noted that many of these legal reforms are based on the previous edition of the UNCITRAL Model Law.<sup>6</sup>
- b. The creation of a new or reformed institution with oversight over public procurement and charged in some cases with developing procurement policy. Generally, the reform process in Africa is accompanied by the creation of an organization responsible for ensuring compliance with the new legislation and policy. The organization maintains consistency in policy and legal interpretation and procurement implementation across some or all tiers of government. This organization may also be responsible for coordinating procurement training as part of the procurement reform process. It should be noted that one of the main outcomes of procurement reform in Africa is a separation of operational procurement institutions from regulatory or oversight institutions.
- c. Training: the development of the capacity of public officials to understand, interpret and implement the new requirements of a reformed public procure-

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<sup>4</sup> R Hunja, “Obstacles to Public Procurement Reform in Developing Countries”, in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution*, (Kluwer Law International, 2003), 15; Benon Basheka, “Public Procurement Reforms in Africa: A tool for Effective Governance of the Public Sector and Poverty Reduction” in Khi V. Thai (ed.) *International Handbook of Public Procurement* (Taylor & Francis, Boca Raton, 2009) 131, 133; Cynthia Walker “Setting up a public procurement system: The Six Step Method” in S Arrowsmith & M Trybus (eds.) *Public Procurement: The Continuing Revolution* (Kluwer Law International, 2003), 3; Sope Williams-Elegbe, “Beyond UNCITRAL: The Challenges of Procurement Reform Implementation in Africa” (2014) 1 Stellenbosch Law Review 209; Paul R. Schapper, João N. Veiga Malta and Diane L. Gilbert, “An Analytical Framework for the Management and Reform of Public Procurement” (2006) 6 Journal of Public Procurement 1.

<sup>5</sup> Robert Hunja, n4, 15.

<sup>6</sup> UNCITRAL Model Law on Procurement of Goods, Services and Construction, 1994. Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html)

ment system is crucial to the success of the reform. Legal and institutional changes without managing the moral hazard inherent in the procurement function will ultimately lead to the failure of the reforms. Thus in Africa, reforms are accompanied with a large training component to professionalize the procurement function, and raise the “strategic profile of procurement”.<sup>7</sup>

- d. The creation of a system of administrative remedies: Legal adjudicatory mechanisms in developing countries are often slow, weak, compromised and in need of reform themselves. In relation to procurement, where time may often be of the essence, procurement reform is often accompanied by the creation of administrative remedies to settle bid disputes as well as the creation or strengthening of existing organizations to dispense these administrative remedies.<sup>8</sup>

It must be noted that there are of course other components that accompany procurement reform, as it is an ongoing exercise that often takes several years, with new issues being addressed as they arise. However, these four mentioned are the common issues that are addressed by the African countries under study and will provide the framework for the assessment of the countries under review.

### III. Country perspectives

#### a. Ghana

Ghana underwent extensive public sector financial reforms beginning in 1996.<sup>9</sup> The aim of these reforms was to improve public financial management and ensure the effective use of public funds.<sup>10</sup> The reforms led to the establishment of a Public Procurement Oversight Group in 1999. This group was created to steer the design of a comprehensive public procurement reform programme.<sup>11</sup> A major part of the reforms was the drafting of a public procurement bill in September 2002 that was passed into law on 31 December 2003. This law was called the Public Procurement Act 2003 (PPA), and it was modeled on the 1994 edition of the UNCITRAL Model Law.

Prior to the enactment of the PPA, the procurement legal framework was

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<sup>7</sup> Hunja 4, 16.

<sup>8</sup> Geo Quinot, “A Comparative Perspective on Supplier Remedies” in Geo Quinot & Sue Arrow-smith (eds) *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), 316

<sup>9</sup> This was known as the Public Financial Management reform Programme. See Collins Ameyaw, Sarfo Mensah & Ernest Osei-Tutu, “Public Procurement in Ghana: The Implementation Challenges to the Public Procurement Law 2003 (Act 663)” (2012) 2 *International Journal of Construction Supply Chain Management*, 55, 56.

<sup>10</sup> Dominic Dagbanja, “Promoting a Competitive Local Business Community in Ghana: The Role of the Legal Framework for Public Procurement” (2014) 58 (2) *Journal of African Law*, 350, 353.

<sup>11</sup> Collins Ameyaw et al n9, 56.

incoherent and fragmented at best. Procurement was governed by a myriad of regulations and a plethora of institutions and there was no body with oversight over procurement policy, enforcement and implementation. The World Bank Country Procurement Assessment Report (CPAR) conducted in Ghana in 2003 similarly found several shortcomings with the procurement system, including a lack of capacity of procurement officials and suppliers, political interference in the procurement process.<sup>12</sup>

The PPA provides for the mandatory use of tendering procedures and provides for administrative review of procurement decisions through a layered system of procurement review. The tendering methods listed in the PPA include open tendering, two-stage tendering, restricted tendering, request for quotations and single source procurement.<sup>13</sup>

In relation to the creation of institutions, the PPA provides for the establishment of a Public Procurement Board, which is tasked with the responsibility of providing policy direction, monitoring, supervising and securing compliance with the rules.<sup>14</sup> Under the PPA, the Board is required to “harmonise the process of public procurement in the public service to secure a judicious, economic and efficient use of state resources in public procurement and ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner”.<sup>15</sup> Other requirements in the PPA include the use of preferences for domestic suppliers and well as local content requirements.<sup>16</sup> It should be noted that such requirements are not unusual and are in fact to be expected in developing country procurement to assist local suppliers to compete with their foreign counterparts.<sup>17</sup>

As to be expected, the PPA contains various anti-corruption provisions and the PPA criminalizes various infractions such as collusion, undue influence of the procurement process, fraudulent misrepresentation and forgery.<sup>18</sup> The PPA also prohibits conflicts of interests on the part of public officials.<sup>19</sup>

In relation to training, Ghana has adopted a comprehensive approach that seeks to mainstream public procurement capacity building by creating relevant degrees at HND and BSc levels. These programs are delivered by the Ghana Institute of Management and Public Administration as well as Takoradi Poly-

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<sup>12</sup> World Bank, Ghana Country Procurement Assessment Report: Main Report Vol. 2 (2003), ch. 2.

<sup>13</sup> Sections 35–43 PPA 2003.

<sup>14</sup> Section 1 PPA 2003.

<sup>15</sup> Section 2 PPA 2003.

<sup>16</sup> Section 60 PPA 2003.

<sup>17</sup> Geo Quinot, “Promotion of Social Policy through Public Procurement in Africa” in Geo Quinot & Sue Arrowsmith (eds) *Public Procurement Regulation in Africa* (Cambridge University Press, 2013), 380.

<sup>18</sup> Section 92 PPA 2003.

<sup>19</sup> Section 93 PPA 2003.

technic. Both institutions also offer short-term training courses for procurement professionals. Efforts are also ongoing to professionalize the procurement cadre.<sup>20</sup>

As was mentioned earlier, Ghana created a layered system of administrative review under the PPA. The Act thus provides for the resolution of procurement disputes at both the procuring entity level and by the procurement board.<sup>21</sup>

## b. Kenya

Procurement reform in Kenya followed a very similar pattern to that of Ghana. In 1997, the World Bank and the Kenyan government conducted a Country Procurement Assessment and discovered many shortcomings in the Kenyan procurement system, which included the absence of a sound regulatory framework, lack of competition and widespread abuses and fraud in the system.<sup>22</sup> Prior to the spate of reforms in its public procurement system, procurement in Kenya was governed by a myriad of circulars and regulations issued by the Ministry of Finance, the Ministry of Public Works and the Office of the President. Some of these regulations conflicted with each other and led to a fragmented, ineffective and confusing system of governance. The CPAR found that the approach to procurement regulation limited the efficacy of public financial management, affected the government's ability to deliver public services and there was no enforcement mechanism to enforce the rules which did exist. The CPAR was thus the beginning of widespread reform in Kenya's public procurement system.

The first step taken by Kenya in pursuance of reform was to revamp the legislative framework by passing the Public Procurement Regulations (PPR) in 2001, based on the 1994 UNCITRAL Model Law. The regulations abolished the central tenders' board that was hitherto responsible for the award of government supply contracts. The PPR also created a procurement directorate as well as a procurement appeals board. In 2005, the legal regime was further enhanced through the passage of the Public Procurement and Disposal Act (PPDA), which superseded the 2001 regulations and came into operation in January 2007. The most recent and significant change to the procurement landscape in Kenya occurred in 2010, when the new Kenyan constitution included the principles of public procurement in the Constitution.<sup>23</sup>

The constitutionalization of public procurement is not entirely new in Africa and

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<sup>20</sup> World Bank, *Ghana's Comprehensive Approach to Public Procurement Reform*. Available at <http://www.worldbank.org/en/news/feature/2013/02/04/Ghana-8217-s-Comprehensive-Approach-to-Public-Procurement-Reform>.

<sup>21</sup> Sections 78–81 PPA 2003.

<sup>22</sup> Jerome Ochieng and Mathias Muehle, "Development and Reform of the Kenyan Public Procurement System". Paper presented at the 5th International Public Procurement Conference 2012.

<sup>23</sup> Section 227, Constitution of Kenya, 2010.

it was first done by South Africa in its 1996 constitution,<sup>24</sup> which includes the “principles” of public procurement in the Constitution and requires any person who conducts procurement to abide by these principles. This approach has now been modeled by Kenya, and these are calls in jurisdictions such as Nigeria for a similar approach.<sup>25</sup> The rationale for the constitutionalization of procurement is that it elevates procurement and gives constitutional status to the adherence of its principles so that a person who acts contrary to these principles, which in Kenya (and South Africa) are stated to be fairness, equity, transparency, competition and cost-effectiveness is not merely in breach of extant law, but is in breach of the Constitution. This gives the courts wide powers of review over procurement decisions, ensures that the principles of procurement as included in the Constitution supersede any contradictory legislation and may be intended to forestall the manipulation of the procurement process by procuring entities.<sup>26</sup>

The PPDA provides for the mandatory use of procurement procedures, which are listed as open tendering, restricted tendering, direct procurement, request for proposals, request for quotations and special procedures for low value procurements.<sup>27</sup> Unlike the requirements in Ghana, the Kenyan PPDA only provides for the use of international competitive bidding, where there will not be effective competition unless foreign persons participate.<sup>28</sup> The Kenyan law also covers the use of concession contracts and design competitions.<sup>29</sup> It should be noted that security agencies are not exempted from the provisions of the PPDA but may use restricted tendering provisions as required.<sup>30</sup>

In relation to the creation of new institutions, the PPDA created the Public Procurement Oversight Authority; the Public Procurement Oversight Advisory Board and changed the procurement appeals board to the Procurement Administrative Review Board.<sup>31</sup> The Oversight Authority is the organization charged with maintaining oversight over the procurement system and is tasked with

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<sup>24</sup> Section 217, Constitution of the Republic of South Africa 1996. Constitution. See also Phoebe Bolton, *The Law of Government Procurement in South Africa* (LexisNexis Butterworths, South Africa), 2007.

<sup>25</sup> Morocco also included procurement provisions in its 2011 Constitution. See Laurence Folliot Lalliot, “Morocco: When governance, transparency, integrity, accountability, & public procurement entered the Constitution” (2012). Available at <http://blogs.worldbank.org/arabvoices/morocco-when-governance-transparency-integrity-accountability-public-procurement-entered-constitution>

<sup>26</sup> Phoebe Bolton, Overview of the Government Procurement System in South Africa in in Khi V. Thai (ed.) *International Handbook of Public Procurement* (Taylor & Francis, Boca Raton, 2009), 357, 370.

<sup>27</sup> Sections 50, 73, 74, 76, 88 & 90 PPDA 2005.

<sup>28</sup> Section 71 PPDA 2005.

<sup>29</sup> Section 92 PPDA 2005.

<sup>30</sup> Section 133 PPDA 2005.

<sup>31</sup> Sections 8, 9, 21, 22, 25 PPDA 2005.



inter alia ensuring that the procurement procedures mandated by the Act are complied with, monitoring and reporting on the functioning of the procurement system, developing procurement policy and assisting in the operation of public procurement by developing the appropriate documentation, assisting procuring entities and supporting the capacity development of the procurement workforce.<sup>32</sup> It is thus very similar in function to the Ghanaian Public Procurement Board.

On the other hand, the Advisory Board is charged with advising the Oversight Agency on the discharge of its functions, approving the budget of the Oversight Agency and appointing its Director-General.<sup>33</sup> The Advisory Board is constituted by 9 individuals drawn from relevant professional organisations in Kenya.<sup>34</sup>

In relation to its anti-corruption provisions, the Act also contains stringent measures against conflicts of interest, corruption, fraud and collusion.<sup>35</sup> Procurement contracts entered into on the basis of corruption are voidable at the option of the procuring agency and severe penalties are attached.<sup>36</sup> One interesting aspect in relation to the Kenyan approach is that where a public official knowingly inflates a contract, he will be required to repay the procuring agency the amount of the loss suffered by the agency as a result.<sup>37</sup>

In relation to remedies, the Procurement Administrative Review Board hears complaints in respect to breaches of the procurement laws and is empowered to suspend a procurement process until the review is concluded.<sup>38</sup> It may also annul a procurement procedure, substitute the decisions of the procuring agency, give direction to the procuring agency and order the payment of the aggrieved party's costs.<sup>39</sup> The Director General is also empowered to conduct investigations into any procurement matter. There is a clear system of checks and balances in Kenya as the review board may review decisions that emanate from an investigation by the Director General and overturn his decision where appropriate.

### c. South Africa

South Africa has had a very different procurement history than the commonwealth countries of Kenya and Ghana, which have similarities in the nature of post-colonial procurement organization as well as similarities in the approach to procurement reform.

In contrast to the other countries under study, South African public procure-

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<sup>32</sup> Section 9 PPDA 2005.

<sup>33</sup> Section 23 PPDA 2005.

<sup>34</sup> Section 9 PPDA 2005.

<sup>35</sup> Section 40, 41, 42, 43 PPDA 2005.

<sup>36</sup> Section 40 (2) & (3) PPDA 2005.

<sup>37</sup> Section 30 PPDA 2005.

<sup>38</sup> Section 94 PPDA 2005.

<sup>39</sup> Section 98 PPDA 2005.

ment has been formally regulated from the time of the early Dutch settlement and management of the Cape between 1652 and 1910.<sup>40</sup> However, the modern genesis of South African procurement regulation can be traced to the desire of the post-apartheid government in 1995 to reform the procurement system to use procurement to promote good governance and achieve specified socio-economic objectives.<sup>41</sup> The reform of the South African procurement system took the form of a review of the procurement policy and the issue of an Interim Ten Point Plan on Procurement,<sup>42</sup> which established the principles on which the new procurement system was to be based as well as the issue of a Green Paper on Public Procurement.<sup>43</sup> Thus it is apt to say that whilst the objective of procurement reform in Kenya and Ghana was to increase good governance, transparency and efficiency and eliminate corruption and mismanagement in public contracts, in South Africa, procurement reform was intended to democratize the procurement process and use procurement to achieve social and economic goals.<sup>44</sup> It should be noted that as mentioned above, the principles of public procurement in South Africa have been given constitutional status.<sup>45</sup>

Similar to Ghana and Kenya, South Africa also had a CPAR conducted in 2001<sup>46</sup> and although the World Bank did not drive the initial reforms to the South African procurement system, the Bank contributed financial assistance to the reform programme.<sup>47</sup> Whilst the CPARs conducted in the commonwealth countries was intended to review the public sector procurement structure to improve the efficiency and transparency of public sector procurement, the CPAR conducted in South Africa in 2001 had a more subtle objective as it was aimed at streamlining the existing procurement system and enhancing capacity building in the area of procurement and contract management.<sup>48</sup> Despite the differences in the objectives of procurement reform, it is interesting to note that there were

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<sup>40</sup> Stephanus Petrus le Roux de la Harpe, *Public Procurement Law: A comparative Analysis* (Phd Thesis, University of South Africa 2009), ch.5.

<sup>41</sup> Deen Letchmiah, "The process of public sector procurement reform in South Africa" (1999) 8 *Public Procurement Law Review*, 15.

<sup>42</sup> Public Sector Procurement Reform in South Africa: Interim Strategies- A 10 point plan (Government Printer, 29 November, 1995)

<sup>43</sup> Green Paper on Public Sector Procurement Reform (Government Gazette 17928, 14 April, 1997). (Green Paper).

<sup>44</sup> Sope Williams-Elegbe, "The World Bank's Influence on Procurement Reform in Africa" (2013) 21 (1) *African Journal of International and Comparative Law* 95.

<sup>45</sup> Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics" (2008) 37 (4) *Public Contract Law Journal*, 781.

<sup>46</sup> World Bank, 'South Africa Country Procurement Assessment Report: Refining the Public Procurement System,' Volumes I and II (February 2003) (South Africa CPAR).

<sup>47</sup> World Bank, 'South Africa Country Procurement Assessment Report: Refining the Public Procurement System' Vol. II Main Text, February 2003. (South Africa CPAR Vol. II). <[www.worldbank.org](http://www.worldbank.org)>

<sup>48</sup> South Africa CPAR Vol. I, 1.

similarities in the findings of the CPARs of all the countries and similarities in the recommendations for procurement reform.

In South Africa, the CPAR found that there was an extensive and complex but incoherent legislative framework for public procurement, leading to differences in the interpretation and application of the government's objectives in procurement legislation and consequent differences in procurement outcomes.<sup>49</sup> The CPAR recommended that the South African government issue a National Procurement Policy Framework and create uniformity and simplify the procurement regulatory environment.

There was also a lack of procurement capacity and insufficient development of existing capacity. The CPAR also found that the legislation on preferential procurement, enacted to provide historically disadvantaged persons access to procurement opportunities through the use of preferences and the unbundling on contracts created an undue administrative burden on government agencies.

The South African National Treasury is addressing the incoherence in procurement policy through a policy document issued in 2003.<sup>50</sup> Also, in 2013, the South African Minister of Finance announced the creation of the Office of the Chief Procurement Officer ("OCPO").<sup>51</sup> A Chief Procurement Officer was charged with modernizing the procurement system and enforcing compliance with existing rules.<sup>52</sup> The OCPO has taken over the functions of supply chain policy; norms and standards; and contract management and now provides policy direction, monitors compliance and implements strategic procurement practices to ensure cost savings.

In relation to the criticism that the preferential procurement policies were complex and difficult to implement, the government redrafted the Preferential Procurement Policy Framework Act Regulations. The new regulations align the preferential procurement policy with the legislation on black economic empowerment<sup>53</sup> and came into effect in December 2011.<sup>54</sup>

In relation to capacity of procurement personnel in the public sector, the government in 2007 prescribed minimum competency levels for persons involved in the procurement function in agencies that are governed by the Municipal Finance

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<sup>49</sup> South Africa CPAR Vol. II, 5.

<sup>50</sup> National Treasury, 'Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government' (7 April 2003). <[www.treasury.gov.za/divisions/sf/sc/Guidelines/policy.pdf](http://www.treasury.gov.za/divisions/sf/sc/Guidelines/policy.pdf)>

<sup>51</sup> P Gordhan 2013 *Budget Speech*, 28–29.

<sup>52</sup> See National Treasury, Divisions. Available at <http://www.treasury.gov.za/divisions/info.aspx>

<sup>53</sup> Broad Based Black Economic Empowerment Act 53 of 2003 (Government Gazette 25899, 9 January 2004). See John Derek Taylor and Kishore Raga, "Preferential Procurement: A case study of South Africa". Paper presented at the 4th International Public Procurement Conference, Seoul, South Korea, August 2010. <[www.ipppa.org](http://www.ipppa.org)>

<sup>54</sup> Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations 2011 (Government Gazette 34350, 8 June 2011) (PPPPFA Regulations 2011). See generally, Williams-Elegbe, n4.

Management Act 2003.<sup>55</sup> Apart from the minimum competency requirements, the National Treasury has also spearheaded and coordinated the training of procurement personnel which includes short term training in supply chain management, medium term training in all elements of supply chain management as well as specialist skills and long term support of diploma and degree courses by tertiary institutions.<sup>56</sup>

In relation to anti-corruption provisions, suppliers who engage in corruption are subject to a mandatory debarment and South Africa maintains an open register of debarred companies.<sup>57</sup>

More regulatory reform is on the way in South Africa and in 2014, a draft bill to establish a Public Procurement Regulator to replace the office of the Chief Procurement Officer and to provide for the establishment of a Procurement Enforcement Unit; and a Procurement Ombudsman to deal with complaints; to provide for the establishment of the Procurement Appeal Tribunal to hear appeals is under consideration.

#### d. Tunisia

Tunisia's experience with procurement reform is more recent than that of the countries in sub-Saharan Africa. The impetus for the reform efforts stemmed from the civil unrest in Tunisia that began in December 2010 and sparked off the "Arab Spring" wave of unrest in the region. The Tunisian unrest culminated in a change of government and a budgetary crisis in the country. To support the government during this period, donors advanced the sum of \$1.4 billion to provide budget support to restore socio-economic stability and support the smooth transition to a democratic government.<sup>58</sup> One of the issues to be addressed by the loan was the public procurement system, given that the funds advanced would be channeled and expended through Tunisia's procurement system.

The government of Tunisia conducted an assessment of Tunisia's procurement system relying on the OECD/DAC Methodology tool through a body established by the Prime Minister called the Coordination and Follow-Up National Com-

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<sup>55</sup> Municipal Regulations on Minimum Competency Levels (Government Gazette 29967, 15 June 2007) (Minimum Competency Regulations).

<sup>56</sup> National Treasury Practice Note SCM 5 of 2004, Training of Supply Chain Management Officials (27/10/2004). <[www.treasury.gov.za](http://www.treasury.gov.za)> accessed 30 September 2011.

<sup>57</sup> Sope Williams & Geo Quinot, "Public Procurement and Corruption: The South African Response" (2007) 124 (2) South Africa Law Journal 339; Sope Williams, "The Use of Exclusions for Corruption in Developing Country Procurement: The case of South Africa" (2007) 51 (1) Journal of African Law, 1; S. Williams & G. Quinot, "To debar or not to debar: When to endorse a contractor on the Register for Tender Defaulters", (2008) 125 (2) South African Law Journal, 246.

<sup>58</sup> African Development Bank, Social Inclusion and Transition Support Program: Tunisia. Appraisal Report (May 2011).

mittee (CFNC), which was created to drive the procurement reform agenda.<sup>59</sup> The CFNC conducted this assessment between March and June 2012 and found many shortcomings with the existing procurement system. It was found that the legislative framework for public procurement was incoherent and that there was no hierarchy between legal texts and procurement manuals required updating. It was also found that there was no standardized system for the publication of tenders and that there was little reliance on information technology in the management of the procurement function.<sup>60</sup> Another issue was the non-professionalization of the procurement function as well as the development of procurement capacity in the public service.<sup>61</sup>

Legislative reform was an important component of the procurement reform effort in Tunisia. Prior to the spate of reforms, public procurement in Tunisia was governed by Decree 2002-3158 of 17 December 2002 regulating public procurement, and its subsequent amendments decree 2011-623 of 23 May 2011 (The PPL). Other amendments occurred in 2012- Decree number 2012-515 of 2 June 2012, which introduced new public procurement thresholds and the requirement to publish tenders on the website of the National Monitoring Office for Public Procurement.<sup>62</sup> The most recent revision to the procurement landscape is Decree No. 2014-1039 of 13 March 2014, which is an attempt to simplify the procurement legislative framework by consolidating procurement legislation within one text. Tunisian procurement law is based on the principles of fair competition and non-discrimination.<sup>63</sup> However, as was seen in the discussion of the countries in sub-Saharan Africa, the Tunisian PPL also allows for domestic preferences, and provides for competitive procurement procedures as well as publication of contract opportunities.<sup>64</sup>

The institutional landscape relating to procurement in Tunisia is somewhat complexly fragmented and procurement is managed by the following institutions (i) The Office of Prime Ministry, which has overall responsibility for the coordination of procurement planning and supervises all the procurement regulatory institutions.<sup>65</sup> (ii) The High Committee of Public Procurement- this body is comprised of representatives of government ministries and is the highest regulatory institution for public procurement. It consists of 8 committees each with

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<sup>59</sup> AfDB & EBRD, "The Tunisian Experience in Public Procurement Reform", Paper presented at the North Africa and SEMED Regional Procurement Conference, Marrakesh, Morocco, April 2013.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> [www.marchespublics.gov.tn](http://www.marchespublics.gov.tn)

<sup>63</sup> EBRD, *Public Procurement Sector Assessment: Review of Laws and Practice in the SEMED Region* (2013), ch 2, page 103.

<sup>64</sup> Article 2, 28 Tunisian PPL 2014.

<sup>65</sup> EBRD, *Public Procurement Sector Assessment: Review of Laws and Practice in the SEMED Region* (2013), 103.

jurisdiction over a particular kind of procurement.<sup>66</sup> (iii) The National Monitoring Office for Public Procurement- this institution administers a database, which collects and analyses public procurement data, and evaluates public procurement developments.<sup>67</sup> (iv) Follow-up and Investigations Committee – this is an ad hoc entity established to address matters pertaining to public procurement and functions as a unit within the Prime Ministry. It functions as a dispute resolution forum (iv) The Committee for Amicable Settlement of Disputes- this is an arbitration committee established to secure amicable settlements of disputes relating to public procurement.<sup>68</sup>

The Tunisian PPL contains anti-corruption provisions similar to those found in the other jurisdictions. Thus, the law prohibits corrupt practices, fraud, collusion and coercive practices and conflicts of interest in the procurement process.<sup>69</sup> Similar to the position in Kenya, contracts that are tainted with corruption or a conflict of interest may be cancelled under the law.<sup>70</sup>

In relation to administrative review of procurement decisions in Tunisia, the available forum is tied to the stage of the procurement process and the nature of the breach. Thus for breaches of the fundamental principles of procurement such as non-discrimination and transparency, an aggrieved bidder may apply to the Follow Up and Investigations Committee. For breaches that occur after the bidding process has been concluded, aggrieved suppliers may apply for redress to the Committee for the Amicable Settlements of Disputes.<sup>71</sup>

#### IV. Regional initiatives

As stated in the introduction, this paper is focused on procurement reform at the domestic level, as well as reform efforts at the regional level. A good indicator of the commitment of African nations to procurement reform is an intention to submit to supranational assessment of their domestic procurement framework through the process of the harmonization of procurement regulation at the regional level. Procurement harmonization is not peculiar to Africa and regional and multilateral procurement initiatives are popular in the development space<sup>72</sup> as well as in international trade liberalization regimes such as in the European

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Article 172–176 PPL 2014.

<sup>70</sup> Article 177 PPL 2014.

<sup>71</sup> EBRD, *Public Procurement Sector Assessment: Review of Laws and Practice in the SEMED Region* (2013), 107.

<sup>72</sup> The World Bank established a procurement harmonization forum in 1999 to cooperate with other MDBs and IFIs and has standardized the “master procurement documents” of these institutions. See [www.worldbank.org](http://www.worldbank.org)

Union,<sup>73</sup> the World Trade Organization,<sup>74</sup> and the North American Free Trade Agreement (NAFTA),<sup>75</sup> but are less common in African trade integration organizations, although this is beginning to change. There are currently six main economic communities in Africa and two of these have taken measures in relation to public procurement.<sup>76</sup> It may be noted here that there are two drivers of the harmonization agenda- first is the need to ensure coherence and consistency in procurement across major donors in order to increase aid effectiveness<sup>77</sup> and the second is the desire to promote trade by opening up procurement markets across borders.

This section will examine two of the most comprehensive and high profile regional initiatives on procurement in Africa to distill their importance for the development of public procurement in Africa.

The first regional scrutiny of procurement in Africa was the African public procurement conference in Abidjan in 1998. It was described as a “watershed in bringing to the fore the importance of public procurement, its linkages with governance and the far-reaching implications of its poor performance on African economies”.<sup>78</sup> The Abidjan conference was attended by 30 African nations and brought about a consensus among African governments on the importance of public procurement for the promotion of good governance; and reiterated the need for reform of national procurement systems with a focus on improving accountability, transparency and efficiency.

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<sup>73</sup> The EU has had a long history of public procurement regulation geared towards opening of the internal market. The latest revisions to the EU procurement landscape are Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

<sup>74</sup> The Revised WTO Agreement on Government Procurement entered into force in April 2014 and is intended to liberalize international procurement markets.

<sup>75</sup> Chapter 10 of NAFTA requires signatories to accord non-discriminatory, “national” treatment to other signatories in public sector procurement.

<sup>76</sup> The main regional trade organisations in Africa are (i) The Community of Sahel-Saharan states (CEN-SED) with 28 Members (ii) The Community of Eastern and Southern Africa (COMESA) with 19 members, (iii) The Economic Community of West African States (ECOWAS) with 15 members (iv) The South African Development Community (SADC) with 15 members (v) The Economic Community of Central African States (CEEAC) with 10 Members (vi) West African Economic and Monetary Union (WAEMU) with 8 members. Of these only COMESA and WAEMU have procurement harmonization provisions.

<sup>77</sup> See the Paris Declaration on Aid Effectiveness (2005), and the Accra Agenda for Action (2008).

<sup>78</sup> Stephen Karangizi and Isaac Ndahiro, “Public Procurement Reforms and Development in the Eastern and Southern Africa Region” in Roberto Hernández García (ed.), *International Public Procurement: a Guide to Best Practice* (Globe Law and Business, London, 2009, 113.

The 30 African governments and the international development partners that attended agreed on the following resolutions:

- a. the need for modernization of public procurement in Africa to meet international standards and best practice;
- b. the need to forge a consensus among all stakeholders on the urgency of engaging in public procurement reforms; and
- c. the need to promote national reform programs with a common strategic framework focusing on accountability, transparency and efficiency. 79

The Abidjan conference was followed by the High Level Conference on Public Procurement Reform in Tunis in 2009, which was attended by 45 African nations and committed to “to consolidate the reforms and promote a multi-sector and participatory approach, mainstreaming public procurement into all State reforms in order to improve their economic impact, particularly in innovative sectors.”<sup>80</sup>

#### a. West African Economic and Monetary Union (WAEMU)

The West African Economic and Monetary Union (WAEMU) was established in 1994 and is comprised of eight francophone West African countries, namely Benin, Burkina Faso, Cote d’Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo. The objective of the union is to promote regional economic integration and create a common market. The members of the union maintain a common currency, a common central bank, monetary policies and linguistic and cultural similarities.

Since the Abidjan conference, several African countries have embarked on procurement reform programs with the support of the international community, especially the African Development Bank and the World Bank. In addition, the conference and subsequent collective engagements on public procurement spurred the adoption of regional initiatives on public procurement.

WAEMU participated in the African conference on public procurement in Abidjan in 1998. However, the genesis of its procurement integration and harmonization efforts can be traced to its 2000 Ministerial Council Decision, which adopted the Regional Public Procurement Reform Project. The Project had two main aims: (i) the development of the legal framework on public procurement – to include the adoption of procurement directives and the creation of a remedial

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<sup>79</sup> African Development Bank Group, *COMESA Public Procurement Reform and Capacity Building Projects: Project Performance Evaluation Report*, (2012), 2–3.

<sup>80</sup> Tunis Declaration on Public Procurement Reform in Africa Sustaining Economic Development and Poverty Reduction (17 November 2009).



system and (ii) increasing integrity in the procurement system and the reinforcement of human and institutional capacity for procurement.<sup>81</sup>

It should be stated the ultimate goal of procurement integration in WAEMU is to increase regional trade and deepen regional integration. To this end, WAEMU passed two procurement directives in 2005, namely Directive n° 04/2005/CM/UEMOA on December the 9th 2005 relative to the process of attribution, execution and payment of public procurement contracts in WAEMU and Directive n° 05/2005/CM/UEMOA on 9th December 2005 relative to the control and regulation in public procurement in WAEMU.<sup>82</sup> Member states were given two years to transpose these directives into law. Under the Dakar Treaty establishing WAEMU,<sup>83</sup> a member state must adopt a directive in a manner that it achieves its intended results. By the deadline of 31<sup>st</sup> December 2007, all 8 Member States had enacted new procurement legislation based on the WAEMU directives.

The directives in brief require the separation of operational procurement from the regulators and enforcers of procurement legislation. Thus, the directives require the creation of a public procurement regulation authority, which develops policy, conducts audits and settles administrative disputes. The directives also require the creation of a national public procurement bureau, which ensures compliance by procuring entities and issues sanctions for the breach of the rules. In addition, each procuring entity must create a procurement office and professionalize the procurement function. In addition, the directives also require a peer review and assessment mechanism through the Regional Observatory of Public Procurement.

Some of the substantive requirements of the directives include advertising requirements, the use of competitive procurement procedures, the use a mandatory standstill period, the mutual recognition of supplier's certificates and qualification documents, preferences for regional suppliers as well as the creation of an effective remedies system.

It can be seen that WAEMUs approach to procurement harmonization follows the approach of domestic procurement reform discussed above in section II. Thus, WAEMU focused on the creation of new institutions, the enforcement of procurement rules, capacity development and the professionalization of the procurement function. This approach recognizes that although African nations may be at different stages of development, as will be discussed below in the section

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<sup>81</sup> Eric Patrick Ky, "Integration by Public Procurement: Harmonization of Public Procurement Policies in order to promote Regional Integration", Paper presented at the 5th International Conference on Public Procurement (2012). Available at <http://www.ippa.org/IPPC5/Proceedings/Part8/PAPER8-2.pdf>

<sup>82</sup> Available at [www.uemoa.int/Pages/ACTES/ConseildesMinistres.aspx](http://www.uemoa.int/Pages/ACTES/ConseildesMinistres.aspx)

<sup>83</sup> Article 67 Dakar Treaty.

on challenges, many African countries, irrespective of context face similarities in the nature of procurement issues faced.

It must be noted that WAEMU is quite an unusual organization compared to the other regional trade organizations, given the level of integration that has already been achieved by the organization in relation to common market and monetary union. There is no such other organization in Africa and of course, its procurement reform efforts have been greatly facilitated by the similarities in the Member States and the support of French Government. Given this peculiarity, other regional procurement harmonization measures are unlikely to follow the WAEMU model.

## b. Common Market for Eastern and Southern Africa (COMESA)

The Common Market for Eastern and Southern Africa (COMESA) is a regional economic community established in 1994 and comprising of 19 member states in the sub-region, namely: Burundi; Comoros; Democratic Republic of the Congo; Djibouti; Egypt; Eritrea; Ethiopia; Kenya; Libya; Madagascar; Malawi; Mauritius; Rwanda; Seychelles; Sudan; Swaziland; Uganda; Zambia and Zimbabwe. This represents the largest economic zone in Africa with an estimated annual public procurement market of US\$ 50 billion.<sup>84</sup>

COMESA's move towards regional harmonization of procurement commenced in 1998, when the COMESA Council of Ministers recognized that there was need to have uniform and harmonized procurement rules, and the institutional capacity to develop coherent policies to enhance trade through closer coordination of public procurement activities of Member States.<sup>85</sup> The Council recognized the importance of harmonizing procurement policies in line with the process of effective liberalization of trade, and recommended that the COMESA Secretariat should mobilize funding to embark on the proposed study to identify existing procurement rules and their weaknesses in the member States. The COMESA reform project actually took off in 2001, with the aim of laying the groundwork for ensuring accountability and transparency, combating corruption, and creating an enabling legal infrastructure in public procurement in the COMESA countries.

Similar to the objectives of procurement harmonization in WAEMU, the objective of the reform project in COMESA was to deepen regional integration, and increase regional trade and investment.<sup>86</sup> However, unlike the approach in

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<sup>84</sup> African Development Bank Group, n79, 1, 2.

<sup>85</sup> AfDB, COMESA: Enhancing procurement reforms and capacity project appraisal report (May 2006).

<sup>86</sup> Karangizi and Ndahiro, n78, 114.

WAEMU, which mirrors the approach in the EU, wherein national procurement regulation must meet a test of equivalence with the supranational directives, in COMESA, the hallmark of the procurement reforms are that the reforms of national systems must maintain their national identity, whilst ensuring they meet international best practice.<sup>87</sup>

It is interesting to note that COMESA adopted the UNCITRAL Model Law as the “basic guiding text” for COMESA nations wishing to improve their national systems. Further, in 2003, COMESA Council of Ministers adopted procurement directives, which created an obligation on COMESA member states to include in national legal framework, the principles set out in the directives.<sup>88</sup> In addition to the directives, which are principles based, COMESA in 2009 issued its public procurement regulations. These regulations are intended to open up the procurement markets of COMESA member states to suppliers from other member states. The objectives of the regulations are stated in Article 3 of the regulations to be:

- (a) to foster competition and openness in public procurement procedures;
- (b) to foster fair management systems in procurement;
- (c) to promote accountability, transparency, and value for money in public procurement process for national development; and
- (d) promote harmonization of public procurement laws and practices for the enhancement of intra COMESA Trade.

The regulations contain the thresholds for procurements that should be open to regional suppliers and contains rules for preferences for regional suppliers in cases of international competitive bidding. In addition, the regulations provide for a national treatment obligation for regional suppliers and provides for the use of two procurement methods- regional competitive bidding and international competitive bidding. The regulations also prohibit the use of contract splitting to defeat the purpose of the regulations.

## V. Commonalities and challenges of procurement reform in Africa

There are many areas of commonalties with respect to procurement reform in Africa and many similarities in the nature of challenges that remain. In relation to commonalities, the first thing to note is the decentralization of procurement

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<sup>87</sup> Ibid.

<sup>88</sup> Karangizi and Ndahiro, n78, 121.

operations through the move away from central operational state tenders board to an independent central monitoring and policymaking body. Such a central monitoring body is found in Kenya (Public Procurement Oversight Authority) Ghana (Public Procurement Authority) and possibly in South Africa in the near future (Public Procurement Regulator). Secondly, there is a move towards the professionalization of procurement and a realization of the strategic importance of this function. Third, in all countries where there has been procurement reform, this has been accompanied with extensive capacity building and in countries like South Africa and Ghana, this has been accompanied by a requirement of degree level and master's level courses in purchasing and supply, supply chain management or procurement for recruitment into the public sector procurement cadre.

Fourthly as was seen, most countries have developed or are in the process of developing dedicated procurement administrative review mechanisms. These mechanisms are intended to provide a speedy and cost-effective forum for the adjudication of procurement (bid) disputes, without prejudice to the jurisdiction of national courts to provide relief through judicial review of the procurement process and the actions of the public sector agency.

In relation to the challenges, most jurisdictions in Africa appear to face three main problems- insufficient compliance with the rules, a lack of capacity and an ineffective implementation of the remedial system.<sup>89</sup>

In relation to insufficient compliance with the rules, this is due to two reasons- the relative novelty of public procurement regulation and the generally weak adherence to the rule of law in many parts of Africa. Thus, in many cases, one sees that despite the extensive reform of the legislation, the procurement system is yet to reap the benefits of reform after several years of legislative changes.<sup>90</sup>

The lack of capacity also affects the effectiveness and quality of procurement reform efforts in Africa. As was seen, both domestic and regional procurement measures are accompanied by measures to improve capacity and professionalize the procurement workforce. In Africa, low literacy rates as well as the unfamiliarity of the civil service with new procurement rules is seriously militating against the advancement of African procurement systems. In trying to bridge the gap between existing capacity and procurement staffing requirements, some countries like South Africa, require by law strict and extensive procurement/supply chain management qualifications.<sup>91</sup> This has however led to a situation where many high cadre positions remain unfulfilled, as the existing workforce simply does not possess the required qualifications and skills.<sup>92</sup>

In all jurisdictions including African countries, the procurement remedial

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<sup>89</sup> Williams-Elegbe, n4, 210–224.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

system is crucial for ensuring the proper functioning of the system by securing compliance with the rules, and detecting and punishing violations of the same.<sup>93</sup> As was seen in the discussion of national systems, the countries examined generally adopt a multi-forum approach to in providing for a system of review of procurement decisions.<sup>94</sup> As was discussed also, procurement reform in Africa is often accompanied by the creation of a new administrative forum for the review of procurement decisions. Despite this, however, the procurement remedial system in many African countries is sadly lacking. In relation to the administrative forums, some of the issues include a lack of capacity on the part of the adjudicators in these forums. As has been discussed elsewhere, judicial forums are on their part hampered by delays, corruption and also a lack of understanding of the procurement system.<sup>95</sup>

## VI. The future of procurement reform in Africa

Despite the challenges facing procurement reform in Africa, it is clear that reform efforts will continue and it may be said that the future of procurement reform in Africa is going to be regional. Of the six main economic communities in Africa, two are already aiming for the harmonization of procurement policy and practices and the opening up of regional procurement markets. This approach is not new to Africa and as mentioned earlier, the economic communities in Europe (EU) and North America (NAFTA) also include procurement integration as a priority, given the size of their combined procurement markets. In fact, in 2014, the EU-USA Transatlantic Trade and Investment Partnership,<sup>96</sup> which is a comprehensive trade agreement between the EU and the USA will if passed, contain provisions designed to open up the procurement markets of the EU and the USA at federal, regional/state and local levels.<sup>97</sup> This will be the first time that nations are attempting non-regional procurement liberalization and the harmonization that attends liberalization efforts.<sup>98</sup>

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<sup>93</sup> Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), ch 12.

<sup>94</sup> X Zhang, "Forum for Review by Suppliers in Public Procurement: An Analysis and Assessment of Models in International Instruments" (2009) 5 *Public Procurement Law Review* 201.

<sup>95</sup> Joseph Diescho, *The Paradigm of an Independent Judiciary: Its history, Implications and Limitations in Africa*. Available at [http://www.kas.de/upload/auslandshomepages/namibia/Independence\\_Judiciary/diescho.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf)

<sup>96</sup> For information on the TTIP see <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/process/>

<sup>97</sup> See [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153000.3%20Public%20Procurement.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf)

<sup>98</sup> See generally, Attila Kovacs, "The Global Procurement Harmonisation Initiative" (2005) 14 (1) *Public Procurement Law Review* 15; Maria Anna Corvaglia & Laura Maschner, "The Completeness of Soft and Hard Law in Public Procurement: Between Harmonisation and Resilience" (2013) NCCR Trade Working Paper No 2013/10.

In Africa, harmonization of procurement- both in terms of the liberalization of procurement markets and the congruence or uniformity of procurement regulation will of course assist in economic development, help to support national and regional industries and will ensure that both procurement expenditure and the multiplier effect of government spending remains in Africa.

Regional procurement harmonization will promote trade facilitation in Africa and reduce barriers to trade. It will deepen markets and boost African economies and industries. It will assist in building capacity as specialists will be able to work in other African procurement markets. Harmonization also assists countries with weaker procurement systems to develop more rapidly, given the incentives available.<sup>99</sup> Of course, harmonization is no easy task, but it is certainly the next stage of procurement reform in Africa.

There are a few approaches to regional procurement harmonization, which may be replicated from other jurisdictions. The first one is a comprehensive top down approach, similar to the approach taken by the European Union and WAEMU, where a global body with the required jurisdiction issues regulations or directives, which must be adopted by the targeted countries within a certain time frame. In Africa, the organization, which may spearhead such an approach is the African Union (AU). However, given the nature of African politics and the slow pace of legislative activity more generally, as well as the limitations of the AU itself,<sup>100</sup> it is unlikely that such an approach will work in the African context. It cannot however be ruled out, as the AU continues to expand its reach, and areas of activity within Africa.

The second approach is the approach adopted by NAFTA, wherein a regional trade agreement, contains non-discrimination and national treatment principles, which extend to procurement in the same way as other areas of trade activity. The approach here is not procurement harmonization strictly so called as in such cases, what is really being sought is access to procurement markets and not convergence of legal norms, principles or practice. However, some level of convergence may be required to prevent legal differences being used as a barrier to trade in procurement markets. This is also the approach being proposed in the Transatlantic Trade and Investment Partnership Agreement currently being negotiated between the EU and the USA.

Thirdly, and similar to the approach adopted by COMESA, an organization which could be global (AU) or a regional trade community could establish procurement principles, which are then required to be implemented into domestic law. This approach is possibly easier to achieve, as compliance may not require

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<sup>99</sup> Wayne Witting, *Public Procurement and the Development Agenda* (International Trade Centre, 2003). Available at [http://www.wto.org/english/tratop\\_c/gproc\\_e/wkshop\\_tanz\\_jan03/itcdemo1\\_e.pdf](http://www.wto.org/english/tratop_c/gproc_e/wkshop_tanz_jan03/itcdemo1_e.pdf)

<sup>100</sup> Deidre L. Badejo, *The African Union* (Infobase Publishing, New York, 2009).

much legislative changes on the part of member states, where an adequate procurement legal framework already exists. However, this may also mean that it will be difficult to achieve substantial harmonization.

Whichever approach is chosen, tricky issues of sovereignty,<sup>101</sup> jurisdiction and the adverse effects of procurement liberalization on an under-developed supplier base or on non-competitive local industries will need to be considered and addressed.

## VII. Conclusion

This paper has examined procurement reform initiatives in four countries in Africa. It was seen that there are similarities in the nature of procurement challenges faced by African countries and similarities in the nature of reform efforts. It was also seen that two of the main African regional trade communities have taken measures to harmonize procurement at a regional level in order to deepen trade integration and eliminate the differences in the substance of their procurement regulation. It was seen also that the nature of the approach to harmonization in Africa has so far differed significantly, with WAEMU adopting an equivalence-based approach and COMESA adopting a much more soft-law principles-based approach. The paper also suggested that regional procurement harmonization will provide many benefits for the economy of African countries and is a goal that ought to be pursued by the other regional economic communities in Africa, despite the fact that it will not be an easy task.

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<sup>101</sup> See generally, Pierre Englebert, *Africa: Unity, Sovereignty and Sorrow* (Lynne Reinner Publishers, Boulder CO, 2009).