



Strengthening Africa in World Trade



Government Procurement Policies at National, Bilateral and Multilateral level:

Implications to Uganda's Sustainable Development

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Implications to Uganda's Sustainable Development

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Table of Contents

Acronyms	3
Tables and Figures	3
Executive Summary	4
1. Introduction	6
2. Government procurement and development: A developing country perspective	8
2.1. What is development?	8
2.2. What do developing countries need to do in order to develop under the existing socio-economic and political conditions?	9
2.3. What should be the role of national governments in the quest for development?	10
2.4. How does procurement by government fit into the development conundrum?	11
3. Status of negotiations on government procurement at multilateral and bilateral levels: concerns and opportunities	12
3.1. Government procurement negotiations at the WTO	12
3.2. Government procurement in Free Trade and Bilateral Trade Agreements	12
3.2.1. Government Procurement in EU-CARIFORUM EPA	13
3.2.2. Government procurement in US Free Trade Agreements	14
3.3. Experiences on government procurement - US and China and Malaysia	15
4. Government procurement policy for Uganda and sustainable local development	17
4.1. Evolution of government procurement processes in Uganda	17
4.2. Policy and legal framework for government procurement	19
4.2.1. Shortcomings of the government procurement policy framework	22
4.3. State of government procurement in Uganda	23
5. Economic Implication of Uganda signing the GPA	25
6. Conclusion and Recommendations	26
References	27

Acronyms

CHOGM	Common Wealth Heads of Government Meeting
FTAs	Free Trade Agreements
EPA	Economic Partnership Agreement
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPA	Procurement Agreement (GPA)
GPL	Government Procurement Law
HDRO	Human Development Report Office
IPR	Intellectual Property Rights
MFN	Most Favoured Nation
NDP	National Development Plan
OECD	Organisation for Economic Cooperation
PGPA	Plurilateral Government Procurement Agreement
PPDA	Public Procurement and Disposal of Assets
RTA	Regional Trade Agreements
UNDP	United Nations Development Programme
WTO	World Trade Organisation

Tables and Figures

Figure 1: Dimensions of Human Development

Table 1: Activities of the PPDA Authority

Executive Summary

Government procurement is an important development instrument that a government can use to invigorate the economy during depression periods, encourage growth of local industries, distribute national wealth equitably, create job opportunities for nationals, and reduce poverty for marginalised citizens. The inclusion of government procurement in trade agreements has been a contentious issue especially for developing countries and has lingered on for a while. Developing countries make the case that signing of agreements at either multilateral or bilateral levels that includes a clause liberalising government procurement constrains policy space for governments to use procurement as a tool to achieve their local development needs.

Specifically Uganda, government procurement was and is still characterised by low capacity, inefficiency and lack of transparency. In order to improve and streamline its procurement, the country undertook a series of processes, including commissioning of a study, which culminated into the promulgation of the Public Procurement and Disposal of Asset (PPDA) Act of 2003. The Act came into effect in 2014. Currently, Government procurement in the country is guided by the PPDA. Despite being a useful regulatory framework, the PPDA does not make reference to the country's development needs as expounded in National Development Plan II and Vision 2040. The Act does not also make reference to the responsibility of government to the citizen. As such, the role of government to drive development using procurement appears to be secondary rather than primary in the Act. One gets an impression that achieving efficiency and value for money is the overarching objective of the Act yet this is supposed to be just a means to the development objective.

From an international trade perspective, Uganda is not yet a member of plurilateral Government Procurement Agreement (GPA) at the WTO. It is therefore not bound by the GPA conditions and requirements. A binding GPA at multilateral and bilateral level with a core objective of market access would constrain Uganda's policy space to devise her own development interventions, including building the capacity and competitiveness of local enterprises. Moreover the country will have to incur significant costs to put structures and institutions that will manage the implementation of the GPA.

Taking note of the concerns of Uganda losing the ability to support local development using its procurement policy, it is recommended that the country should sign the GPA for now. However, it is compelled to do so by other factors:

- a) The country should first take an observer status entailing no commitments. The country should use this period to gain better understanding how the agreement works and how it is affecting other comparable developing countries.
- b) After the observer status and equipped with factual information how the agreement works, the country should progress to a stage of signing the agreement but asking for reservations and exceptions, where applicable, based on experiences of stage one.
- c) Finally and after sufficient time to ensure that the local economy and the citizenry can compete with external goods and services providers, the country should sign the GPA in its totality.

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1. Introduction

Government procurement also known as public procurement is a process of obtaining goods and services by national government. It is a multi-stage process that includes development of specifications, market research, price search through bidding or negotiation, purchase and taking delivery of goods and services by governments (United Nations, 2013). Arrow smith (2003) defines public procurement as the purchasing of goods and services by government needed to perform its services. A more broad definition of government procurement is presented by Ambe and Badernhorst-Weiss(2012) who define government procurement as a function whereby public sector organisations acquire goods and services from local or international suppliers based on principles of fairness, equity, transparency, competitiveness and cost effectiveness. The challenge with Ambe and Badernhorst-Weiss definition is the creating of an impression that if the process of acquiring goods and services does not conform to these specific principles then it ceases being government procurement. Nonetheless they highlight an important aspect that government often procures through different public sector organisations. Ultimately and simply put, government procurement is about government acquiring goods and services from markets that it needs to fulfil its mandate of provision of services to the citizens.

Government procurement can be within the boundaries of a country, in regional or international markets. Nevertheless, the decision of where to procure from is of national importance from a socio-economic and political point of view. As such, it requires careful consideration. If a government decides to procure locally, an opportunity is created for local suppliers to increase their sales. Procurement from regional markets has a potential to support regional integration and good neighbourliness among countries. Procurement from international markets may broadly enable a government to access goods and services that are not available in local or regional markets (Wittig, 2013).

With the increasing globalisation of development policies, government procurement is the recent target of liberal economy proponents. In the name of becoming global participants, countries both developed and developing, are being persuaded to sign the Government Procurement Agreement (GPA) that completely liberalises government procurement. Many developing countries are sceptical about the move seeing it as another step towards constraining their development policy space.

Uganda has not signed or developed a formal position on signing the GPA yet it will soon be engaged in discussions and negotiations about it. It is prudent that the country takes an informed position regarding the GPA guided by its development priorities as articulated in National Development Plan II.

As an input into Uganda's engagement on the GPA, this research paper:

- Discusses the link between government procurement and development.
- Analyses the state of play of government procurement negotiations at bilateral and multilateral level. It also includes an examination of the proposals by the demanders of an Agreement on Government Procurement at the WTO.
- Explores Uganda's procurement policy framework in the context of using procurement as a tool for the country's development.
- Proposes positions for Uganda's engagement in GPA negotiations at bilateral and multilateral level.

The rest of the paper is organised as follows. Section 2 after the introduction, discusses the link between government procurement and development in general. It further highlights insights from the literature that are relevant for a developing country

like Uganda. Section 3 focuses on multilateral and bilateral negotiations on government procurement and position of developing countries. Section 4 and 5 look at Uganda's procurement policy in the context of procurement being a development tool and the implications of Uganda signing the GPA in its current form respectively. Section 6 concludes with recommendations.

2. Government procurement and development: A developing country perspective

In an economic world, the ability to sell goods or services plays an important role in the growing of business. It enables the producers or service providers to participate in mainstream economic activities of a country and reap socio-economic benefits thereof. According to Keynesian economics school of thought, demand is the key motivator for undertaking production. Without demand, there will be no motivation to produce. Government procurement is one of the ways through which a national government creates demand in the market place. By directing this demand to benefit particular people, sectors or regions, a government can be able to influence socio-economic conditions of the targeted beneficiaries.

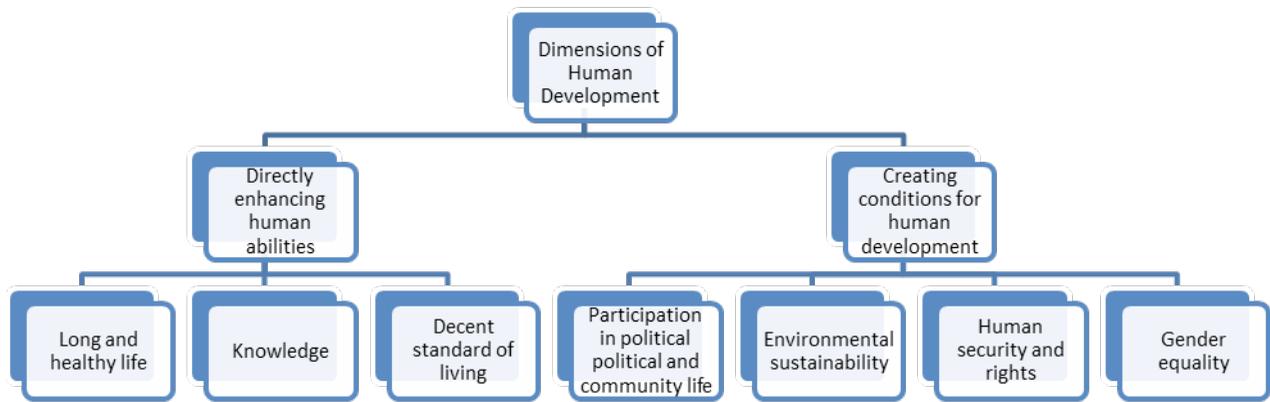
Governments are significant consumers of goods and services. Through their consumption, governments can contribute significantly to the world's Gross Domestic Product (GDP). The 2008 United Nations report, estimated that central and local governments' expenditures to be 20% of GDP in OECD countries, and 15% in non-OECD countries. In many African countries, national governments are the main customer of defence, health, and research services, construction, energy, and transport equipment, expenditure on which is often significant. The importance of government expenditure through procurement in achieving socio-economic objectives of a country is fairly acknowledged. It is often pointed out that through its procurement, governments can influence social, economic, and political dynamics in the locally and internationally Bolton (2006). Nonetheless, to contextualise the link between government procurement and development one needs to take a step back and answer these questions:

1. What is development?
2. What do developing countries need to do in order to develop under the existing socio-economic and political conditions?
3. What is or what should be the role of national governments in the development quest?
4. How does government procurement fit into the development conundrum?

2.1. Defining development.

For the purpose of this paper, development is considered to be synonymous with human development. Broadly, human development refers to the improvement in the quality of people's lives and welfare. It entails progress in access to a range of economic and non-economic parameters which include income, nutrition, health and education services that people generally need to have a fulfilling life. From a developing country's perspective, development has to entail poverty reduction, access to basic goods and services, human development, freedom and ultimately self-actualisation of the often disenfranchised citizens. The Human Development Report Office (HDRO) of the United Nations Development Programme (UNDP) goes into more details of disaggregating human development. It presents development as function of aspects that enhance human abilities and aspects that create conditions for human development. The full unpacking of the human development according to the UNDP is presented in Figure 1 below

Figure 1: Dimensions of Human Development



Source: HDRO Outreach, 2015.

It is important to note that achieving higher levels of economic growth is an important pre-requisite for human development in most if not all developing countries. As such, economic matter have to be prioritised, but not at the cost of other factors, in the pursuit of development.

2.2. What do developing countries need to do in order to develop under the existing socio-economic and political conditions?

There are a number of things that developing countries ought to do in order to accelerate local economic growth. For the purpose of this paper the focus is on economic interventions. As noted in the previous section, getting economic performance right is a necessary though not a sufficient condition for human development. Two aspects are pivotal to economic growth and by extension to development for developing countries that is; increase in local production accompanied by industrialisation, and increase in trade of value added products in both local and international markets.

Increase of local production and accompanied by industrialisation: A common characteristic of developing countries especially in Africa, is that they have a significant number of their citizens engaged in subsistence agriculture or crude exploitation of natural resources. In a country like Uganda, the

majority of people are still engaged in low-earning subsistence agriculture, partly explaining why the high levels of poverty still exist in the country. As regards industrialisation, many developing countries have very weak domestic industrial base, yet people employed in industries tend to be better remunerated. Industrialisation in many developing countries is an important prerequisite for creating high paying jobs. Moreover, remittances therefrom can supplement local incomes, increase effective local demand, which in turn stimulates production in various sectors to meet the increased demand (SEATINI, 2009).

In order to get most of their citizens out of poverty, developing countries have to modernise agricultural and other natural resources exploitation activities to the point they can offer decent returns to people engaged in these primary sectors. Their modernisation should include the use of technology and modern techniques that enhances output per capita. The modernisation of primary resource exploitation needs to be accompanied by local industrialisation to provide inputs to the exploitation but also to consume and/or process what is being produced. The synergy that will be created has a potential to increase earnings for the people involved in different sectors, subsequently lifting a sizable number of citizens from poverty.

Increase in trading of value added products: Trade has proved itself as one of the cornerstone of sustainable economic growth. However, it is not trade per se that is important but the value of what is traded vis-à-vis the value what is bought from

the markets. Trade depends on access to markets. Without market access, trade is not possible and without trading, productive activities will be market constrained. Overtime, it has come to be acknowledged that trade rather than any other forms of economic interventions including aid is likely to put developing countries on a sustainable economic development trajectory. This is because Trade is thought to be a more effective means of promoting development than direct funding of projects, which is vulnerable to mismanagement, abuse and outright corruption (SEATINI, 2009)

One of the perennial problems that has characterised trade by the developing countries is the export of unprocessed or low value added products, the consequence of which to developing countries has been getting less and less income from trading while spending more money to acquire goods and service of others. For trade to be strictly beneficial, it should enable a trading country to earn more than what it is spending in the international markets. In economic terms, trade should be an injection to the domestic economy rather than being leakage. The trading of low value products has led to developing countries earning far less money than the optimal. Moreover, because little or no value addition is done locally before export, the potential positive linkages between trading and others sectors of the local economy has remained minimal. As a result, Countries have ended up not realising the full socio-economic benefits of trade even for those that have made reasonable progress in accessing international markets. Nevertheless, the positive effects of increased trade that can ultimately contribute to local development have been lessened by the export of low value added products. To take full advantage of trade, value addition need to take place domestically, otherwise trade ceases to be an important driver of domestic economic development.

2.3. What should be the role of national governments in the quest for development?

To some, the role of government in national development should be creating a suitable environment for business to operate. Reality is that no country has managed to achieve sustainable

development without active participation of government beyond creating the environment for business to operate. Whether in Europe or in the South East Asian success stories, government intervention and strategic participation and taking of leadership in mapping out the economic future of its citizenry is evident, particularly in the early days of industrialisation. Differences in industrialisation success between countries can be explained based on the nature of government interventions. The difference in the industrialisation of South Korea and India is attributable to the role of national governments in the two countries. South Korea has managed to excel in its industrialisation effort yet India still remains average in comparative terms.

According to Prof Chibber¹, for successful industrialisation, government should offer incentives but also be able to enforce discipline on local industrialists. In other words the government has to make a contract with the local industrialists on what is expected of them. Short of which, government should stop incentives offer. This has created the difference in industrialisation between South Korea and India. The government in South Korea offered incentives for industrialisation on almost a contractual arrangement with industrialists. There were performance conditions attached to the incentives. As a result, Korea was able to excel in domestic industrialisation, achieving international competitiveness subsequently creating international brands like Samsung and KIA. India, on the other hand, offered incentives to local industrialist and left the rest to market forces.

At the end of the day the success of India in industrialisation, although impressive, has lagged behind that of South Korea. Simply put, these examples show that the role of government in achieving local development should not be limited to creating suitable environment to do business alone. It should be an active one that may include direct participation in the markets and if need be, should extend to correcting the market so that they are not only short term and profit oriented.

Developing countries, therefore, need to be active on both policy formulation front, as a basis for creating

¹ Prof Chibber MISTRA Annual Conference Presentation. University of Johannesburg. 2016.

conducive environment to do business in the local economy, but also participate actively in the market place if need be. Recognising that markets are seldom perfect, expanding local production capacity, increasing local value addition, supporting local industrialisation, and enabling citizen to become active and beneficial participants in the mainstream activities should form part of the government development agenda.

2.4. How does procurement by government fit into the development conundrum?

With the recognition that government needs to play an active role in the development efforts of any country, it is important to reflect on how government procurement fits into this development conundrum.

Government procurement can be used to achieve the following objectives that have a direct bearing on development of a country:

- Redistribution of national wealth in an equitable way to citizens. This may be relevant to countries that have experienced historical discrimination of some sections of society from main stream economic activities. Bolton (2006) argued that the use of procurement as policy in the developing countries could be seen as the governments' way of redistributing wealth to the previously disadvantaged groups of people in the country.
- Stimulating and encouraging growth and development of local industries through optimal usage of local resources and materials
- Expanding and invigorating local industrial sector by means of acquisition and/or transfer of technology and expertise to suit the nation's needs
- Creating opportunities for the broadest possible participation by citizens in the public procurement process

- Increasing the volume of work available to the poor and enhance the income generation of marginalised sectors of society.

By designing and implementing a procurement policy that makes the above objectives possible, government are able to impact on local development. However, there are inherent risks of using government procurement policy as development tool. These include creating and sustaining uncompetitive local businesses. The application of the policy in a developmental but discriminatory way is also vulnerable to corruption. Procurement policies in developing countries create a secure environment where preferred people may become inward-looking, complacent and internationally uncompetitive (Ding and Chee-Wah; 2006). Basheka (2008) says that developing countries suffer more from procurement-related corruption than their developed counterparts. Such corruption can be detrimental on decision-making, and can lead to benefits shifting to the elite instead of the targeted group. This raises the question of what is the best way for developing countries to implement development oriented procurement while at same time improving procurement efficiency and transparency. Whatever the answer, procurement policies in developing countries can still be justified.

3. Status of negotiations on government procurement at multilateral and bilateral levels: concerns and opportunities

3.1. Government procurement negotiations at the WTO

The issue of government procurement at the multilateral level can be traced back to the General Agreement on Tariffs and Trade (GATT) of 1948. In the agreement an exemption for government procurement from the application of the national treatment principle was included under Article III, but incorporated an obligation of “fair and equitable treatment” for procurement by state trading enterprises, under Article XVII.2”. Formally, the Tokyo Round of GATT negotiations initiated negotiations on government Procurement which culminated into a plurilateral Government Procurement Agreement (GPA) in the WTO in 1996. The WTO GPA is a voluntary plurilateral agreement applicable to WTO members that choose to be Parties to the Agreement.

The GPA as it stands now is basically an exclusive club of industrialized, developed countries with, at the moment, 45 member countries, including the 28 member countries of EU. The current members of GPA are: Armenia, Canada, European Union, Hong Kong (China), Iceland, Israel, Japan, Republic of Korea (South Korea), Liechtenstein, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Chinese Taipei (Taiwan), United States of America. Ten countries are negotiating accession to the GPA though. These are: Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Tajikistan and Ukraine. Five other WTO members have undertaken commitments, in their WTO accession protocols, to initiate accession to the GPA.

They are Mongolia, the Russian Federation, Saudi Arabia, Seychelles and the Former Yugoslav Republic of Macedonia (WTO, 2015).

Hardly any developing country has joined this agreement. In general developing countries are concerned about the adverse effects to their socio-economic interest of their becoming members.

The lack of participation of developing countries in this plurilateral agreement has prompted the developed countries to propose a WTO multilateral agreement on ‘transparency in government procurement’. To ease fears of developing countries, their proposal was that the agreement deals only with transparency aspects, leaving members the freedom to determine whether or not to grant national treatment for foreign companies. It was implicitly implied that the market-access component to the agreement would not form part of the sought agreement.

The 1996 WTO Ministerial Conference agreed to establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies and priorities. The intention was to use this study’s findings to develop elements for inclusion in an appropriate agreement. It is important to note that the decision to undertake the study did not specify that there must result an agreement; it only committed WTO members to set up a working group to study the subject of transparency in government procurement and, based on this study, to develop the elements to include in an appropriate agreement at an appropriate time. Before and at the 2001 WTO Ministerial Conference in Doha, many developing countries strongly expressed the view that they were not ready to negotiate an agreement on transparency in government procurement. Their views were however, not adequately reflected in the Doha Declaration adopted by the conference. The Declaration, in paragraph 26, stated that negotiations would take place after the next Ministerial Conference, which was to be held in Cancun in 2003, on the basis of a decision to be taken by explicit consensus at

that conference on modalities of negotiations. The Declaration also stated, again in paragraph 26, that the negotiations would build on progress made in the working group on transparency in government procurement and take into account participants' development priorities. It was explicitly stated that negotiations were to be limited to the transparency aspects and therefore would not restrict the scope for countries to give preferences to domestic supplies and suppliers.

Again developing countries rejected any agreement or proclamation on transparency in government procurement because they were suspicious that once a transparency agreement is in place, the developed countries would then move to extend the agreement to also cover market access and national treatment. Due to this concern, at the Cancun Ministerial Conference in 2003, the developing countries asked that the issue of transparency in government procurement be dropped from the negotiating agenda. After the conference ended without a decision, the developing countries continued their demand, and in July 2004, the WTO's General Council made a decision to drop this as a negotiating issue during the Doha work programme. The interest of developed countries to include government procurement in trade agreements with the developing countries did not stop at the WTO. Recognising the almost unanimous rejection of GPA at the WTO, many developed countries especially the US and the EU opted to include a government procurement chapter in their Free Trade Agreements (FTAs) and asymmetrical bilateral trade agreements.

3.2. Government procurement in Free Trade and Bilateral Trade Agreements

There has been an increase in Regional and Bilateral Trade Agreements (RTAs) globally in order to further liberalise trade. Government procurement was not part of the initial trade agreements in the 1970s and 1980s but has been increasingly included since the 1990s. Recent RTAs increasingly include provisions on government procurement. In fact the 'non-traditional' areas like Government Procurement are now the focus of many FTAs. An FTA may include specific procedures that have to be followed. For instance, the FTA could specify what kind of

conditions can or cannot be imposed on suppliers interested in participating in procurement. It could specify what kind of tendering procedures should be followed. Importantly, it may oblige the country to set up independent review institutions and processes to enable a supplier to challenge a decision on granting of procurement contracts.

3.2.1. Government Procurement in EU - CARIFORUM EPA

The European Union attaches great importance to its negotiations on Government Procurement in its bilateral trade negotiations. The EU has continued to push for binding rules on government procurement in the Free and Bilateral Trade Agreements. Rules governing treatment of foreign providers of goods and services to public entities, and requirements relating to procedural standards in public tendering and contracts, are increasingly common features of EU FTAs (Aprodev, 2008). The Union uses the government procurement provisions of FTAs to 'modify the rules and procedures of partner countries and to improve the opening up of the Government Procurement market to foreign firms' (Global Europe, 2006).

The European Union specifically states that Government Procurement is a focus area among others in opening up new markets. It puts sharp focus on market opening and stronger rules in new trade areas of economic importance, notably intellectual property (IPR), services, investment, public procurement and competition' (Global Europe, 2006). Thus, the EU is pushing for the negotiation of procurement in the EU-EAC EPA rendezvous clause. The EU's position on public procurement can be discerned from the EU-CARIFORUM EPA. It is provided for in Chapter 3 of the EU-CARIFORUM EPA text. The text provides for principles of transparency, openness and due process in government procurement practices. The Text puts onerous obligations on the Partner to ensure transparency in government procurement. These include having in place, inter alia:

- Procedural guarantees that increase information flow on procurement opportunities, notification of specific procurement opportunities and guarantees that all suppliers will have access to the same information on an equal basis and

provision for review mechanisms when disputes arise.

- Prompt publication, in appropriate publications including officially designated electronic media, of any law, regulation, judicial decision and administrative ruling of general application, and procedures, and all modifications to such measures.
- Provision for effective dissemination of the tendering opportunities generated by the relevant government processes.
- Publish in advance a notice of intended procurement.

In the nutshell, the EU requires that the opening of tenders and awarding of contracts should be done in a fair and transparent manner and the results of the procurement process should be promptly disseminated; and on request, any eliminated supplier should be informed of the reasons for the rejection of its tender and of the relative advantages of the successful supplier's tender. The text also allows the supplier to challenge domestic measures and decisions. It is a requirement in the EU EPA model that parties have to establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement. These provisions greatly restrict the ability of CARIFORUM countries to use government procurement to promote local industries and suppliers.

3.2.2. Government procurement in US Free Trade Agreements

The US has also increasingly included a chapter on government procurement in the FTAs it has signed or negotiated with other countries. This chapter talks to market access to the government procurement business of the country concerned.

The US FTA chapter typically involves:

- Market access for each party to the government procurement market of the other party
- National treatment for the foreign firms and products
- A broad definition of government procurement, involving various levels of government and various types of government business; and

- Threshold levels representing monetary values.

The US-Chile FTA provides an example of such a government procurement chapter. One of the objectives stated therein is to strive to provide comprehensive coverage of procurement markets by eliminating market access barriers to the supply of goods and services, including construction services. The scope and coverage applies to any measure relating to a procurement by any contractual means, including purchase and rental or lease, with or without an option to buy, build-operate-transfer contracts, and public works concession contracts.

In addition to the scope are the main general principles are 'national treatment' and non-discrimination. In any measure governing government procurement, each party shall give to the goods and services of the other party, and to the suppliers of the other party, 'treatment no less favourable than the most favourable treatment the party accords to its own goods, services and suppliers. Also, neither party may treat a locally established supplier less favourably than another local supplier on the basis of degree of foreign affiliation or ownership, or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier are goods and services of the other party. The agreement includes a provision requiring the entities to publish in advance a notice inviting interested suppliers to submit tenders for that procurement. The notice has to include a description of the procurement, conditions for suppliers to fulfil, time limits to submit tenders and delivery dates for the goods to be procured. There are also many detailed provisions on time limits for the tendering process; provision of information on intended procurements; technical specifications; conditions for participation; tendering procedures; awarding of contracts; and domestic review of supplier challenges. To implement such obligations, any developing country would have to undertake reforms and new procedures.

3.3. Experiences on government procurement - US and China and Malaysia

Respective countries have put in place various government procurement legislation to protect and

promoted domestic production in order to stimulate their economies. The USA has successfully used "Buy US" legislation to protect its domestic industries and has also used this in its international trade negotiations, though this has elicited condemnation from its trade partners. The US Buy American Act of 1933 includes provisions that require 100% U.S. content for iron/steel and manufactured products, as a condition for U.S. federal government grants to state, municipal or other organizations including transit authorities. Generally under the Act all goods for public use (articles, materials, or supplies) must be produced in the U.S. Manufactured items must be manufactured in the U.S. using U.S. materials. Many states and municipalities include similar geographic production requirements in their procurement legislation. The Act creates a price preference that favours domestic end products from American firms on U.S. federal government contracts. Price preference is also given to non-manufactured products mined or produced in the United States, and manufactured products in which the cost of its U.S. components exceeds 50% of the cost of all components of the item and the product is manufactured in the United States.

Although there are exceptions to "Buy American", whereby waivers can be issued for products, projects or entire categories of technology, depending on the review process and the requirements of a given federal department or agency, this Act, in essence provides an edge to American products over products from other trading partners. This goes a long way in promoting increased production in the US at the detriment of its trade partners.

China has almost the same preferential government procurement policy for domestically produced or sourced goods and services. The Chinese government under two national laws: the Government Procurement Law and the Tender Law, and local government procurement measures, mandates the purchase of domestic products in government-invested pro Government procurement. On June 29, 2002, the People's Republic of China Government Procurement Law (GPL) was promulgated, and came into effect on January 1st, 2003. It was the first national law passed by China's top legislature to exclusively regulate government procurement activities. In the past, government procurement in China was conducted by government agencies and local governments with money from their budgets

without reference to a uniformed set of government procurement rules.

China's GPL stipulates that:

- Within the scope of government procurement, government-invested projects must buy domestically when ordering construction projects, goods, or services.
- Exceptions to this order must be specified by law and may include cases in which the construction projects, goods, or services cannot be obtained, or cannot be obtained by means of "reasonable commercial conditions," within the territory of China.
- Where buying imported products is really necessary, the purchasing activities must be examined and approved by relevant government authorities in accordance with the state provisions.

In projects wholly or partially invested in by the government, directly or indirectly designating the purchase of foreign brand products or their functional parts or limiting the use of domestically made machinery is deemed illegal activity, which is subject to legal liability. It is provided that the government will also review the tender and bidding rules and regulations, to decide whether there are provisions limiting the use of domestically made products.

Although the GPL requires government procurements to be derived from domestic sources, Article 10 of the GPL provides some exemptions in the following circumstances:

- The required goods, projects or services are not available in China, or are not available under reasonable commercial conditions;
- The objects of procurement are for use outside of China; or
- It is specified otherwise in other laws or administrative regulations.

Later on, in a move which was deemed as a response to Washington's "Buy America", and as a stimulus package in the wake of the financial crisis, on May 26, 2009, Chinese authorities issued a circular tightening government supervision of tenders and bids in connection with government-invested

projects . The Circular ordered the purchase of domestic products in government-invested projects. The use of public procurement as a local development instrument is not limited to US and China. Countries like Malaysia have applied to the tool. In the case of Malaysia, for example, government procurement and expenditure has been a major instrument for economic management and for socio-economic planning, as well as political stability among ethnic communities. Malaysia has used government expenditure to influence the level and growth of economic output. For example, by boosting public-sector spending during recessionary conditions, the country was able to reduce economic instability. Further, procurement has been used to expand the opportunities for local enterprises. In this regard, the use of local banks in government business was a major method of increasing their share in total banking business after independence. The quest for use of government procurement as a local development instrument cuts across developed and developing countries. What is contentious is that the latecomers to the use of this instrument are being convinced to discard it in the name of trade liberalisation and the mysterious economic efficiency arguments. Yet they still need this important development policy tool.

4. Government procurement policy for Uganda and sustainable local development

4.1. Evolution of government procurement processes in Uganda

The features of the Ugandan public procurement system prior to the inception of the reform programme in the late 1990s were typical of many developing African countries that were at one time British colonies or protectorates. Procurement was centralised, with contracts above a threshold value of US\$1,000 being awarded by a Central Tender Board in the Ministry of Finance, on the basis of regulations that had been approved in 1977. There were separate tender boards for the Police and Military.

Procurement of many items on behalf of ministries was undertaken by the Government Central Purchasing Corporation. The Corporation had been set up by statute in 1990, replacing a central purchasing organisation within the civil service. While these arrangements offered the advantages of consolidated purchasing and central control, the Central Tender Board was unable to keep pace with the expansion of government activities and their attendant procurement requirements. There was a consequential backlog of tender submissions and the procurement process became protracted.

International and foreign aid organisations which account for nearly half of all development expenditure in Uganda considered public procurement to be a key obstacle to effective service delivery and development. A study of the changes that were needed in the procurement system (Task Force on Public Procurement Reform, 1999) found that:

- Guidance for the existing procurement system was scattered among various outdated regulations and procedures
- Little action was taken to ensure that the procurement process complied with established

regulations and procedures

- There were no clear lines of public accountability in the procurement process and little transparency
- There was little institutional coordination in the procurement processes
- Operating through cash budgets and with inadequate financial planning, the government was an unreliable business partner and suppliers frequently suffered delays in receiving payment for goods and services supplied. As a result, bidders sought to offset these risks by asking for higher prices for goods and services to be delivered.
- The system suffered from various forms of malpractice and unethical conduct, including a high incidence of vested interests, interference and insider dealings and occasional cases of retrospective approval of contract awards.
- There was a lack of professional knowledge and expertise in the purchasing and contracting function at all levels.

In advocating for the need for procurement reform, the Task Force considered the following to be the desired outcomes:

1. Transparency, characterized by well-defined regulations and procedures open to public scrutiny. In addition, clear, standardized tender documents containing complete information coupled with equal opportunity for all in the bidding process.
2. A more effective means for fighting waste and corruption and improving financial accountability
3. Integration of the public procurement system with national budgeting procedures
4. A more attractive investment climate by lowering risk.
5. Greater competitive pressure to satisfy customer needs.
6. A streamlined procurement process through greater use of electronic commerce. Foremost

among these desired outcomes, though, was a substantial reduction in corruption.

The Task Team desired outcomes resonated with observation of the Inspector General of Government (IGG). The IGG who acts both as the Ombudsman against inefficiencies and abuse of power and as the chief protagonist against corruption in the public sector, observed that there was still a lot of corruption in Uganda's public procurement system. In order to overcome the procurement challenges he expressed the opinion that government procurement needed:

- A professional cadre of staff that implements and manages the procurement function.
- A competitive and transparent procurement process with strong self-reinforcing mechanisms providing for wide advertising of upcoming procurement opportunities, public opening of bids, pre-disclosure of all relevant information, clear accountabilities for decision making, and an enforceable right of review for bidders.
- An entity within government that is charged with overall responsibility for formulating procurement policy and ensuring that the system is functioning properly.

Despite not being bound by an international or bilateral agreement on government procurement, the country was under pressures to improve on its government procurement processes and procedures. The pressure to reform its procurement regime come from the World Bank and other donor organisations as conditions for providing development aid but principally because the inefficiencies of the unreformed systems have become self-evident. Most donors consider that a well-functioning procurement system is an essential requirement if their funds are to be used effectively to promote development. Where such a system is not provided by the host country, donors may insist on using their own procedures. There has been a trend in recent years for using national systems where these are suitable, through multi-donor budget support programmes (Abeillé 2003).

In summary, the country has gone through 5 distinctive of stages in terms of procurement policy processes:

- *Recognition of need for reform in the late 1990s:* Failure of the existing procurement system to cope with the expansion in government procurement requirements and to deliver value for money had become generally accepted among government and donor partners. In December 1997, a National Public Procurement Forum was held to bring together key decision makers to discuss procurement reform. Following the Forum, the Minister of Finance established a Task Force on Public Procurement Reform, which commenced operations in May 1998.
- *Study of Possible Procurement Models and Identification of Blueprint for Reform:* The Report of the Task Force was published in January 1999. Among its principal recommendations was the replacement of the Public Finance (Tender Board) Regulations of 1977 by a legal framework that would decentralise responsibility to each procuring entity while defining the procurement procedures to be followed, giving preference to competitive methods. The World Bank supported these local reform initiatives by undertaking a comprehensive study of the development needs of the procurement system in a Country Procurement Assessment Report, which was published in 2001 and revised in 2004.
- *Enactment of Procurement Law:* The Public Procurement and Disposal of Public Assets Act was passed into law in 2003. The Act requires all public procurement and disposal to be conducted in accordance with the principles of transparency, accountability and fairness and in a manner that maximizes competition and achieves value for money. The law provides for delineation of roles and separation of powers between User departments, which initiate the procurement process and evaluate bids; - Procurement and Disposal Units, comprising of procurement professionals who manage the procurement process; - Contracts Committees, which approve each stage of the procurement or disposal process and decide on the best evaluated bidder and contract award; and - The Accounting Officer, a senior official in the ministry or agency who is responsible for ensuring the proper functioning of the system. The law sets out detailed procedural rules, whose provisions include the advertising and public display of bid

opportunities, notices of best evaluated bidder and contract award. The required procedures are supported by an enforcement system that allows dissatisfied suppliers to seek administrative review and provides for suspension of providers for offences and disciplinary measures to be taken against public officers who commit malpractices.

- *Establishment of regulatory institution:* The law established an autonomous regulatory body, the Public Procurement and Disposal of Public Assets Authority (PPDA). The work of the PPDA is carried out under the direction of a Board of Directors by a Corporate Office headed by the Executive Director. It also provided for the creation of four departments that are responsible respectively for Training and capacity building; Legal matters and compliance assessment; procurement audits and the investigation of complaints; and - finance, administration, human resources and information technology.
- *Publication of Regulations, Guidelines and Standard Bidding Documentation:* The law is complemented by Regulations, Guidelines, Forms, Codes of Conduct and Standard Bidding Documentation. These serve to assist the procuring and disposing entities and providers of services, goods and works to carry out procurement and disposal processes according to the law and good practice.

The following two sections look deeper into the country's procurement policy legal framework and the state of government procurement in Uganda as a sustainable development tool.

4.2. Policy and legal framework for government procurement

Government procurement in Uganda is guided by the Public Procurement and Disposal of Public Assets (PPDPA) Act of 2003 that came into effect in March 2014. The Act contains 7 parties and 99 sub-sections. In the following section a systematic analysis of the parts and sections of the PPDPA that talk to the government procurement as a development tool are discussed before drawing conclusions on government and sustainable development of the

country. It is important to point out from the start that Act does not explicitly present procurement as development instrument. The biggest part of the Act focuses on technicalities and process of government procurement. Nonetheless, there are a few sections that show, though indirectly, that the Act was also intended to serve the country's development needs. These are the one we focus on.

Section 4 of Part 1 of the Act, the introductory, talks about two aspects of relevance to government procurement and development that is international obligations, and procurement under bilateral tied loans. Under the International obligations, the Act states that:

- *Where the Act conflicts with an obligation of the Republic of Uganda arising out of an agreement with one or more states, or with an international organization, the provisions of the agreement shall prevail over this Act.*
- *Where an agreement referred to in this section contains a preference or preferences in favour of national and resident providers, a procuring and disposing entity shall ensure that the applicable preference or preferences are clearly stated in the bidding documents.*

Using government procurement to influence local development is part of a broader policy space that a country needs to positively change live of the citizenry. By stating that the international agreements previous entered into by the government will take precedence over the Act, it diminishes the useful of the policy in supporting local development. The gravity of this exception need to be understood in the context of many agreements that developing countries signed that ended up not benefiting them or under delivered. The second part relating to full disclosure of preferences that apply, based on previously signed agreement, increases the administrative burden of government procurement but may also create a legal loophole that can be exploited by some potential suppliers to the disadvantage of a national government.

Another constraining factor for using government procurement as local development instrument relates to the power that the Act gives to donors in terms deciding terms and conditions of procurement. Section 4A of the Act states that:

- *Where there is a conflict between this Act, regulations made under this Act or guidelines issued by the Authority and a condition imposed by the donor of the funds, the conditions of the donor shall prevail with respect to the procurement that uses the funds.*

For a country like Uganda where a significant section of the national budget is still donor funded, the inclusion of section 4A further lessens the extent of using government procurement to support development. A significant amount of government procurement transactions will end up being carried outside the stipulation of this Act. Although dependence on donor funding has been declining over time, 29% of the country 2014/2015 budget was donor funded. It should be noted that donor funding does not necessarily mean that money will be spent on non-development oriented activities, it but creates space for related procurement to be done outside the PPDA Act.

Section 43 of the Act stipulates the basic principles of government procurement that is:

- *Non-discrimination*
- *Transparency, accountability and fairness*
- *Maximisation of competition and ensuring value for money*
- *Confidentiality*
- *Economy and efficiency and*
- *Promotion of ethics*

The principles are implementation-focused and they do not explicitly include or consider the development objective. It would have been useful to include a statement that considered in totality, government procurement, guided by these basic principles should support local development. By stating the basic principles without the development objective being mentioned, an impression is created that if these principles are strictly followed in government procurement, local development will be automatically supported, which may not be the case. Moreover some of these principles can contradict each other in practise.

Some of the principles need to be qualified as far as local development aspirations are concerned. In practical terms, principles like non-discrimination, maximum competition to achieve value for money and strict economic efficiency, may need to be relaxed for the purpose of supporting local economic development efforts. Targeted discrimination in government procurement can be used to give opportunity to vulnerable or non-competitive sections of citizens, or sectors to benefit from the procurement for example, but it goes against the principle of non-discrimination.

The Act, to some extent, seems to recognise the need for exception to the strict adherence to these principles assumingly for local development purposes. Section 44 of the Act that expounds on non-discrimination stipulates that:

- *A bidder shall not be excluded from participating in public procurement and disposal on the basis of nationality, race, religion, gender or any other criterion not related to qualification, except to the extent provided for in this Act.*

Exceptions included on the application of the non-discrimination principle can be taken advantage of for development purposes. The Act also includes an exception provision as regards competition. Section 46 of the Act starts with the qualifier. It reads:

- *Subject to this Act, all procurement and disposal shall be conducted in a manner to maximize competition and achieve value for money.*

The only section of PPDA Act that talks to using government procurement as a tool of national development is Section 50 titled -Preferences and Reservations. The first part of the section states:

- *Subject to the economic and social policies of Government and the international obligations of Government, preference shall be given to domestically manufactured goods and Ugandan contractors and Ugandan consultants, in order to promote their development, by giving them a competitive advantage when competing for public procurement contracts, with foreign manufactured goods, foreign contractors or foreign consultants.*

It is notable though that the provisions of this section are subject to international obligations and other economic and social policies of government, not mentioned. This has a potential to lessen the usefulness of these provision in practise. It is also notable that provisions of the section are more likely to benefit companies and Ugandans that are already in business or active in the main stream economy. It does not talk to poor Ugandans at the periphery human survival.

The second part of Section 50 of the Act focuses on the issue of promoting sector development using government procurement. It says:

- *To promote particular sectors within specified geographic areas, specified public procurement contracts or parts of a contract shall be subject to reservation schemes.*

Details of the preference schemes are presented in Section 59A and 59B. In defining the conditions to qualify for preference, some local development parameters such as local employment, local value addition for products and nationality of service providers are included. The section stipulates that preferential government will apply in cases where:

- i. The labour or value addition to the good is more than thirty percent of the ex-works of the goods
- ii. The production facility in which the goods are to be manufactured, assembled or processed is in Uganda and is engaged in the manufacturing, assembling or processing of the goods at the time of submission of the bid.
- iii. The contractor or consultant is incorporated or registered in Uganda
- iv. The contractor or consultant if an individual, is a Ugandan citizen
- v. The contractor or consultant if a company registered in Uganda, more than fifty percent of the capital of the contractor or consultant is owned by Ugandan citizens

Section 59B is particularly informative on objectives of reservations schemes some of which should ideally apply to the entire Act. It states that a public procurement contract shall be subject to a reservation scheme in order to:

- a. Promote the use of local expertise and materials
- b. Promote the participation of local communities or local organisations;
- c. Apply specific technologies

By applying these reservation schemes in government procurement in order to achieve the above objectives a link between government procurement and local development is created in Uganda's PPDPA.

The PPDPA Act has some elements that talk to government procurement at international levels that resonates with the WTO negotiations. In specifying methods of procurement, Section 81 mentions open international bidding as one of them. It defines open bidding as:

- *The procurement method which is open to participation on equal terms by all providers, through advertisement of the procurement opportunity and which specifically seeks to attract foreign providers. Open international bidding is used to obtain the maximum possible competition and value for money, where national providers may not necessarily make this achievable.*

The above provision points to the fact that its optimal use is when there is limitation or no capacity to source locally. The challenge with this provision in terms of a country's long term development is that countries need to develop their local supply capacity. Applying the logic of this provision means that countries will never develop their local suppliers which goes against any countries long term development aspirations.

The Act also includes restricted international bidding as an alternative procurement procedure. Section 83 defines restricted international bidding as:

- *The procurement procedure where bids are obtained by direct invitation without open advertisement and the invited bidders include foreign providers.*

Application of Section 83, can address the concerns of interim support and protection of local suppliers from external competition but not entirely.

4.2.1. Shortcomings of the government procurement policy framework

A key weakness of the Uganda's government procurement policy as guided by the PPDPA Act of 2003 is that it does not refer to the country's development needs as expounded in National Development Plan. The policy does not also make reference to the responsibility of government to the citizen. As such, the role of government to drive development appears to be secondary rather than primary in the policy. According to Uganda's National Development Plan (NDP) of 2010-2014, the overarching objectives of the country are to achieve economic growth, create employment and to attain socio-economic transformation for prosperity. It is presupposed in the NDP that required economic growth and resultant poverty alleviations will be achieved via export-led economic growth. Because the procurement policy does not refer to the NDP, important relationships like that of government procurement and export oriented growth are not well articulated and catered for in the policy.

From a constitutional perspective, the fundamental responsibilities of government in respect to development are:

- To the enact legislation establishing measures that protect and enhance the right of the people to equal opportunities in development.
- To stimulate agricultural, industrial, technological and scientific developments by adopting appropriate policies and the enactment of enabling legislation (Uganda Constitution, 1995).

To achieve balance and equitable development, the country's constitution goes further to stipulate that government shall:

- Adopt an integrated and coordinated planning approach.
- Take necessary measures to bring about balanced development of the different areas of Uganda and between the rural and urban areas
- Take special measures in favour of the development of the least developed areas (Uganda Constitution, 1995).

The PPDPA Act ought to have made reference to both the NDP and the constitution of the country. This would have made put into context what

ultimately the government wanted to achieve via the procurement Act in perspective. Otherwise, one get an impression that achieving efficiency and value for money was the overarching objective of the policy yet this is just a means to the development objective.

4.3. State of government procurement in Uganda

Figures on government expenditure on procurement are not readily available. Agaba and Shipman (2008) estimate that 70% of government expenditure in Uganda goes to procurement. The portion of spending on procurement cannot unfortunately be linked to local development.

Anecdotal evidence indicates a big part of government expenditure has gone to national security and classified expenditure. One can argue that national security in an important pre-requisite for future development but the experience of many African countries show that is not the case. Partly because the security being sought often have little relation with national socio-economic interests but rather selfish interest of those in power. It is also important to point out that there is often a trade-off between government expenditure on national security and expenditure on socio-economic services that have a direct bearing on people's welfare.

Having a policy and regulatory framework on procurement is one positive development for the country. The 2011 report of the Public Procurement and Disposal of Public Assets Authority paints a good picture of what has been achieved in terms of streamlining government procurement according to the Act. The number of procurement audits and people trained on procurement process were on increase among others (Table 1 below).

Activity	2009/2010	2010/2011
Procurement audits	48	84
Compliance checks	27	54
Investigations	46	43
Follow ups on audit investigations	306	292
Deviations handed	297	240
Suspensions	9	2
Administrative reviews handled	33	32
Registration of RoP	919	1215

Table 1: Activities of the PPDA, 2010/2011P

Source: PPDA, 2011

Despite the administrative and operations improvement seemingly being made by the PPDA Authority, there still a high prevalence of corruption related to government procurement, both at national and local government level. According to Basheka (2008) out of 322 contracts audited by the PPDA at end of 2005, only 7, or 2% were found to be clean.

The Uganda Debt Network of 2013 highlighted the following as some of the few recent government procurement project tainted by corruption:

- The 600MW Karuma hydro-power project estimated to cost \$2.2billion. The project was halted due to irregularities in the procurement process, including flouting of the procurement procedures and allegations of ghost bidders.
- The supplies of the 70,000 pieces of Bicycles for local government. Government paid for unknown specification of bicycles which were never delivered.
- The botched National ID project that allegedly influenced by the Presidency. The procurement process of the national IDs was awarded without competitive bidding, contrary to the procurement laws. The favoured company was expected to deliver 3.5 million IDs by December 2010 and at least 21 million by the end of the project in June 2013. By 2013, but the firm had only released only 400 IDs. The project was temporarily abandoned, without anyone being brought to book.
- The 2007 Common Wealth Heads of Government Meeting (CHOGM) procurement irregularities, where excessive amounts were spent without

service being delivered. For instance, money was advanced to hotel owner to extend their room capacity but at the end of the day, the hotels were not used and money was not refunded.

Apart from outright corruption in government procurement there other challenges in executing government procurement the efficiently. These include but are not limited to lack of awareness of procurement laws and procedures by key stakeholders, incompetent contractors and shoddy works, and poor monitoring and inspection by supervisors (UDN, 2013).

The prevalence of large scale corruption in government procurement creates a strong case for liberalisation of the process and for the signing of the Plurilateral Government Procurement Agreement, arguing that this will introduce transparency and efficiency. But corruption in government procurement should not be used as the reason to sign GPA at least in isolation. It will not serve national purpose when Uganda eliminates corruption in government procurement but yet misses out the opportunity and space to use the procurement as a development tool for the benefit of its citizens. The desire or intention to eliminate corruption in government procurement should be separately dealt with, without compromising the country's socio-economic aspirations and means available to government to influence these.

5. Economic Implication of Uganda signing the GPA

Countries that sign on to FTAs containing a chapter on government procurement will in future not be allowed to give preferences to local companies for the supply of goods and services and for the granting of or concessions for implementing projects. The effects on developing countries would be severe. Opening up government procurement through the National Treatment and MFN principles, can severely curtail the scope and space for a government to use procurement as an instrument for development.

When government procures most of its goods and services from outside the country it decreases the multiplier effects of public spending on the domestic economy. The ability of government to assist the local companies and SMEs or specific communities, or regions will also be curtailed. Malaysia, as previously mentioned is a good example that demonstrated how government procurement and expenditure can be a major instrument for economic management and for socio-economic planning, as well as political stability among ethnic communities. (Khor, 2012).

With the signing of the GPA, developing countries government will also not have a leeway to give preferences to certain foreign countries. This will curtail important regional economic growth objectives such as the promotion of South-South trade and will also severely affect regional integration efforts. Given the great importance of government procurement policy as a tool required for economic and social development and nation-building, it is imperative that developing countries retain the right to have full autonomy and flexibility over their procurement policy. Uganda's economy, most especially the local private sector is still struggling. A well-targeted, development-oriented government procurement regime can play an important role in addressing this challenge. Such a procurement regime that is aligned to national development needs can be used to inform Uganda's position in bilateral and multilateral negotiations on procurement. It is therefore, important to consider the option of not including government procurement as an item in any of the bilateral trade or economic agreement at least in the short to medium term.

6. Conclusion and Recommendations

At the moment, Uganda is not a member of GPA and is therefore not bound by the GPA conditions and requirements. The country should maintain its status quo of now as regards the GPA. A binding GP agreement at multilateral and bilateral level with a core objective of market access would constrain Uganda's policy space to devise her own development policies, including building the capacity and competitiveness of local enterprises. Uganda would find it difficult to support its local industries. If not protected and treated with preference, many local companies and firms may not be able to survive the competition resulting from such an agreement. Uganda also lacks the institutional, regulatory and administrative capacity to respond to the requirements of the GPA and also to conduct procurement per some of the proposed provisions therein. The inclusion of the Most Favoured Nation (MFN) Clause will particularly constrain Uganda's ability to give preferences to certain foreign countries of their choice.

Another very important reason for not signing market access government procurement provision is the issue of the excessive compliance costs. Several studies have confirmed that government procurement transparency costs are likely to entail high compliance costs. Choi (1999) argued that the immediate economic costs of accession to a government procurement agreement might be smaller domestic supply, higher unemployment and a greater bureaucratic burden resulting from the need to comply with detailed transparency and procurement guidelines and reporting requirements.

As indicated in this study, most countries, both developing and developed, provide preferential treatment to local suppliers in government procurement. Thus, the biggest threat to policy space would be to give up this preferential treatment, and to give equal (or superior) treatment to foreign suppliers. Given the great importance of government procurement policy as an important tool required for economic and social development and nation building, and given the competing development priorities and limited resources, it is imperative that Uganda retains the right to have full autonomy and

flexibility over its procurement policy.

Currently there is insufficient evidence on how a bilateral or multilateral agreement on Government Procurement will support Uganda's development strategies. Therefore in any bilateral and multilateral negotiations on government procurement, Uganda should negotiate for technical assistance and cooperation. The technical assistance would be utilized to assist government to put in place a development oriented government procurement regime. In all, given the undisputed fact that Uganda's signing of the Plurilateral Government Procurement Agreement in particular will limit the policy space for the country to direct its development agenda using procurement the following specific recommendation are made:

1. The country should first take the observer status entailing no commitments. The country should use this period to gain understanding how the agreement works and how it is affecting other comparable developing countries.
2. After the observer status and equipped with factual information how the agreement works, the country should progress to stage of signing the agreement but asking for reservations and exceptions, where applicable, based on experiences of stage one.
3. After sufficient time to ensure that the local economy and the citizenry can compete with external goods and services providers, the country should fully embrace the GPA, among the multilateral and bilateral agreement that have clauses on liberalising government procurement.

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