

**THE IMPORTANCE OF PUBLIC PROCUREMENT LAW TO SOCIO-
ECONOMIC DEVELOPMENT WITH SPECIAL REFERENCE TO NAMIBIA.**
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ABSTRACT

This study discusses the importance and relevance of public procurement law to socio-economic development, more specifically in the Namibian context. The discussion therefore contextualizes public procurement law within rational socio-economic considerations, as opposed to the assumption that public procurement is merely a mechanical process.

Chapter one deals with the preliminary issues including subject of research, expectation from the research, the problem to be researched, the research question, relevance of the study, hypothesis, data sources and methodology and summary of conclusions.

Chapter two introduces the paper, defines public procurement and contextualizes public procurement within the ambit of conceptual issues including normative and positive reasons for government intervention in the procurement market. It highlights and reflects on relevant economic theory relevant to public procurement. In general, the chapter reviews literature on the subject matter.

Chapter three provides the background of the economic trends, investment regime and the history of the Tender Board of Namibia.

Chapter four discusses the position of Government Procurement Agreement (GPA) within the context of international law. It is posited that Government procurement or as it is alternatively known, “public procurement”, is a very interesting subject matter for the reason that it attracts both national and

international attention. Yet it has been on the periphery of international trade law until only in 1 January 1981 when the GATT Government Procurement Agreement (GPA) came into force. Still to date accession to the GPA remains voluntary, because the GPA is one of the WTO “plurilateral” agreements. Hence the interests of developing countries and a model law on procurement are highlighted.

For purpose of comparative analysis some elements of the Government Procurement Agreement and of multilateral financial institutions (African Development Bank) procurement systems are discussed in chapter five. In this case, the African Development Bank is used as a point of reference. The reason for choosing the procurement system of the African Development Bank is to juxtapose its experience with developing countries (specifically with that of Namibia in order to avoid over-generalization) because this is one institution that deals with many poor developing countries. How the Namibian procurement system conforms with international standards and proposed changes to the system are discussed in the same chapter.

The concluding chapter focuses on the various reasons why government intervenes in the market through public procurement, major reasons among others being market failures; socio-economic imperatives such as social justice; economic empowerment; and industrialization drives. These constitute important criteria used by government to target tenders in order to meet some specific development objectives. It is submitted that the Namibian procurement system complies to some extent with the accepted international standards. However, further areas for improvement include developing arbitration mechanisms, dispute settlement procedures, procurement through electronic system and broadening accessibility of public procurement to the broader populace in the country.

Abbreviations:

GATT - General Agreement on Tariffs and Trade

WTO - World Trade Organization

RTA - Regional Trade Agreement

GATS - General Agreement on Trade in Services

FTA - Free Trade Area

MFN - Most Favoured Nation

NAFTA - North American Free Trade Agreement

BOT - Built - Operate - Transfer

SME's - Small and Medium sized Enterprises

GPA - Government Procurement Agreement

OECD - Organisation for Economic Cooperation and Development

ADB - African Development Bank

IBRD - International Bank for Reconstruction and Development

UNCITRAL - United Nations Commission on International Trade Law

AGOA - African Growth and Opportunity Act

MTEF - Medium Term Expenditure Framework

VAT - Value Added Tax

CMA - Common Monetary Area

EPZ - Export Processing Zones

CBI - Caribbean Basin Initiative

ATPA - Andean Trade Preference ACT

UNCTAD - United Nations Conference on Trade and Development

IMF - International Monetary Fund

EIB - European Investment Bank

SACU – Southern Africa Customs Union

SADC – Southern Africa Development Community

DEDICATION

This work is dedicated to my children.

ACKNOWLEDGEMENT

The saying that scholarship is a collective effort is surely true of this study. It would have been very difficult to finalize this thesis without the kind assistance of Ms Maureen Narib, to whom I here record my great indebtedness. I am under the greatest debt of gratitude to my supervisor Prof. M. O. Hinz who so tirelessly supervised and guided this work. I also acknowledge the co-supervisors, Mr. Riundja Ali Kaakunga and Mr. Brian Katjaerua for the considerable time and effort they devoted to the preparation of this study.

DECLARATION

I declare that the thesis:

“The Importance of Public Procurement Law to Socio-Economic Development with Special Reference to Namibia” is my original work both in conception and in execution. All the sources that I have used or quoted have been indicated and acknowledged by means of complete reference.

This work has not been submitted for any other degree elsewhere.

.....

Usutuaije Maamberua

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CHAPTER ONE

1. INTRODUCTION

(a) Subject of Research

This study explores the reasons attributed to the premise that public procurement is very important at national as well as at international level.

In this context the aim is to discuss its importance to socio-economic development, more specifically in the Namibia context.

The study covers the public procurement law as pertaining to Namibia within the context of the Tender Board Act (1996) in relation to issues of socio-economic development. Reference is made specific to Namibia, but comparative analysis with the WTO Government Procurement Agreement (GPA) and the African Development Bank procurement procedures are made because Namibia is a member of both institutions and is affected by their frameworks in the sphere of public procurement.

The study draws linkages between socio-economic considerations and the procurement law at national and international level. The purpose of the study

is an attempt to assist policy-makers, governments, consumers and firms to improve understanding of the linkages in their planning process.

(b) Expectation from the Research

It is expected that, the thesis will highlight some of the socio economic intricacies of public procurement law and consequently be better understood.

It is further expected that the reasons why public procurement has hitherto been a “peripheral” subject in most of international trade rounds of negotiations and the extent of involvement of developing countries will be explained.

Within the sphere of international trade law and specifically the WTO trade negotiations, developing countries’ interests have not been fully taken care of, because the negotiations have not always and necessarily dealt with development issues as they pertain to developing countries. The aim is to trace the position of developing countries during the process of the international trade negotiations in order to explain how public procurement law relates to socio-economic development.

It is therefore expected that the conclusions to be drawn and recommendations to be made shall serve to improve the understanding of the relationship between public procurement law and socio-economic development issues.

(c) The Problem to be Researched

The problem to be researched is two-fold. The first aspect is to establish why public procurement law is important to socio-economic development. The second aspect is to systematically trace the position of developing countries in the international trade negotiations that culminated in the World Trade Organisation (WTO). Therefore the study explores the relationship between developing countries and the WTO's Government Procurement Agreement.

(d) The Research Question

Consequently the research question is two-fold. Firstly, how can Namibia address through public procurement system the following socio-economic constraints: unemployment, poverty, economic dualism, low level of investment? Secondly; within which international public procurement framework could developing countries and Namibia in particular operate, in order to enhance the effectiveness and efficiency of their public procurement system?

(e) Relevance of the Study

In Europe, for example, public procurement has been well researched, documented and the legal framework also is in place¹. In Africa, however, the experience with procurement has been disappointing due largely to the absence of a proper legal framework and/or, proper implementation.

In Namibia, research on this topic is absent or rather scanty, probably due to lack of consolidated theoretical research information. It has proven difficult to make cross-reference. This dissertation therefore aims at partly filling this gap.

(f) Hypothesis

The hypothesis of the dissertation is that public procurement is predicated on rational socio-economic considerations at the national level, and at the international level on trade law considerations, as opposed to the assumption that it is a merely mechanical process.

¹(a) David Medhurst, EU Public Procurement Law, Blackwell Science, 1997.

(b) Christopher Bovis, EC public Procurement Law, European Law Series, Longman, London, 1997.

Thus this hypothesis will be tested against economic theories, primarily: market failures and externalities, and comparative advantage, fairness and equity (specific to poverty and unemployment alleviation).

(g) Data Sources and Research Methodology:

The data for analysis has been gathered from various sources, including literature review in the areas centered on the definition of public procurement, conceptual issues with regard to the rationale for government intervention in the public procurement markets, economic theory relevant to procurement and socio-economic development.

Namibian government publications and others published by private organizations including other documents on the Namibian academic and national archives and libraries have also been consulted.

Specific interviews have been held with some selected resource administrators in the government, specifically the Secretary to the Tender Board of Namibia. Personal observations by visiting the Procurement Division of the African Development Bank (ADB) were done two years ago.

My previous studies in research methodology during my Masters in Accounting and Management Science and Masters of Business Administration including the

knowledge which I acquired in statistics and other quantitative areas during those studies have partially helped to ease my work in this research.

(h) Summary of Conclusions

The study concludes that for reasons of externalities and market failures; macroeconomics stabilization; fairness and equity and Namibia's unique socio-economic position – dualism in the economy; poverty alleviation; unemployment – the Namibian government has used public procurement and other measures including subsidies and black economic empowerment schemes in attempting to bring about equity and fairness in the distribution of socio-economic resources.

The conclusion is also reached that having had regard to the various international and regional statutes, instruments and practices including those of the WTO, ADB, SADC and AGOA, have stood Namibia well as witnessed by the support Namibia enjoys from its trading partners.

Further work in this area could be done by others, more especially in determining which developing countries have had the most benevolent public procurement laws and practices. Also work could be done in establishing the process necessary to harmonize public procurement systems within the

Southern African Customs Union and the Southern African Development Community.

CHAPTER TWO

CONCEPTUAL ISSUES: Literature Review

(a) Public Procurement Defined

Procurement means the acquisition by any means, including by purchase, rental, lease or hire-purchase.² A more comprehensive definition of public procurement is the means and mechanisms through which official government agencies purchase goods and services.

The scope of government procurement is broad in terms of the very wide range of goods and services that governments and the virtually countless numbers of public entities.³

A more agreeable and comprehensive meaning is offered⁴ as it is defined as embracing the whole process of acquisition from third parties, a process sometimes referred to as supply chain management, and covers goods, services and construction projects.

² Tender Board of Namibia Act no 16, 1996, Preamble and Definitions.

³ S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in : Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999, page 462.

⁴David Medhurst: European Union Public Procurement Law, Blackwell Science, 1997, page 27.

An objective of procurement policies is to obtain value for money. This could mean the purchase of goods that meet certain qualifying levels, at minimum cost. It could also mean choosing the good with the highest quality among a set of similarly priced goods.

Generally and specifically in Namibia, procurement takes place through the following four distinct stages: Tendering (where government notifies potential suppliers of its desire to procure certain types of goods and services); evaluation (assessment not only of the price but also price factors such as the quality of the good, after sales service, the reliability of the supplier, etc.); choice (the decision); challenge (procedures that enable firms to challenge the decisions, such as appeals or arbitration).

(b) Reasons for Intervention by Government in Procurement Market

(i) Introduction

It has been observed that governments all over the world purchase products as inputs into the production of public goods and services – education, defense, utilities, infrastructure, public health and safety and so on⁵. In addition,

depending on the economic system of a country, central government purchases of goods and services typically account for some 10 percent of gross domestic product (GDP). In Namibia, the figure is about 24 %⁶.

As to the rationale why governments would want to intervene in the market, it is further noted that, the cost minimizing objective underlying competitive bidding requirements is frequently offset to a greater or lesser degree by other objectives⁷.

These may include a desire to promote the development of domestic industry or technology; support particular types of enterprises (e.g. small and medium size firms); or to safeguard national security.

As a result of such objectives even if cost minimization is an important goal of government, procurement practices often discriminate against foreign suppliers. In this respect, regulations do not necessarily stop at the public sector per se, but do often bias incentives of private firms away from sourcing from foreign suppliers. Examples include trade barriers and financial incentives that are

⁵ . Bernard M. Hoekman and Petros C. Mavroidis: (ed) Law and Policy in Public Purchasing, The WTO Agreement on Government Procurement, University of Michigan, 1997.

⁶ Ministry of works, Transport and Communications, Public sector Procurement: White Paper on Labour-based works policy (2001).

⁷ Bernard M. Hoekman and Petros C. Mavroidis: (ed) Law and Policy in Public Purchasing, The WTO Agreement on Government Procurement, University of Michigan, 1997.

conditional upon local content. National security reasons have also been often used for prohibiting foreign sourcing.

(ii) **Normative and Positive Reasons**

The normative analysis of government is concerned with what governments should do. It is prescriptive in nature. The positive analysis of government, on the other hand, tries to explain why governments choose the policies they do.⁸

Thus positive analysis seeks to understand why current policies have come about and tries to predict future directions in policy⁹.

Many people are sometimes surprised when they discover the extent to which the business decisions of private sector firms are affected by government intervention.

Hence, they wonder what all this government intervention is intended to achieve, and why government chooses the policies it does. Some illustrations include; black empowerment, affirmative action, small and medium enterprises, price preferences, and export economic processing zones. All these are policies, which impact on private sector decisions.

⁸ James Brander: Government Policy Toward Business, John Wiley & Sons, 1995, page 91.

⁹ Ibid.

(iii) Market Failures¹⁰ and Externalities¹¹

Besides the normative rationale for parastatals, in the utility areas, for example, as natural monopolies, markets in the development of public enterprise fail due to the inability of financial markets to finance large scale projects even though these projects are worthwhile. Parastatals are able to borrow more easily than private firms, because their debts are assumed to be guaranteed by the government, and the government can out rightly give a loan to the parastatals. The development of parastatals has been important in the telecommunications, water provision, electric power industry, where the required investment has been large compared to the size of potential set of private financial sources.

Public corporations may be used to supply public goods, although this is rare, and they may be used to subsidize the development of activities with positive externalities.¹² Parastatals may pursue distributional or equity objectives, and, in addition, some public enterprises such as the Social Security Commission are focused on other social objectives, notably social justice. In short, parastatals in

¹⁰ A market failure is a situation in which private markets fail to achieve allocative (or Pareto) efficiency.

¹¹ These are third party effects. They arise when some person or group is affected by the economic activity of others, without markets to price the effects.

¹² James Brander: Government Policy Toward Business, John Wiley & Sons, 1995, page 413.

Namibia have been targeted at almost the entire array of normative rationales for intervention. Parastatals have been on the following rationales: regional development (Namibia Power Corporation), bidding gaps (undertaking economic activities that private sector will not undertake for example Small Business Credit Guarantee Trust), creating infrastructure (Road Fund Administration), the provision of non-commercial essential services such as the national broadcasting services.

Despite the important role played by public corporations in Namibia, where the private sector is still emerging, public investment remains the lion's share of national investment, and public procurement is, therefore, a critical government responsibility. Good procurement management plays a crucial role in achieving cost-effective investment and public spending.

(iv) Comparative Advantage and Economic Policy Considerations

An implication of the theory of comparative advantage is that countries trade with each other because they are different. If the nature of production and demand were the same in each country, there would be no comparative advantage because the opportunity cost of each good would be the same in each country. There are several reasons why production possibilities are different in different countries. Most importantly, different countries have

different basic resources or factor endowments. Also, climate, education levels, consumer tastes, and technology all contribute to differences in comparative advantage across countries¹³.

Thus, the theory of comparative advantage explains why Namibia might export diamonds to Japan and import machinery from Germany or even Japan.

A country is said to have a comparative advantage in the production of X if the opportunity cost of producing more X is lower in that country than in other countries.

Following from the above theoretical arguments, there is a general presumption that discriminatory procurement reduces imports and increases domestic output in comparison to free trade. However an argument against this presumption in a competitive context has been advanced, showing that extending preferential treatment to domestic industry neither reduces imports nor increases domestic price, output and employment¹⁴.

¹³ James Brander, *Government Policy Toward Business*, Wiley, 1995, page 175.

¹⁴ Robert Baldwin and J David Richardson *Government Purchasing Policies, Other NTBs, and the International Monetary Crisis*. 1972. In H. English and K Hay, eds., *Obstacles to Trade in the Pacific Area*. Ottawa: Carleton School of International Affairs. Cited by Simon Evenett, *Multilateral Disciplines and Government Procurement*. In *Development Trade and the WTO*, IBRD, 2002, page 421.

Therefore in the context of public procurement, countries when procuring goods and services should take the economic theory into account. This will help to maximize benefits to reduce high cost due to inefficiencies.

Discriminatory procurement is ineffectual because shifting government demand towards domestic producers generates an equal and opposite shift in consumer demand toward imports.

There is one rather obvious qualification to this result. If government demand is larger than the quantity supplied domestically in the non-discriminatory equilibrium, then shifting domestic demand towards domestic producers can clearly have real effects – increased domestic output and reduced imports.

CHAPTER THREE

ECONOMIC AND LEGAL ENVIRONMENTS FOR FOREIGN INVESTMENT WITH REGARD TO PUBLIC PROCUREMENT.

(i) Economic Environment.

A brief discussion of some aspects of economic trends is necessary in order to underscore the link between public procurement and the economic environments within which public procurement operates.

Gross investment in Namibia declined to N\$ 4.3 billion in 2000, from a position of N\$ 4.8 billion in 1999. As a result, the ratio of investment to GDP declined from 23.2 percent in 1999 to 18.1 percent in 2000¹⁵. The result has been a gap of N\$ 2.4 billion in excess savings, which reflects the outflow of savings to South Africa. This means Namibia is an exporter of savings, which is an untypical situation for a developing country.

¹⁵ National Accounts 2001 (National Planning Commission) and Bank of Namibia Annual Report 2001.

In the past, specifically before independence, state control of key economic sectors meant that the Government played a monopolistic role in the functioning of the economy. However, after independence the Government's dominance is being reduced, as the private sector is encouraged to participate in many areas of economic activity, and the state parastatals are being commercialized for purposes of facilitating them to turn profitable if meaningful privatization can eventually be put in motion.

The Government's economic strategy to address the wide range of macroeconomic and structural imbalances, which characterize the economy, have been concentrated on stabilizing the economy and creating the other conditions (i.e., improving the Government's economic database and creating appropriate legal and organizational frameworks) necessary to enable the Government to proceed with socio-economic development.

The macroeconomic and structural imbalances in the Namibian economy can be traced partly to the socio-economic dichotomies prevailing in the country before independence, which have been a factor in the rapid growth of the budget deficit, the deterioration of the balance of payments, and the increase in external and internal indebtedness. However, the Government has recognized that deficiencies in economic management and in low productive capacity have also

contributed to these problems¹⁶. The Government's economic programme addresses these issues through policy measures aimed at achieving a more efficient utilization of the country's resources. These policies are summarized below:

- Restructuring and modernization of the country's fiscal system:

The Ministry of Finance introduced a medium-term expenditure framework (MTEF) in an effort to strengthen public finance management. In addition, the Department of State Accounts (Ministry of Finance) and the Bank of Namibia conduct auctions of Treasury bills and bonds frequently as a way of developing and deepening the money and capital markets. The Funds Control System¹⁷ automatically disallows unbudgeted expenditure. Treasury authorization warrants are given only monthly.

- Reforming and modernization of the tax system;

The tax base collections have increased by almost 9.5%, from 210 000 tax payers in 2000/2001 to 230 000 tax payers in 2001/2002. The tax collected in all categories,

¹⁶ This approach of the Namibian Government is within the context of competitive debate as expounded by Michael Porter in *Competitive Advantage of Nations*, 1990.

¹⁷ A computerized financial management system at the Ministry of Finance for control against over-expenditure in Government.

individual, companies, indirect taxes and others also show a steady increase¹⁸. This increase is ascribed to the introduction of VAT in November 2000. Another factor contributing to this increase in revenue collection is the profitable trading conditions that resulted in increased revenue from company taxes.

(II) Legal Environment for Foreign Investment.

Foreign investment involves the transfer of tangible or intangible¹⁹ assets from one country to another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets²⁰.

The first attempt at designing multilateral rules on investment was made shortly after World War II. Although proposed by the United States, the issue of protecting foreign investors in host countries was opposed by developing countries and therefore was never included in the Havana Charter. In fact, concerns of USA-based multinationals related to nationalization, expropriation, lack of prompt, adequate, and effective compensation for foreign investment

¹⁸ Ministry of Finance, Annual Report, 2002.

¹⁹ Cited by M. Sornarajah "In earlier times, the emphasis was on tangible property. It is now generally accepted that intangible property falls within the protection of international law. Intangible assets include intellectual property rights, such as patents, copyright, know-how ..." in *The International Law on Foreign Investment*, Cambridge University Press, 1995, page 4.

²⁰ Cited by M. Sornarajah "...Encyclopedia of Public International Law (Vol. 8, p. 246): foreign direct investment is defined as a transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of that enterprise..." in *The International Law on Foreign Investment*, Cambridge University Press, 1995, page 4.

were also not dealt with. The Calvo Doctrine²¹, which had been the tradition of most Latin American countries was at the heart of these concerns²².

Public procurement should not be seen as merely a way of acquiring goods and services and as an end in itself, but as a process which amongst others has a purpose of meeting socio –economic objectives. It is in this respect that it has been observed that Public procurement is a major development mechanism, the potential of which has not been fully tapped. Moreover, a public procurement system can help governments optimize resources, just as private sectors has cut cost through strategic use purchase and supply development, for increased competitiveness in the global economy²³.

Thus for a developing country like Namibia, there is a direct complementarity between public procurement and foreign direct investment because both are aimed at directly or indirectly addressing the socio-economic constraints. Hence when looking at ways and means through which public procurement addresses socio-economic problems, investment can not be isolated.

²¹ A doctrine expounded in the 1868 Treaties by Argentinian Carlos Calvo. It is postulated on the concepts of sovereignty, independence, and absolute equality of states. Developed countries rely on a direct opposite doctrine, which invokes a so-called minimum standard based on the Nixon Doctrine (1972).

²² Maryse Robert and Theresa Wetter, *Toward an Investment Agreement in America: Building on the Existing Consensus*. In Miquel R. Mendota, et al: *Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations*, 1999, page 391.

²³ Mr. J. Denise Belisle, Executive Director, International Trade Centre, ITC UNCTAD/ WTO: *Trade Aspects of Procurement*.

Within the same scope of understanding, Namibia has been using public procurement to redress these key issues: unemployment, dualism in the economy, poverty alleviation, industrial and commercial concerns.²⁴

A guiding principle of the Namibian Government's economic policy is that foreign investment has a role to play in the development of the country's economy. With that objective in mind, in 1991 the Government promulgated the Foreign Investment Act (Act No. 27 of 1990, as amended in 1993)²⁵. The Act created the Namibia Investment Centre (NIC)²⁶ in the Ministry of Trade and Industry, which facilitates the promotion and administration of foreign investments.

The Ministry of Trade and Industry's efforts are directed at four key activities: investment promotion; facilitation of manufacturing activity; promotion of growth and development of small and medium enterprises; and growth and diversification of Namibia's exports.²⁷ Government policies toward foreign investors have been based on straightforward objectives: maximizing economic gains while minimizing any socio-economic and political costs. The problem has been that in practice, costs and benefits have been closely intertwined. They

²⁴ Section 15 (5) of the Tender Board of Namibia Act (1990) states that in comparing tenders, the Board shall give effect to the price preference policy of the Government to redress social, economic and educational imbalances in a democratic society and to encourage industrial and commercial interest in Namibia."

²⁵ The Foreign Investment Act, No. 27 of 1991, is a classical investor or investment "protection" code in the sense that it does not only purport to protect investors and their investments, but also entices them to invest in Namibia.

²⁶ See Section 2 of the Foreign Investment Act, 1990, as amended in 1993.

²⁷ Namibia Trade Directory, 2003, page 19.

have therefore involved a choice of trade-offs, so that seldom have there been any clear-cut means for implementing these objectives.²⁸

Generally governments in developing countries face a series of dilemmas in shaping their policies toward foreign investment. For instance, permitting multinationals to repatriate most of their profits could be taken as allowing them to siphon off much of the newly created wealth. Forcing multinationals to reinvest their profits locally, however, would in effect allow them to increase their control over the national economy. Similarly, if multinationals pay local wage rates they would be “exploiting local labor.”²⁹

For example, recently the Ramatex Textile Factory has been accused of paying slave wages (that is (N\$300) to its workers. This led to wild-cat strikes. Arguably, if they paid higher than average wages, they would skim off the best labour to the disadvantage of local firms.

The Foreign Investment Act of 1990 provides liberal foreign investment conditions, including equal treatment of foreign and local investors, full protection of investments, no local participation requirements, generous repatriation conditions (subject to Common Monetary Area (CMA) regulations,

²⁸ See IFC, 1997, page 6.

²⁹ Ibid.

as long as the South African Rand is legal tender) and openness to all sectors of the economy.³⁰ There is an exception, however, in the case of the exploitation of natural resources, where Government may be entitled to an interest or grant more favourable rights to Namibians.³¹

(III) Incentive Regime for Investment.

A broad meaning of the term incentive would include any governmental action that raises an investment's profitability above the levels that would be possible without the action or which reduces their risks³².

On the other hand the more generally accepted meaning of incentives, refers mainly to fiscal measures such as various ways of reducing taxes or providing other financial relief to an investment³³.

Business sponsors emphasize the importance of fundamentals such as market size, labour costs, and productivity. They downplay the effect of fiscal incentives in determining when they make investments. For their part, governments do not

³⁰ Section 3 (1) of the Foreign Investment Act 1990, as amended in 1993 clearly spells out that subject to the provisions of this section and the compliance with any formalities or requirements prescribed by any law in relation to the relevant business activity, a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake.

³¹ Section 3 (4) of the Foreign Investment Act 1990, as amended in 1993, says that the Minister may, by notice in the Gazette, specify any business or category of business which, in the Minister's opinion, is engaged primarily in the provisions of services or the production of goods which can be produced or adequately by Namibians.

³² International Finance Corporation, (IFC), Foreign direct Investment, 1997, number 5, page 45.

³³ *Ibid.*

want to relinquish fiscal incentives because they find that investors seek every possible type of fiscal relief and, moreover, many other countries give fiscal incentives.³⁴

Namibia has also created export processing zones (EPZs)³⁵ to attract foreign investments. EPZs are areas outside normal customs barriers and formalities in which firms receive favourable treatment. They are usually located at or near customs ports of entry where foreign and domestic merchandise normally fall within the domain of international trade and commerce. The universal incentives offered by EPZs include the following³⁶:

- (i) Duty-free imports of raw materials and intermediate goods;
- (ii) Exemption from normal income tax on a temporary basis;
- (iii) Reduced requirements to comply with customs documentation on imports;
- (iv) A specially provided economic infrastructure, and:
- (v) Subsidized utilities.

All this are aimed at ensuring that Namibia becomes an attractive destination for foreign investors. With success in investment, it is expected that economic growth will follow. This in line with Ministry of Trade responsibility of promoting

³⁴ Ibid.

³⁵ Ministry of Trade and Industry: Namibia's Export Processing Zone Programme, 1 February 1996.

³⁶ Ibid.

the growth and development of the economy through the formulation and implementation of appropriate policies to attract investment, increase trade and develop and expand the country's industrial base.

It is argued here that with a healthy and investor friendly environment as obtained currently in Namibia, procurement practices are enhanced and greater benefits can be derived for the enjoyment by the broader masses of the Namibians. Hence the postulate here is that a conducive legal and investment and economic atmosphere is imperative for benevolent public procurement.

(b) The Tender Board of Namibia: Background.

Before independence tenders were administered by the South West Africa Tender Board established under Section 26(a) of the Finance and Audit Ordinance, 1926 (Ordinance 1 of 1926).

The Tender Board of Namibia was established in 1996 by the Tender Board Act, Act No. 16 of 1996, Section 2(1)³⁷. In accordance with Section 20 of the Tender Board of Namibia Act, Tender Board Regulations were gazetted in 1996.

³⁷ On the date of commencement of the 1996 Act, the South West Africa Tender Board established under section 26A of the Finance and Audit Ordinance, 1926 (Ordinance 1 of 1926), ceased to exist and from that date a reference in any law or otherwise to such board have been construed as a reference to the board established by 1996 Act of the Tender Board of Namibia.

Similarly in accordance with the same section of the same Act, Tender Board Code of Procedures was gazetted in 1997. Prior to independence, the majority of the Namibian population was not familiar with the Tender Board, therefore they did not benefit from the tendering process.

In the past, the Tender Board was heavily influenced or affected by the Administration of whites, which made tenders less transparent to the entire Namibian population and the outside world. However, the promulgation of the Act set in place the guidelines of tendering, which improved the tendering process. To ensure that the tender process is carried out fairly and transparently, the Act states in Section 11(b) “that tenders shall be published by the Board once in the Gazette and at least once in each of the newspapers contracted by Government.” The principles that underpin the tendering process are contained in Section 15(2) (a) and (b)³⁸.

The Act, the Regulations and Code of Procedures, are the three instruments, which have made it possible for qualifying business people, (Namibians and Foreigners) to have access to tenders, under Section 7(1) (a) of the Act³⁹.

³⁸ The Board shall not consider a tender unless-

(a) the tender complies with all the characteristics, terms, conditions and other requirements set out in the title of tender; or

(b) if the tender does not so comply, the non-compliance consist in the opinion of the Board of a minor deviation that does not materially alter or depart from such characteristics, terms conditions or other requirements.

³⁹ The Board shall on behalf of the Government conclude an agreement with any person within or outside Namibia for the furnishing of goods or services to the Government or for the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government or for the dispose of Government property.

Based on the context of the normative approach, the Government has a responsibility to ensure that its procurement policy supports its overall economic objectives and serves as an instrument for attaining those objectives. One of the key strategic elements in Government therefore is to create employment and income generation through the promotion of small, medium and micro enterprises.

The colonial and apartheid epochs in Namibia left the country with an abhorrent dualism in the socio-economic sphere. The country therefore ranks amongst the highest in the world with the widest disparity in resources distribution⁴⁰.

The role played by Government in procurement would enable Namibia to use its purchasing power to attain specified socio-economic objectives. However, in striving to attain its objectives, Government must also ensure that such a procurement policy subscribes to international best practice and reinforces the principles of good governance.

It has been observed that governments in general encourage certain activities by buying only from companies that engage in those activities that would enhance the achievement of the stated or desired objectives.

⁴⁰ The Gini Coefficient for Namibia is 0.7.

New York City⁴¹ for example, buys payroll-processing services from banks that make investments in low-income neighbourhoods, and Los Angeles gives preference to contractors who provide day-care facilities. Many governments set aside a percentage of their procurement for minority-owned firms or small business. Government procurement policy can have an enormous impact; occasionally, it creates an entire industry. The federal government of the USA created the computer and semiconductor industries by funding the development of the computer for military purposes during and after World War II, then asking for smaller and smaller units to put into its ballistic missiles and space vehicles. The Tender Board also deliberates and causes action to be taken on general matters relating to the procurement system of the government and the formulation and implementation of socio economic policies and strategies of the Government, such as: Price Preferences; targeted allocations; General requirements relating to employment; and Small and Medium Enterprises.

Price Preferences⁴² – The Tender Board gives effect to the price preference policy⁴³ of the Government to redress social, economic and educational

⁴¹ David Osborne and Ted Gaebler (1992) Re-inventing Government: How the Entrepreneur Spirit is Transforming the Public Sector, page 337.

⁴² ITC 2000, page 103, describes this issue the same way it obtains in Namibia. Preferences work as follows. Suppose that a large firm offers a price of 100 and an SME offers a price higher than 100 ($1 + y\%$) for the same item. The government will purchase the item from the SME, despite the higher price, if it has established $y\%$ as a margin of preference in the procurement. For purposes of transparency, the invitation to tender will clearly state this margin of preference as well as the criteria for its application by the procuring entity.

⁴³ Gatt 1994, Article III: 8 (a) specifically excludes procurement by Governments of goods for their own use from the application of the national treatment rule. On the contrary, however, GPA Article III requires purchasing entities to extend to imported products, services and suppliers national and MFN treatment. Thus preventing them from giving price or other preferences to domestic suppliers and from discriminating among outside supplying countries. Namibia is not bound by the GPA provisions since it is not a signatory to GPA..

imbalances in a democratic society and to encourage industrial and commercial interest in Namibia as stipulated in the Tender Board Regulations.

The Minister of Finance is empowered by the Tender Board Act to make the Tender Board Regulations⁴⁴. The Regulations provide the formula to be used to determine the tender price of a qualifying tenderer. Annexure B of the Regulations further provides the format under which said information is to be submitted to the Tender Board by the tenderers.

The price preference scheme is thus a tool used by the Board under the authority of the Tender Board Act to meet a major Government objective of economic development for the people of Namibia. The increasing number of local tenderers that successfully participate in the tender process and the number of new as well as the number of locally owned companies that are being established, and many of them solely for the purpose of tendering for Government tenders is an indication that the Tender Board has made great strides in meeting this objective.

Tenderers can qualify for price preferences as manufacturing companies that utilize local products, Namibian registered companies, small scale enterprises to

⁴⁴ Section 20 of the Tender Board of Namibia Act 1996, states that: The Minister may make regulations not inconsistent with the provisions of the Act.

name a few of the categories. The Tender Board further awards price preferences to companies that decentralize their activities to communal areas.

Targeted allocations – In a further attempt at implementing the policies of the Government and in this case that of decentralization of development the Tender Board has several tenders that are targeted at companies and/or persons living within the area where the service is to be rendered. Such tenders include but are not limited to, construction, catering, refuse and waste removal. Such persons or enterprises would be small-scale enterprises and would be strongly considered for the award of the tender.

A further strategy aimed at ensuring that more companies and/or persons benefit from Government tenders is a condition inserted in tender specifications limiting the award of the number of items/units for certain tenders per tenderer. Meaning, a tenderer would be limited to a certain number of regions/units or items per tender. The tenders where this condition is applicable are catering tenders for schools, hospitals, clinics and security service tenders.

Functions, objectives and Practice:

The Tender Board Act covers the functions and powers of the Board. The Chairman of the Board is the Permanent Secretary of the Ministry of Finance under which the Tender Board Secretariat is affiliated.⁴⁵

The Act also covers the time and places where Tender Board meetings shall be held as determined by the Chairman. The Act also covers the functions and restrictions of the Secretariat.

The objective of the Tender Board is to develop a healthy tendering environment and to make sure Government funds are spent responsibly. It also ensures that the procurement of goods and services adheres to the Treasury Instructions and is in the best interest of the State.

A main function is to **regulate** the procurement of goods and services⁴⁶. Other functions include the lettering, hiring, acquisition and granting of rights. Tender Board of Namibia also regulates the disposal of Government Property.

⁴⁵ Section 3(1) (a) of the Tender Board of Namibia Act.

⁴⁶ Section 3(1)(b) of the Namibian Tender Board Act, 1996.

CHAPTER FOUR

PUBLIC PROCUREMENT IN THE CONTEXT OF INTERNATIONAL LAW:

ARE DEVELOPING COUNTRIES LEFT IN THE COLD?

(a) Position of International Law on Public Procurement

The law relating to public procurement is a matter which has recently gained prominence.⁴⁷

Like investment transfer and trade in services, government procurement has been a sector in which those negotiating the General Agreement on Tariffs and Trade (GATT)⁴⁸ did not get involved. However, that position changed with the historic negotiation in 1979 during the Tokyo Round of the GATT Agreement on Government Procurement (referred to as the Government Procurement Agreement or GPA), to which adhesion was optional rather than mandatory for contracting parties to GATT.

⁴⁷ John A. Asher, General Editor's Preface, in *EC Public Procurement Law*, by Christopher Boris, Longman, 1997, page X.

⁴⁸ Article III of basic GATT, which establishes the General principle of national treatment reads as follows at paragraph 8 (a): "The provisions of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale." Similar or with a view to use in the production of goods for commercial resale exclusion of government procurement is set forth in Article XIII of the General Agreement on Trade in Services (GATS).

The Uruguay Round, which culminated in the 1994 Marrakesh Accords that transformed the GATT system into the World Trade Organization (WTO), also propelled the multilateral trade liberalization process further into government procurement. The GPA now covers procurement of construction and services in addition to goods.

The Purpose of GPA is to further open up government procurement markets to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

Discussions on government procurement were initiated by Organisation for Economic Cooperation and Development (OECD) in the 1960's, these eventually led to a multilateral agreement, on rules of public procurement to be negotiated under GATT auspices in the late 1970's. The two basic principles governing the GPA are Most Favored Nation (MFN) and national treatment (Art. III). The former prohibits discrimination between foreign products; the latter prohibits discrimination between foreign and domestic suppliers.

Formally there are two Agreements on Government Procurement. The first was negotiated during the Tokyo Round (1973-79) and entered into force on 1

January 1981. The second was negotiated in parallel with the Uruguay Round (1986-94) and entered into force on 1 January 1996.

(b) Historical Background: From GATT to WTO

The treaty establishing the WTO was the culmination of over fifty years of effort toward the development of an international institution to govern and discipline world trade. These efforts begin with the Bretton Woods Conference of 1944, where the Allied leaders agreed to create three post-war institutions: the World Bank, the International Monetary Fund and the International Trade Organisation (ITO). Although efforts to create the ITO proceeded to the point of a draft charter, the US Congress refused to accept it. As a consequence, the GATT – conceived as a temporary measure – remained in force for nearly fifty years.⁴⁹

In 1946, the United Nations Economic and Social Council (ECOSOC) was established. At the first meeting of ECOSOC, the United States called for a “United Nations Conference on Trade and Employment” to draft a charter for an International Trade Organization and pursue negotiations for reductions in import tariffs. The US tabled its famous “Suggested Charter” for an ITO, which formed the basis for the ensuing negotiations. Articles 8 and 9 of the US draft

⁴⁹ John A Jackson and Alan Sykes, *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, page 2.

charter for the ITO subjected government procurement to the MFN and national treatment disciplines.

b (i) The Tokyo Round Negotiations

The limited initial scope of the GPA reflected the tentative and partial steps with which the multilateral trade liberalization process advanced onto the procurement field⁵⁰. It has been noted that much attention was devoted to the question of differential treatment for developing countries. Developing nations were initially convinced that government procurement was an area where special and differential treatment was feasible and appropriate.

Special provisions in the GPA attempted to provide such differential treatment. For instance, developing countries could ask for limited derogations from national treatment obligations; benefits of the Agreement could be extended to least-developed countries not parties to the Agreement; government procurement subject to tied-aid to developing countries were excluded from the application of the Agreement as they were in the OECD Instrument. But this was not sufficient.

⁵⁰S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in : Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999, page 463.

The threshold of Special Drawing Rights⁵¹ (SDR) 150,000 was too high and the offers of developing countries were not of any interest to the developed countries. Only Hong Kong and Singapore ended up signing the Agreement (Israel joined later), although countries such as India, South Korea, Nigeria, and Jamaica participated actively in the negotiations⁵².

b (ii) The Uruguay Round

The Uruguay Round, which culminated in the 1994 Marrakesh Accords that transformed the GATT system into the World Trade Organization (WTO), also propelled the multilateral trade liberalization process further into the sphere of government procurement⁵³.

That round resulted in a substantial expansion of the scope of the GPA in 1994. The GPA now covers procurement of construction and services in addition to goods, and sub-central authorities (e.g. municipalities, regional councils and parastals) now fall within the ambit of the negotiated coverage of GPA, and monetary thresholds triggering applicability have been lowered.

⁵¹ A supplemental monetary reserve asset created in 1969 by the International Monetary Fund.

⁵² S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in : Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999, page 465.

⁵³ Ibid.

(c) Interests of Developing countries and Possible Reasons why they are not Signatories to GPA

(i) Interests

Since the entry into force of the agreement establishing the WTO, it has become clear that many governments and civil society groups in developing countries have been disappointed with the outcome of the implementation of certain WTO agreements, specifically in terms of market access payoffs⁵⁴.

From the perspective of developing countries' interests it was further noted that the ability to deliver results, which however, depends in large part on a particular hurdle – the ability to enforce government policy and monitor and audit programmed effectiveness, constitutes a serious disincentive⁵⁵.

Moreover, in some countries there may be a shortage of “human capital of capitalism – the legal, managerial, economic, accounting, statistical capacity required capacity to effectuate and operate a market economy and from a

⁵⁴Hoekman et al., in *Development, Trade and the WTO*, 2002, page 414, noted that developing countries must ensure that the global rules negotiated in multilateral bodies support the development process. One message that emerges strongly from recent research is that the traditional “one fits all” WTO approach is not necessarily appropriate in areas where countries lack both the experience and the critical institutional development needed to apply proposed rules.

⁵⁵ J.J Laffont, (1998) *Competition, information and development*, in 1998 Annual World Bank Conference on Development Economics, World Bank, 1998.

public sector perspective to regulate or otherwise address its, dysfunction and limitations effectively”⁵⁶.

In this regard, this issue has been properly contextualized as it was said that: “for a good 40 years after World War II, most developing countries did not perceive the GATT as a friendly or fruitful institution for promoting their interests. Inward-oriented industrialization and nationalist ideologies of development prevailed, turning trade relations into the crux of the North-South debate. Involvement in the GATT reflected these preferences: developing countries adopted a “passive” or “defensive” attitude, refraining from significantly engaging in the exchange of reciprocal concessions. Moreover, many developing countries were not members, and among those that were, many failed to maintain official representation in Geneva”⁵⁷.

(ii) General Reasons

In principle there could be some diversion in countries, which have followed the practice of permitting some foreign bidding, but with a price advantage for national bidders; by receiving national treatment, other members of the agreement will be placed at an advantage relative to non-members.

⁵⁶ M.J. Trebilcock, *What makes poor countries poor? The Role of Institutional Capital in Economic Development*, 1996.

⁵⁷ D Tussie and Miquel F Lengyel, *Developing Countries Turning Participation into Influence*. In B Hoekman et al, *Development Trade and the WTO*, IBRD, 2002, page 485.

The new agreement, however, is also intended to encourage more developing countries to join, apparently principally by providing assistance in analyzing the benefits to a particular country of joining.

A number of hypotheses are suggested why membership of the GPA has remained limited. There are valid economic rationales providing potential justifications for the pursuit of procurement practices that are discouraged if not prohibited by the Agreement. Information and contract compliance considerations may imply that procuring entities can reduce their costs by choosing suppliers that are located within their jurisdiction.

If foreign firms have market power and are lower cost producers than local competitors, discrimination in favour of local industry may also be welfare improving (cost reducing). More important may be political economy factors. Non-members may perceive that the benefits of joining are too small – e.g. export opportunities are too small to shift the political balance in a country in favour of liberalizing access to domestic procurement markets.

Domestic firms may benefit importantly from procurement favouritism, and therefore have much more powerful incentives to oppose a change in the status quo than taxpayers have to push for reforms. Yet another possibility is that

external constraints or the specific characteristics of the procurement process make membership unattractive for many developing countries

It may also be that countries with open procurement regimes consider the costs of participating in the GPA to be too high because it would involve the imposition of costly bureaucratic processes. Governments are generally bound by the “principle of democracy” which implies that all “domestic” taxpayers must have equal opportunities to bid⁵⁸. Foreign suppliers are not taxpayers, giving governments a motive to exclude them in instances where the number of domestic suppliers is greater than the minimum needed for least cost procurement.

The reasons that can be advanced as to why developing countries have not acceded to the GPA can only be speculative, because obviously every country has its own reasons. That notwithstanding it is still possible to proceed with seeking some of the explanations within the context of the history of GATT negotiations. In addition, factors such as: accession requirements; membership competitive capacity; socio-economic considerations; reciprocity

⁵⁸ S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in : Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999,...

and non-reciprocity issues, the details of which follow, further explain the relative non-accession of developing countries to the GPA:

- Accession

Any government which is a Member of the WTO but which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties⁵⁹.

Accession to the GPA therefore involves a negotiation between the interested government and existing members on the list of entities and services that will be scheduled. It is submitted that this provision makes it difficult for developing countries to negotiate with individual countries, given their limited human and financial resources. Hence, this can be discouraging to developing countries.

- Inherent Limitations

Membership is limited, as are the entities and sectors liberalized by the GPA⁶⁰. All signatories have made much derogation to their concessions. Awarding procedures themselves still allow considerable flexibility to covered entities. Large loopholes remain. For example, the GPA does not significantly discipline

⁵⁹ Article XXIV: 2 of GPA.

⁶⁰ Signatories may explicitly exclude procurement made by entities if there is competition. Thus, e.g., Japan has stated in its Annex that "This Agreement shall not apply to contracts which the entities award for purposes of their daily profit making activities which are exposed to competitive forces in markets".

existing procurement legislation that allows utilities to award by negotiation with a single candidate of their choice or to award without prior call.

- **Tariff Barriers**

As part of global policy responses to imbalances in global economic relations, special and differential treatment needed to be provided to developing countries. This treatment was to include the elimination by developed countries of tariff barriers to exports of developing countries without requiring reciprocal treatment by the latter.⁶¹

- **Nonreciprocal Treatment**

The concept of nonreciprocal trade had its origin in the broader principle of special and differential treatment for developing countries. It was argued, primarily within the United Nations Conference on Trade and Development (UNCTAD), that trade on a most favoured nation (MFN) basis ignored unequal economic realities among trading nations, especially between developing and developed ones, in terms of stages of development, factor endowments, size of markets, efficiency and diversification of production structures.⁶²

⁶¹ Making Bonapas Francis Onguglo, Developing Countries and Trade Preferences, In M R Mendoza et al Trade Rules in the Making : Challenges in Regional and Multilateral Negotiations, Brookings, 1999, page 110.

⁶² Ibid, page 110.

The beneficiaries of nonreciprocal preferential schemes have to meet certain conditions, often non-economic, to be designated as such and to maintain their beneficiary status. For example, the conditions demanded by the United States for designation as Caribbean Basin Initiative and Andean Trade Preference ACT countries provide that a country will not be designated as a beneficiary if it is a communist country; has allowed the expropriation or nationalization of the property of a citizen of the United States or a corporation owned by the United States; has provided preferential treatment of the products of another developed country that could negatively affect trade with the United States.⁶³

**(d) A Model Law on Procurement – Developing Countries
do not have to Re-invent the Wheel.**

Parallel to the process of greater multilateral and regional attention to government procurement, today an increasing number of countries are undertaking modernization and reform of national public procurement rules and systems. Such national efforts are inspired by domestic demands for greater economy and efficiency in procurement. There is also beginning to be a broader view of how economic development benefits can be derived from a transparent, competitive procurement system that helps to properly manage and channel

⁶³ Ibid.

public spending and investment and curb corruption and is open to rather than insulated from greater domestic as well as international competition⁶⁴.

In a case of striking historical coincidence and good fortune, just at the time that the economic and political changes were taking place in Eastern Europe and the former Soviet Union, and the transition countries were beginning to think about procurement, the United Nations Commission on International Trade Law (UNCITRAL) happened to be preparing the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁶⁵.

A summary of the element of the UNCITRAL Model Law on Procurement includes: wide representation and participatory process; wide scope of application; objective qualification criteria and prequalification proceedings.

Countries should however beware that the following are not covered in the Model Law; procurement planning; contract administration; conflict of interest. Reports received by ITC from several African countries suggest that in many countries there is a need and a desire to modernize the legal framework for public procurement – even in some States that have recently enacted amended legal instruments. According to the data, modernization would span various

⁶⁴ Ibid, page 113.

⁶⁵ S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in : Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999, page 472.

phases of the procurement cycle, including the planning, selection or competition, and the contract implementation and administrative phases. In some cases, there is already an awareness of the utility of the UNCITRAL Model Law on Procurement in the reform process, and the use of the Model Law⁶⁶.

The UNCITRAL Model Law is therefore not relevant solely to one or the other region or level of economic development; it codifies what are widely recognized as a set of minimum essential procedures for transparency, and accountability. For that reason the Model Law may be used by countries throughout the world to measure the adequacy of existing procurement rules and to serve as a model for national procurement rules and to serve as model for national procurement law reform that can be used to implement in national law the principles and procedure mandated by regional and multilateral procurement arrangements⁶⁷.

In a sense the model law was able to come to the rescue of those countries by providing a template on which to base a modern, market-orientated procurement law. It is now being used in virtually all of those countries as they develop their procurement legislation and practices.

⁶⁶ Report on the Proceedings of the Conference on Public Procurement Reform in Africa, Abidjan, 30 November – 4 December 1998, page 72.

⁶⁷ Ibid.

Unfortunately in this respect the Model Law provides little on aspects that concern socio economic policy – therefore if Namibia opts for the Model Law it will have to take that into account.

Namibia for example can benefit or take advantage of the requirement that states that, if an enacting country opts for social-economic criteria, the permitted types of criteria should be limited to those identified in the statutes or regulatory instrument.

CHAPTER FIVE

COMPARATIVE ANALYSIS – APPLICABILITY TO NAMIBIA

(a) Some Aspects of The GPA of WTO And How They Compare With The Tender Board of Namibia Act, 1996.

It is important to underline that GPA is not applied indiscriminately for example, Articles III of the basic GATT, which establishes the general principle of national treatment, reads as follows at paragraph 8 (a):

“The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.”

An analogous exclusion of government procurement is set forth in Articles XIII of the General Agreement on Trade in Service (GATS)⁶⁸.

⁶⁸ Therefore, the GPA sets forth minimum procedural standards with respect to steps of the selection process, such as drafting objective, performance-based, and non-discriminatory technical specifications (Article VI); using nondiscriminatory criteria for assessment of essential qualification (Article VIII); using open or selective tendering procedures, at the minimum, as a norm (Article VII); using the required contents in solicitations (Article IX); using competitive solicitation procedures in restricted tendering (Article X); adhering to minimum time frames for the submission of tenders (Article XI); using the required contents and forms of transmission for tender solicitation

Non-discrimination

The non-discrimination obligations apply irrespective of the customs treatment of the products or services that affect the procurement contract. That is, they “shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement” ⁶⁹.

Parties to the GPA are required to ensure that covered entities do not discriminate between locally-established suppliers “on the basis of degree of foreign affiliation or ownership” or on the basis of the country of production of the good or service being supplied.” ⁷⁰

Tendering Procedures

documents (Article XII); using standard procedures for the submission, receipt, and opening of tenders and awarding of contracts (Article XIII); dealing with information on outcome of procurement proceedings (Article XVIII); and adhering to standard bid challenge procedures (Article XX).

⁶⁹ Article III: 3 of the GPA.

⁷⁰ Article III: 2 of the GPA.

The three methods that may be used by signatory countries according to GPA are: open, selective and limited⁷¹. The first two are the preferred methods. Under open tendering procedures any interested supplier may submit a bid in response to a call for tenders. Selective tendering procedures involve pre-qualification. Limited tendering procedures allow an entity to contract specific suppliers but only on condition that there was no response to a call for tenders.

In comparison with the Namibia public tender procedures, the open tender system seems to be the preferred method. Therefore it is required that all tenders be advertised in the Gazette and in each newspaper contracted by the Government⁷². Although the Namibian Tender Board Act is silent with regard to international competitive bidding, the practice has been that foreign contractors and service providers have been participating in the tendering process. This is evidenced by the presence and dominant role played by the South African and Chinese construction companies in the public sector tenders.

Another method used in Namibia is exemption which is applied only if⁷³:

- (a)** the estimated value does not exceed N\$10 000.00 (ten thousand),
- (b)** the opposite party to an agreement is a statutory body,
- (c)** the Tender Board in any particular case for good cause deems it impracticable or inappropriate to invite tenders.

⁷¹ Articles VII and XIV of the GPA.

⁷² Section 11 of the Tender Board of Namibia Act, 1996.

⁷³ Section 17 of the Tender Board of Namibia Act, 1996.

- Enforcement

An attempt is made to reduce the scope for circumvention by imposing deadlines; prohibiting splitting of tenders and establishing detailed rules on the contents of tender documentation⁷⁴. This is necessary as there are attempts by countries to split contracts to fall below the threshold value, abuse of technical specifications, short deadlines for submission of tenders non-publication of calls for tender. Again here the Tender Board Namibia Act is clear as to the manner in which tenders should be called as noted already above.

Tender Board of Namibia Act⁷⁵ further goes to the extent of specifying the information that must be contained in the tender. This includes: proper instructions to tenderers; technical and quality characteristics; currency for tender price; etc.

- Accession

GPA⁷⁶ states that: “Any government which is a Member of the World Trade Organization but which is not a Party to this Agreement accede to this Agreement on terms to be agreed between that government and the Parties”.

⁷⁴ Article II : 3 of the GPA.

⁷⁵ Section 14 of the Tender Board of Namibia Act, 1996.

⁷⁶ Article XXIV (2) of GPA.

However, special provisions are contained in Article V in respect of special and differential treatment for developing countries. These require development objectives to be taken into account during accession negotiations.

In this regard, Namibia or even South Africa for that matter if they wished to accede to the GPA could use the huge social disparities; sharp dualism in the economy; HIV/AIDS pandemic; as reasons for qualifying for differential treatment. Therefore, they may not have to open their procurement in all spheres for those reasons.

- Exceptions

In addition to the fact that countries can qualify for special and differential treatment during accession negotiations, there are legal grounds contained in Article XXIII that can justify action by signatories that is inconsistent with the Agreement. National security is one other includes measurers: to protect public morals order or safety, necessary to protect intellectual property.

(b) Some Elements of ADB Procurement Rules

The ADB is a regional multilateral development bank engaged in promoting the economic development and social progress of its Regional Member Countries

(RMC). The Bank, was established in 1964 (in Khartoum), started operating in 1966 in Abidjan. Its shareholders are the 53 countries in Africa as well as 24 countries in the Americas, Europe and Asia.

In order to place international procurement into perspective particularly in the context of multilateral financial institutions, the ADB procurement system is discussed.

An important source of practical information about sound rules and practices that is helping to inform national reform efforts is the procurement guidelines of multilateral lending agencies, in particular the World Bank, as well as the regional institutions such as the African Development Bank. The guidelines have been revised over the years to reflect the accumulated experience of these institutions, and they reflect principles and procedures that promote competition, transparency, and the other fundamental procurement policy objectives.⁷⁷

Therefore, developing countries in general and Namibia in particular can benefit from these rich experiences and use some of these guidelines in their domestic circumstances. Moreover, Namibia as a young country with lack of experience in

⁷⁷ S A Sahaydachny and D Wallace, Junior, Opening Government Procurement Markets in: Miquel R. Mendota, et al: Trading Rules in the Making: - Challenges in Regional and Multilateral Negotiations, 1999, page 465. Examples of issues on which there is substantial common ground include scope of application, broad solicitation requirements, non-discrimination principles, qualification assessment procedures, transparency requirements, variety of procurement methods, , essential elements of invitations and other solicitation documents, objective description of procurement object, public bid opening procedures, notice of contract award, record requirements, and review procedures.

the procurement areas needs to benchmark its procurement practices and regulations to international organizations with long experience, in order to draw some benefits.

The Agreement establishing the ADB requires that the proceeds of any loan be used with due attention to considerations of economy and efficiency⁷⁸.

Therefore, as a matter of policy, the Bank requires that there should be international competitive bidding for the procurement of goods and works needed for the implementation of projects financed with loans from the Bank, except where the Board of Directors decides otherwise. According to the Rules of Procedure for Procurement of Goods and Works⁷⁹, of the ADB, the procurement policy of the bank is generally guided by four basic considerations:

- (a) the need for economy and efficiency in the implementation of projects including the provision of related goods and services.

⁷⁸ The Bank shall make arrangements to ensure that the proceeds of any loan made or guaranteed by it are used only for the purpose for which the loan was granted, with due attention to considerations of economy and efficiency". See Agreement establishing the African Development Bank, Article 17.1(h); see also Agreement establishing the African Development Fund, January 1981, Article 15, paragraph 5. Reference is made here also to the requirements of Article 38 of the Agreement establishing the African Development Bank.

⁷⁹ By virtue of Article 31 (4) of the Agreement Establishing the African Development Bank, the Board of Governors adopted the General Regulations of the African Development Bank and the Rule of Procedures of the Board of Governors of the African Development Fund at its First Annual Meeting held 4-7 November 1964 at Lagos.

- (b) the Bank's interest as a cooperative institution in giving all eligible contractors and suppliers from developed and developing countries equal opportunity to compete in the supply of goods and works by the Bank.
- (c) the Bank's interest, as a development institution in encouraging the development and participation of contractors and suppliers from regional member countries of the Bank; and
- (d) the importance of transparency in the procurement process.

In this context it means that generally companies from developing countries have to compete equally with companies from advanced countries.

Methods used by the African Development Bank in Procurement includes:⁸⁰

International competitive bidding

A method for procurement of goods and services requiring notification to the international community. Its objective is to provide potential bidders from all eligible member countries with timely and adequate notification of a borrower;

⁸⁰ The African Development Bank: Rules of Procedure for Procurement of Goods and Works, 2000, pages 37-41.

requirements and an equal opportunity to bid; and it is carried out by open advertisement addressed to suppliers or contractors inviting them to bid.⁸¹

Limited International Competition

Is essentially an international competitive bidding by direct invitation without open advertisement, it may be an appropriate method where:

- (i) the contract values are small, or
- (ii) there are only a limited number of suppliers or,
- (iii) other exceptional reasons may justify departure from full international competitive bidding procedures.

National Competitive bidding

Is the competitive bidding procedure normally used for public procurement in the country of the Borrower, and may be the most efficient and “econoprocuring” goods or works which by their nature or scope, are unlikely to attract foreign competition.⁸²

⁸¹ Ibid.
⁸² Ibid.

Force Account

Force account, that is, construction by the use of the Borrower's own personnel and equipment, may be the only practical method for constructing some kinds of works.⁸³

Whenever it is evident that force account may be the most efficient and economic way of executing certain works the Bank will not object to the Borrower doing so.

The Bank, however, before authorizing the use of this procedure, must satisfy itself that local organs are adequately staffed, equipped and organized to carry out the works expeditiously and at a reasonable cost.

Procurement under BOT and Similar Private Sector Arrangements

Where the Bank is participating in financing the cost of a project procured under a BOO/BOT/BOOT⁸⁴ or similar type of private sector arrangement, either

⁸³ Ibid

⁸⁴ BOO :Build, Own, Operate.

BOT: Build, Operate, Transport.

BOOT: Build, Own, Operate, Transport.

of the following procurement procedures shall be used, as set forth in detail in the Appraisal Report, the President's Memorandum and the Loan Agreement.

Community Participation in Procurement

Where, in the interest of project sustainability, or to achieve certain specific social objectives of the project, it is desirable in selected project components to:

(i) call for the participation of local communities and/or nongovernmental organizations (NGOs), or

(ii) increase the utilization of local know-how and materials, or

(iii) employ labor-intensive and other appropriate technologies, the procurement procedures, specifications, and contract packaging shall be suitably adapted to reflect these considerations, provided these are efficient.

(c) **How The Namibian Procurement System Conforms with International Standards**

It is conventionally accepted that an efficient public procurement system is based on the following main features of the UNCITRAL Model Law on Procurement:⁸⁵

- ❖ Information about procurement opportunities;
- ❖ Information about rules of the game (for private as well as public sectors);
- ❖ information about procurement requirements (what, who, when and where);
- ❖ information about what happened in the procurement proceedings (public bid opening, notice of contract award, record of procurement proceedings, debriefing of failed applicants for prequalification); and
- ❖ restriction of negotiation, and two-envelope system and transparent submission of bids.

The following features of the Namibian public procurement practices are partly a measure of the extent of conformity with the international requirement as seen in the foregoing paragraph:

⁸⁵ Simeon Sahadachny, Elements of Modern Legal Framework , in Report of the Proceedings of the Conference on Public Procurement Reform in Africa, 1998, page 54.

- ❖ Namibian public procurement tenders are advertised in the public media in order to allow every potential tenderer to have access to the information.⁸⁶ Section 11(b).
- ❖ Namibian government tender evaluation procedures are disclosed and unsuccessful bidders are informed of reasons why they were unsuccessful.⁸⁷ Section 16(1) (a).
- ❖ Bids are opened in public.⁸⁸ Section 15(7).

These features are some Namibia's test of conformity. Namibia is arguably not far from conforming. Additional safeguarding measures inherent in the Namibian tender system include:

Efficiency:

Removal of unnecessary layers of approval, etc. Such initiatives require extensive efforts to streamline procedures and make them well understood by all parties concerned with the procurement process.

Non-Discrimination:

⁸⁶ Section 11(b) of the Tender board of Namibia, Act 1996.

⁸⁷ Section 16(1)(a) of the Tender board of Namibia, Act 1996.

⁸⁸ Section 15(7) of the Tender board of Namibia, Act 1996.

Equal and fair treatment to compete for contracts and equal treatment of bidders through the procurement process should be afforded all. However, in a developing country like Namibia where a lot of fledgling businesses exist and makes it very difficult for them to compete against giant international corporations the government is sometimes forced to give some preferences. Where such preferential treatment is given it is clearly spelt out and the conditions made very clear to all the bidders⁸⁹.

Accountability:

Disciplinary measures for intentional or negligent infraction of the rules applying to public procurement are put in place within the ambit of the Public Service Act, and general laws applicable in the country

Economy:

The economic objectives are to ensure that value-for-money purchases are carried out. Procurement should be done at the right time, for the right amount and the right quantity.

⁸⁹ Section 15(g) states that: In comparing tenders, the Board shall give effect to the price preference policy of Government to redress social, economic and educational imbalances in a democratic society and to encourage industrial and commercial.

(d) Some Weaknesses and Proposed Changes to the Namibian Tendering System.

It is apparent that the arbitration and appeals procedures are not well developed and spelt out. We have observed that monitoring procedures need some beefing up.

Therefore, there might be a need to amend the Tender Board of Namibia Act and Regulations. This is normally done in many countries, with outdated laws and regulations. The Tender Board Act was drafted before the Affirmative Action Act, 1998, the Labour Act, 1992 both under the Ministry of Labour and Policy on Small Business Development. Consequently, the Tender Board Act is silent about these policies and therefore it becomes difficult to enforce or require from companies that implementation of affirmative action and Labour Laws are essential, for consideration of their tenders.

In order to address these issues the Tender Board of Namibia Act and Regulations need to be harmonized with those issues and policies. Possible areas of change are as follows:

1. There have been several legal challenges to the Tender Board decisions⁹⁰. Hence in the absence of dispute or arbitration procedures challenges to the Tender Board decisions have been directed to the courts of law and this has proven to be very expensive. Thus it is suggested that dispute resolution and arbitration procedures be included in any new legislation.

2. A suggestion can also be made that, any dispute, controversy or claim arising out of or relating to a contract, be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. In the same spirit a further suggestion is that the parties to the dispute should agree that the appointing authority shall be the International Court of Arbitration of the International Chamber of Commerce of Paris.

This suggestion is not oblivious of the fact that the route of UNCITRAL Arbitration Rules could be too costly, and time-consuming, particularly if the dispute involves a local company and also where it is known that the domestic courts are competent and have the credibility and jurisdictions to handle the matter. However, where the dispute involves foreign countries and entities, it is

⁹⁰ (a) Tender Board vs VO Security (1998) case: (T) 1. V O Security had argued that their bid was not approved because of unsubstantiated and ill-founded technical grounds. They therefore requested the decision of the Tender Board to be declared contrary to the rules of natural justice and unconstitutional decision. The decision of the Board was rescinded due out of court settlement. Consideration having been given to the high cost and time involved.

(b) Tender Board vs JMS (1999) Case A 312/99– Plaintiff argued that the Tender Board did not apply its mind when making the decision to award the tender and that the Tender Board acted *mala fides* or capriciously. The judge found none of these allegations valid and therefore decision of Board was upheld by the court.

important for transparency, objectives and international image to go this route. Future Procurement Legislation could lay down the specifics.

3. It is stated already that the rationale for public procurement is not limited to merely the economics of a proposed transaction/contract. But there are much broader considerations amongst others; empowerment, socio-economic advancement, ethical, good governance and technological development. Therefore, incompetent or disreputable suppliers should be debarred from participating in public procurements. However, this is a serious sanction which calls for lawfully considered procedures and guidelines to be enshrined in the Act.

4. It is now established that a state cannot invoke its internal laws to evade its international obligations⁹¹. Therefore in cases where the Tender Board of Namibia Act provisions conflict with an obligation of the Government under or arising out of an agreement with one or more other states or with an international organization, the provisions of that agreement shall prevail. Thus a section in this respect should be provided for in Tender Board of Namibia Act.

5. It is tempting to suggest that E-Commerce procurement should form part of Namibia's public procurement system, however with some hesitation no

⁹¹ See Vienna Convention on the Law of Treaties (1969), Article 27.

proposal can be made because Namibian laws have not been fully developed to govern transactions via the Internet. That notwithstanding, globalised international trade has made it imperative for e-procurement. Hence Namibia should be exhorted to amend its procurement laws, infrastructure, systems, processes and procedures in this respect if it is to take advantage of the ever increasing global trade⁹².

⁹² ITC in Improving SME access to Public Procurement: The experience of selected countries: states that "A good example how e-commerce could work for developing countries is provided by Mexico, where the Government recently initiated an Internet-based procurement system named Compranet." Geneva 2000, page 69.

CHAPTER SIX

CONCLUSION

It can safely be concluded that there are various reasons why government interferes in the market, major among others being market failures. Other socio-economic imperatives such as social justice, economic empowerment, industrialization drives, etc., are important rationales used by government to target tenders in order to meet some specific development objectives.

It has also been observed that the Namibian procurement system complies to a large extent with the accepted standards.

It is universally accepted that trade is good for countries in that because of synergy that can be had, wealth can be maximized. In this respect international public procurement should be encouraged. But other considerations of national interests, such as security, protection of infant industries and so on, have been used to justify high tariffs, resulting in adverse consequences for international trade.

The adoption of the Government Procurement Agreement by the World Trade Organization is deemed important and necessary, for it contributes to enhancing the scope of international trade law. However, accession to the Agreement has been not very successful, due to a number of constraints including, accession difficulties, inherent limitations, tariff barriers and non-reciprocal treatment.

For decades government procurement was a stepchild of the trade negotiation process. That is clearly no longer the case, as the subject is increasingly approaching, if not center stage, at least an important supporting role in trade liberalization.

It has been underscored that the trade liberalization process in the procurement fields – pioneered by the GATT Agreement on Government Procurement and the regional efforts in the EU – will continue to expand. This is certainly so with the advent of the NAFTA and the nascent moves being made in other regional integration developments.

This process will be significantly assisted by the fact that many of the same procurement reforms that are fuelled by the imperative of national economic and administrative development also help to lay the groundwork for open government procurement markets. Developing countries cannot afford to ignore

the velocity of procurement market opening because the impact on their domestic industries could prove to be considerable. In Africa in particular trade arrangements such as the Cotonou Agreement, South Africa vis-à-vis European Union Agreement, and so on have perhaps shielded many countries from the fast opening procurement market.

But the future is uncertain particularly with regard to Cotonou Agreement. The African Growth and Opportunity Act (AGOA), which so many Africans are excited about, require that African countries open their markets to USA goods and services.

For all the reasons cited above, developing countries are certainly facing a dilemma. On the one hand they have to protect their infant industries and be concerned with issues of national security; on the other hand they have to be seen to be full participants in the international trade sphere.

Hence, if they do not acquire the necessary capacity (at least in international trade law) as soon as possible, they definitely will be left in the “cold” as the rest of the world is fast globalizing. As a result of its history of political fragmentation and economic disparity, Namibia has since independence in 1990 embarked on nation and institution building. Policies of national reconciliation and affirmative action have been instated. These policies have been extended to the spheres of

public procurement as already indicated particularly with respect to preferences, open competition, provision of investment incentives and encouragement of export oriented trade through the economic processing zones regime.

Thus the pursuit of pragmatic economic, investment and procurement policies, and building of stable macro-economic and legal environments have resulted in a predictable and enabling investment environment in Namibia. It has been witnessed that due to a combination of these factors steady flow of development assistance and foreign direct investment were attracted.

Moreover, having had due regard to the various international and regional statutes, instruments and practices including those particular of WTO, African Development Bank, SADC, AGOA, has stood Namibia well as witnessed by the support it enjoys from its trading partners. However some suggestions have made to the government procurement regime including:

- (a) aligning the Tender Board Act with the Affirmative Act and the Labour Act;
- (b) aligning its arbitration rules to those of UNCITRAL;
- (c) development of dispute resolution and appeals procedures and mechanisms.

These would further strengthen Namibia's trading relation with the regional and international community and could lead to the recognition of Namibia's public procurement as fully or substantially meeting international standards.

Further work in this area could be done by others, more especially in determining which developing country(ies) have had the most benevolent public procurement laws and practices. Also work could be done in establishing the process necessary to harmonise public procurement systems within the Southern Africa Customs Union and the Southern Africa Development Community.

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