

Public Procurement Policies for Equitable Development: The Role of Trade Agreements Sub-Regional Caribbean Public Procurement Conference

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Introduction

This paper assesses regional trade agreements' procurement provisions in the context of broader development policies. The paper compares the EC-CARIFORUM government procurement provisions with other RTAs and the WTO's plurilateral Agreement on Government Procurement (GPA), in order to identify lessons for Caribbean countries. In particular, it examines the transparency and non-discrimination requirements, the thresholds and coverage, and bid challenge mechanisms. In conducting this analysis, the role of and rhetoric concerning the 'policy space' debate are also discussed with reference to government procurement reform.

The paper argues that both norms in public procurement, as well flexibilities, already exist in trade agreements. Therefore, demands for maintaining or enlarging policy space should not be allowed to conceal entrenched domestic interests that profit from the lack of effective procurement regulation at the expense of the wider society. Through effective negotiation, regional and international agreements can serve as a commitment mechanism to incorporate appropriate developmental and social policies while promoting the economic and welfare benefits of transparent and fair procurement systems.

The paper argues that transparent and competitive procurement policy should be seen not only as an important tool for good governance but as a vital element of sustainable economic and social development. Both developed and developing countries can use trade agreements as a vehicle to lock-in beneficial and domestically appropriate procurement reforms in the face of inertia and vested interests. The key challenges facing developing countries lie in the formation of internally coherent policies that are able to achieve social objectives and can be advanced within the procurement negotiations to produce beneficial outcomes.

The first part of the paper focuses on identifying the scope and strength of the EC-CARIFORUM government procurement provisions. It then compares the EC-CARIFORUM EPA to the procurement provisions in other RTAs and the WTO's GPA. The paper concludes that while the EC CARIFORUM EPA makes an essential step acknowledging the importance of good procurement frameworks in economic and social development, the provisions could be developed to introduce sound policies.

Transparency, while an important element of an efficient procurement regime, it is not enough to ensure sound purchasing decisions if the underlying system is flawed. Incorporating some element of non-discrimination into the procurement provisions introduces the competition necessary to ensure that prices are lower, choice is greater, and service improves. This will enable scarce government resources to be used better and to stretch further in meeting the needs of society.

Trade agreements can and should be used to promote procurement reform as a vital element of a country's broader development agenda. In addition to setting preferential tariffs levels and market access, these EPAs can also offer legislative push and technical assistance, by-passing domestic

inertia to serve as a commitment mechanism and restrict the use of government purchasing as an ad hoc or private resource, without coherent or mandated policy objectives.

The EC-CARIFORUM government procurement provisions: a comparative assessment

Although the EC-CARIFORUM EPA contains a chapter regulating government procurement, the preamble to the agreement omits any reference to public procurement. This is not unusual for an RTA, as most choose to set out the procurement policy goals in the procurement chapter's General Objective provision. In the EC-CARIFORUM EPA, the General Objective Article 65 *recognizes* the importance of transparent competitive tendering for economic development but with due regard being given to the *special* situation of the economies of the CARIFORUM States. This is unusual. Although many RTAs between both south-south and north-south parties have chosen not to negotiate procurement rules, the EC-CARIFORUM EPA is the only RTA that balances reforming procurement systems against the development policy within its general objective provision. For example, north-south RTAs, such as the EC-Morocco, set out reciprocal and gradual liberalisation of procurement markets as the general objective but implicitly recognise the development needs of Morocco by omitting binding timeframes or coverage requirements.

Alternatively, the US-Jordan RTA Article 9 states that:

Pursuant to Jordan's July , , application for accession to the WTO Agreement on Government Procurement, the Parties shall enter into negotiations with regard to Jordan's accession to that Agreement.'

The relatively more comprehensive agreements such as EC-Chile or US-Australia RTAs go further to state explicitly the objectives effective and reciprocal opening of procurement markets, or place non-discrimination and national treatment as general principles for government procurement. In the most comprehensive procurement agreement between Australia and New Zealand (ANZGPA), the general objective is to form a single government procurement market 'to maximise opportunities for competitive ANZ suppliers and reduce costs of doing business for both government and industry'.

Thus, in contrast to these RTAs, the general objective of the CARIFORUM EPA procurement text acknowledges the importance of transparent competitive procurement policies *and* gives due regard to the region's special situation, but does not define what this is, either relative to the EC or other developing countries. The special situation can be understood to mean that developing country economies may have priorities other than and in conflict with transparent and fair government procurement and which may take primacy over it. While this is not a novel argument, in the area of procurement reform it is a source of confusion. For when government purchases involve everything from building roads, schools and hospitals, to buying school equipment and medicine as well as defence and administrative items, the dispensability of creating sound procurement regulation is highly questionable. This is particularly true for developing countries where procurement usually accounts for a high proportion of total expenditure, for example, 4 per cent in Malawi and 7 per cent in Uganda, compared with a global average of 12–20 per cent.¹ The dual emphasis of the provision therefore expresses a fundamental policy contradiction about the role of government procurement in sustainable development policy. Any link or complementarity between transparent and fair procurement policies and sustainable development is side-stepped because the two issues are counterpoised in potential conflict rather than being seen as mutually reinforcing.

¹ OECD (2005) Development Assistance Committee. p18.

This contradictory approach is apparent throughout the chapter. For instance, while recognising the importance of competitive, transparent procurement policies, the provisions offer no legislative obligation to introduce some element of fairness or non-discrimination into government purchasing systems. The CARIFORUM EPA does not contain any binding commitments determining the eligibility criteria for those seeking to participate in a public procurement tender. Article 69 ensures that this decision remains with the procuring state. The provisions only obligate parties to ensure that their policies are made transparent and to ensure that the procurement of their procuring entities takes place in a transparent manner according to the procedural provisions set out in Article 68. These procedures relate only to the publication and dissemination of relevant procurement information.

However, a better development outcome would have introduced an element of non-discrimination without bringing in full competition. A trade agreement is a flexible enough tool to open procurement markets only to other CARIFORUM Members, thereby introducing partial competition within the region, while excluding the possibility of potentially dominant EU firms capturing CARIFORUM markets and driving out local business. In effect, this would have followed the General Objective of competition within the context of developing country vulnerabilities, rather than compromised it.

Article 67 explicitly recognises the economic importance of establishing *competitive* regional procurement markets. It provides that the signatories will ‘endeavour’ not to treat a fellow CARIFORUM supplier less favourably than another locally established supplier, nor to discriminate against a supplier of another party that has established a commercial presence in a domestic economy. Thus, there are no measures to prohibit discriminatory purchasing policies, even among the CARIFORUM parties. Article 67 paragraph 3 states that, subject to paragraph 4, each Party shall accord to the goods and services of the other Party treatment no less favourable than the treatment accorded to domestic goods, services and suppliers. However, paragraph 4 states that this is not foreseen until a decision is taken to this effect by the Joint CARIFORUM-EC Council, with no time frame envisaged. More legislative push could have been achieved if a schedule was set out, however long term. Again, this would have better balanced the development objectives of the chapter.

The application of the EC-CARIFORUM EPA provisions is restricted to CARIFORUM central government purchasing above the highest thresholds negotiated to date. As a signatory of the WTO’s GPA, the EC normally in practice includes in its trade agreements thresholds that are the same as those set out to govern access to its GPA partners in the GPA. This is standard practice for WTO GPA members although it is not universal – the more recent US agreements, for example, have negotiated thresholds that are lower than those agreed to in the WTO GPA. The Australia-New Zealand ANZGPA does not set any thresholds and all government entities are subject to the procurement obligations except those that are explicitly listed as exempt.

However, apart from the ANZGPA, most RTAs that include government procurement provisions tend to follow the WTO GPA ‘positive list’ approach, defining the coverage of the commitments during negotiations to apply only to procurements listed in Annexes to the text. This positive list system allows national governments flexibility to omit sensitive sectors and also a more incremental approach to procurement reform. Governments must define their policy objectives prior to signing the agreement. The negative list approach is more ambitious and easier to negotiate. For example, the NAFTA’s Chapter on government procurement only regulates federal government enterprises and some parastatals. The EC-Chile RTA differs for while the EC lists the federal entities covered for each EU Member State some Member States, such as Finland, use a

negative list approach at the sub-central level. For its part, Chile follows a positive list approach for both central and municipal levels.

Most RTAs and the WTO GPA prohibit government entities from imposing ‘offsets’ as a condition for award of contracts. Parties can instead choose to negotiate specific exceptions in scope or coverage of commitments set out in the agreement. Permitted measures include for instance, ‘Joint Programs for Small Business’ contained in the NAFTA establishing a committee to report on the efforts being made to promote government procurement opportunities for their small businesses.

NAFTA also initially provided that Mexico’s national oil and electric companies could set aside one half of their procurement each year for domestic suppliers for a temporary time period, and allowed local-content requirements for some turnkey construction projects. Mexico negotiated set asides for as much as 5 percent for local inputs for capital intensive projects, and up to 4 percent Mexican content for labour intensive projects. In Article 5 of the Australia-Singapore RTA, the Australian government is explicitly entitled to promote employment for significant indigenous communities. Some agreements also chose to exclude *de Plano* certain sectors; for instance, the EU-Chile RTA and the European Free Trade Agreement (EFTA) States-Chile RTA both exclude financial services. In the EC-CARIFORUM procurement provisions, the CARIFORUM governments are permitted to include offsets or any other preferential procurement policy at a domestic level because the requirements are made without prejudice to the method of government procurement used in respect of any specific procurement.

The policy ambiguity of the procurement chapter is further demonstrated in by the design of the bid challenge mechanism. The EC CARIFORUM bid challenge provisions obligate the parties to provide transparent, timely, impartial, and effective procedures enabling affected suppliers to challenge domestic measures in the context of covered procurement. In addition to providing redress, bid challenges are important self-monitoring and self-implementing mechanisms. They allow those most affected by the failure of procuring entities to correctly apply national procurement laws that give effect to the trade agreement to present their case. The bid challenge provisions in the EC-CARIFORUM agreement thus allow private parties that have participated in bidding for a state contract and have some grievance or matter they wish to raise a complaints process against to have their matter addressed officially. Importantly, private parties do not first have to petition their respective governments to initiate formal dispute settlement procedures – provided, at least, that the government has correctly implemented the trade agreement through compliant laws, or the relevant legal system allows complaints based directly on violation of the trade agreement itself.

EC-CARIFORUM EPA Article 79 Bid Challenges

- 1. The Parties and the Signatory CARIFORUM States shall provide transparent, timely, impartial and effective procedures enabling suppliers to challenge domestic measures implementing this Chapter in the context of procurements in which they have, or have had, a legitimate commercial interest. To this effect, each Party or Signatory CARIFORUM State shall establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.*
- 2. Each supplier shall be allowed a sufficient period of time to prepare and submit a challenge as from the time when the basis of the challenge become known or reasonably should have become known to the supplier. This paragraph*

does not preclude Parties or Signatory CARIFORUM States from requiring complainants to lodge their complaints within a reasonable period of time provided that duration of that period is made known in advance.

3. Procuring entities shall ensure their ability to respond to requests for a review by maintaining a reasonable record of each procurement covered under this Chapter.

4. Challenge procedures shall provide for effective rapid interim measures to correct breaches of the domestic measures implementing this Chapter.’

However, unlike in most RTAs and in the WTO GPA5, the EC CARIFORUM EPA bid challenge mechanism does not specify either the measures to be taken to correct breaches in the accord, or whether the compensation should be made available to aggrieved parties. For example, Article 55 paragraph 4 of the EC-Chile FTA is explicit that challenge procedures provide:

‘(A) rapid interim measures to correct breaches of this Title and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied; and (b) if appropriate, correction of the breach of this Title or, in the absence of such correction, compensation for the loss or damages suffered, which may be limited to costs for tender preparation and protest’.

The WTO GPA challenge procedures also state that challenge procedures shall provide for: *‘(a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing; (b) an assessment and a possibility for a decision on the justification of the challenge; (c) Correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.’*

The lack of comparable measures in the EC-CARIFORUM provision serves to undermine both transparency and a stable predictable trading environment. A strong bid challenge framework is necessary because only a few of these agreements provide for specific dispute settlement systems regarding the implementation of the public procurement provisions.² As it stands, the effectiveness of the EC-CARIFORUM EPA bid challenge system is undermined because its potential strength as a deterrent and enforcement mechanism is vague.

RTAs which contain government procurement provisions have not generally sought to create an independent regional body or institution to implement the provisions. The US-Chile RTA is unusual because it establishes a ‘Committee on Procurement’, which is in charge of addressing matters related to the implementation of the public procurement commitments assumed by the parties. In the EC CARIFORUM EPA, oversight is set out in its Article 8 which states that the CARIFORUM-EC Trade and Development Committee is obligated to review the operation of the Chapter every three years. This potentially allows for a built-in agenda to arise and for new procurement provisions of mutual interest to the parties to be negotiated. The CARIFORUM EPA also sets out the implementation period in its Article 8. This normally gives CARIFORUM states two years from the agreement’s ratification to bring their measures into conformity with any specific procedural obligations arising from the Chapter. An extension can be granted by the EC-CARIFORUM Trade and Development Committee, should the implementation period be

² D. Gordon, Constructing a Bid Protest System: The Choices that Every Procurement Challenge System Must Make. *Public Contracts Law Journal*, 35 (2006), p427.

insufficient. Certain CARIFORUM states are granted a five year implementation period, particularly with regard to publication and on-line information dissemination. That is, even these fairly limited procurement provisions relating to transparency only are not expected to be implemented in the CARIFORUM states without due preparation time.

In sum, the comparative overview provided above indicates that the provisions attempt to balance procurement reform against development policy, rather than seeing them as inextricably linked. This significantly undermines the potential benefits to be gained from procurement reform. Nevertheless, relative to the procurement provisions that have been negotiated in other EPAs, including the interim agreements, the EC-CARIFORUM EPA appears quite comprehensive.

For example, the EC-CAR 'stepping stone' EPA included one procurement provision. Article 59 expresses a commitment to negotiate transparent and non-discriminatory procurement provisions in the future, taking into account the development needs of the parties. The decision not to include procurement provisions in the other EPAs may have been viewed as an achievement for the ACP negotiators seeking to defend the right of their governments to set procurement frameworks as they determine them. However, as the next section contends, the maintenance of policy space can also undermine the potential for EPAs to drive good procurement policy to better generate economic and social development.

Government procurement reform and policy space

The comparatively limited scope and coverage of the government procurement provisions in the EC-CARIFORUM identified in previous section does not intrude on the capacity of CARIFORUM countries to determine their domestic procurement procedures as they see fit, subject to transparency requirements. Indeed, the CARIFORUM Regional Negotiating Machinery (CRNM) has stated that their negotiating mandate was to avoid any commitments which could have the potential to predetermine the content of the future regional regimes.³ They were therefore successful in confining the negotiations to transparency in procurement without granting any market access commitments to either the EC or another CARIFORUM country. Presumably then, this outcome should be supported by all those seeking to preserve or strengthen the 'policy space' needed to pursue bespoke national development strategies.

Advocates, such as Rodrik⁴ has argued:

'There is growing recognition that the pendulum between policy autonomy and international rules may have swung too far in the direction of the latter in recent trade rounds. ... Developing nations should push hard for "policy space" in future trade negotiations. In the past they compromised on that in return for greater market access in rich country markets. This has turned out to be a bad bargain.'

Some well-known development organisations also follow this position, ActionAid and the World Development Movement for example: *'[T]he evidence demonstrates that new rules to reduce developing country policy space and guarantee market access for industrialised country multinationals will create development costs not benefits.'*

³ A. Cunningham, 'The CARIFORUM States and the Economic Partnership Negotiations: A Glance at Negotiating Strategies and Negotiating Outcomes', Working Paper – Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH 2008.

⁴ D. Rodrik, 'Industrial Policy for the Twenty-First Century', 2004, p.2, available at <http://ksghome.harvard.edu/~drodrik/unidosep.pdf>.

Further, one of the main criticisms of the EC-CARIFORUM EPA has been the inclusion of 'WTO-plus' elements including public procurement, which are unnecessary for WTO-compatibility and limit the 'policy space' of the Caribbean governments. However, despite the establishment of the goal of policy space in prominent declarations such as the UNCTAD XI Sao Paulo Consensus there has been little consensus on what it actually constitutes. To be of analytical value the term 'policy space' must be characterizable on a case by case basis, identifying actual and potential measures available in each situation. Such measures may include tariff sequencing; tax export incentives; quantitative restrictions; import licensing; duty of establishment; local labour requirements; offsets or domestic content or local production requirements, and so on. Furthermore, in addition to identifying policy measures or tools, the rationale for using them should be set out along with supporting evidence of its ability to achieve the stated policy goal more effectively and with less anti-competitive effect than other available measures.

Discussions of policy space in the context of government procurement measures usually focus on the ability of governments to use preferential procurement policies such as offsets and local content requirements to address social and developmental goals or infant industry strategies. This focus ignores the ability of all governments to exclude certain areas of the economy from the Annexes of covered entities and sectors. For example, the US negotiators, among other items excluded all transportation services from coverage of the WTO GPA in Annex 4, while paragraph of the US General Notes state that the GPA will not apply to set asides on behalf of small and minority businesses. These carve-outs are achieved during the trade negotiations by all parties. They are fundamental to the agreement, and yet such wide ranging exclusions are set out without the accompanying rhetoric about maintaining policy space for undefined purposes. It has been shown that in some circumstances preferential procurement policies can expand the output but not necessarily the profits of domestic industry. but this theoretical finding cannot be used to make unequivocal claims that any particular preferential procurement policy can effectively attain stated development goals over the longer term while delivering more social benefits than costs, and further that these development goals cannot be achieved using another policy measure at lower societal costs.⁵

There is, on the other hand, a more sizeable body of research available on the economic and social benefits of transparent and competitive government procurement policy. When a limited number of firms compete for state contracts, the research indicates that the prices paid by public agencies will generally be higher than necessary and therefore the quantity that can be purchased is smaller than need be. Many simulations of procurement actions imply that when the number of bidders for a state contract is four or less, there are significant cost savings from introducing more competition.⁶ An implication of this finding is that restricting competition amounts to a transfer from the users of public services (including the poor) and taxpayers to owners of the incumbent firms bidding for state contracts. Curtailing competition, therefore, has redistributive as well as efficiency-reducing effects.

Research into the impact of provisions that limit discrimination in procurement markets tend to rely more on arguments made using first (economic) principles than on statistical evidence. Moreover, the empirical evidence that is available often refers to the experience of industrialised countries. With respect to first principles, an important and early finding is that bans on procurement discrimination will only lead to greater imports from foreign suppliers under a narrow set of circumstances. Only when the domestic industry is completely dependent on the

⁵ S. Evenett and B. M. Hoekman, 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules', *European Journal of Political Economy*, 21 (2005), 163.

⁶ R. P. McAfee and J. McMillan, 'Bidding Rings', Working Papers 726, 1990, California Institute of Technology, Division of the Humanities and Social Sciences.

government as the buyer of the goods that it produces for the domestic market, and the price paid by the government exceeds the price paid by domestic private customers to import the same product from the world market, will the elimination of procurement discrimination against foreign firms result in greater imports.⁷ This research finding was first demonstrated for government purchases in competitive markets and has been validated in many other market structures since.

When procurement auctions are employed by governments to source goods, the removal or reduction of procurement discrimination can have different effects. Computer-based simulations of procurement auctions have shown that less discrimination against foreign bidders (for example, in the form of lower price preferences or allowing more foreign firms to bid in the first place) reduce both the probability that any domestic firm wins the state contract in question and the profit margin Should they do so. This establishes the strong interest domestic incumbents have in sustaining discrimination. Interestingly, foreign bidders tend to respond to lower price preferences by raising their prices and profit margins and, when there are a small number of domestic and foreign bidders, total procurement costs paid by the government tend to fall only a little.⁸ Other simulations have shown that the biggest falls in state procurement costs occur when the total number of domestic and foreign bidders rises from a very small number (two or three) to five or more bidders.⁹ These findings suggest that procurement provisions in RTAs which induce more foreign bidders are likely to generate the greatest improvements in value-for-money for governments and enable them to spread their budgets further across their needy populations.

The research findings on improving the transparency of state procurement processes are relevant too. Improved clarity in the terms and conditions for applying for state procurement contracts attracts larger numbers of both domestic and foreign firms to bid. Small and medium sized enterprises, which governments often seek to promote in both developing and industrialised countries, appear to be particularly responsive to increases in procurement-related transparency. The overall impact, then, is to tend to reduce the mean size of firms bidding for state contracts. The impact of improved transparency on imports however, is mixed, precisely because more domestic firms bid for state contracts too and some will win them. This casts doubt on any presumption that transparency-improving provisions in EPAs necessarily increase imports and are a back door way to improving market access to developing country markets.

One of the relevant observations made in this area is that improvements in transparency that have the effect of discouraging extra-legal payments to state officials also result in a shift in state spending away from highly differentiated products such as aircraft (where cross product price comparisons are more difficult and where corruption can flourish) towards more homogenous goods (where it is more evident when the state is overpaying for a good). In short, transparency improvements tend to have a variety of effects, many of which are of direct benefit to developing countries.¹⁰

The absence of transparency, accountability and competition provides a fertile environment for corruption. This results, among other problems, in even less resources being available to meet policy objectives. The Country Procurement Assessment Report (CPAR) for the Philippines, for example, estimated that corruption, inefficiency, disorganization, and even ignorance have resulted

⁷ G. Deltas and S. Evenett, 'Quantitative Estimates of the Effects of Preference Policies', in B. Hoekman and P.C. Mavroidis (eds.), *Law and Policy in Public Purchasing* (Ann Arbor: University of Michigan Press, 1997).

⁸ S. Evenett and B. M. Hoekman, 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules', *European Journal of Political Economy*, 21 (2005), 163.

⁹ R. P. McAfee and J. McMillan, 'Bidding Rings', Working Papers 726, 1990, California Institute of Technology, Division of the Humanities and Social Sciences.

¹⁰ T. Trepte, 'Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Public Procurement' (2005) (paper to OECD Expert Group meeting on Integrity in Public Procurement).

in the loss of billions of pesos and in the procurement of substandard materials and services. One OECD estimate concluded that, on average, 25 percent of every contract goes to leakages, equivalent to approximately. Some of the obstacles to sound procurement systems commonly include the lack of uniform coherent texts regulating procurement, which undermines both transparency and general interpretation. Furthermore, the widespread absence of a dedicated institutional body that is mandated to formulate and implement policy efficiently also undermines the uniform application of rules. While the overall lack of accountability provides a fertile environment for corruption.

Hunja identified four general categories of countries attempting to reform their procurement systems.¹¹ These include industrialised economies wishing to use new information and communication technology to improve their processes and achieve greater value for money and former state socialist economies without any recent experience of competitive procurement frameworks, which need to establish entirely new procurement frameworks. Prior to exogenous reform pressures from aid agencies and development banks, the developing country category tended to possess a procurement system that had either changed little since the colonial era. For example, Agaba and Shipman described the highly centralised features of the Ugandan public procurement system prior to the inception of the reform programme in the late 90s as typical of many developing African countries that were at one time British colonies or protectorates. A Central Tender Board located in the Ministry of Finance awarded contracts above a threshold value of US\$1,000 under conditions prescribed in 1977 regulations, alongside separate tender boards for the Police and Military.¹²

In 1990, a Government Central Purchasing Corporation was set up to procure many items on behalf of government ministries. However, any advantages of consolidated purchasing and central control were lost because the Central Tender Board was unable to keep pace with the expansion of government procurement requirements. The urge to reform and modernise the procurement processes and procedures in these countries is grounded in a growing acceptance of the importance of proper management of public expenditures, including the fight against corruption, not to mention the exogenous requirements of lending agencies and the donor community, including UNICTRAL and The World Bank.¹³ Despite the endogenous and exogenous pressures to reform procurement systems, there is unfortunately little evidence of sustained success among the developing countries attempting to implement fundamental changes to procurement systems.

The most difficult obstacle to overcome in the reform movement is not the creation of the necessary regulation but the lack of political will at the highest levels of government to comprehensively overhaul the existing system. Those responsible for pushing through reform measures are often those who profit most from the status quo. These vested interests include local business cartels that have an interest in maintaining a legal framework that prohibits competition from foreign suppliers, as well as public figures using their access to public contracts as a private resource to reward political supporters and to financing political parties. These vested interests are pervasive in commercial, bureaucratic, and political spheres and easily conspire to ensure that reform is either ineffectual or removed from the policy agenda. All too often even well intentioned political leaders lack the will to overcome the resistance of powerful economic forces.

¹¹ R. Hunja, 'Obstacles to Public Procurement Reform in Developing Countries', in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: The Continuing Revolution* (London: Kluwer Law International, 2003).

¹² E. Agaba and N. Shipman, 'Public Procurement Reform in Developing Countries: the Uganda Experience', chapter 16 in G. Piga and K. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge Sharing* (Boca Raton: PRAcademics Press, 2007).

¹³ E. Beth and J. Bertók, *Integrity in Public Procurement: Good Practice from A to Z* (Paris: OECD, 2007).

Assessments of existing procurement systems indicate that abuses of the system are based in the weak or inconsistent enforcement of the prevailing rules, which casts doubt on whether the introduction of a new legal framework will result in the desired reforms.¹⁴ Implementing reforms to the system through trade agreements requires the creation of effective monitoring and enforcement mechanisms, such as the bid challenge system discussed above. This has not been achieved in the EC CARIFORUM bid challenge system because its lack of clarity over the measures to be taken to correct breaches to the accord, or whether compensation is to be made available to aggrieved parties. These omissions undermine the effectiveness of the mechanism and indicate the unwillingness of the negotiators to introduce necessary reforms because of the pressure to maintain policy space and therefore the status quo. This is not in the welfare interests of the poorer and politically marginalized members of society – who, in developing countries, are the majority.

The EC-CARIFORUM EPA could have been viewed as an opportunity to side step these vested interests by signing up to an agreement that potentially offers both the legal instrument and technical assistance to institute comprehensive reforms. This could be designed to include an incremental approach to introducing competition into procurement markets, while creating a stronger monitoring and enforcement mechanism. Rather than being seen as a Trojan horse to smuggle in EC market access strategies into the CARIFORUM region, the EPA could have been seen as a commitment mechanism to implement and lock-in sound procurement systems while negotiating the exclusion of sensitive areas of the economy and society from the scope and coverage of the agreement, and opening markets only within the CARIFORUM region in the first instance.

Regional agreements can only work as commitment mechanisms to comprehensive reform if the enforcement mechanism is credible. Collier and Gunning¹⁵ noted that regional agreements between smaller low-income countries, which typically trade very little with each other, add little credibility because a country that breaks the rules is extremely unlikely to be penalized by other members of the bloc. In north-north or north-south RTAs, on the other hand, this problem is less likely to arise. Mexico, for example, has gained credibility through its membership in NAFTA partly because the US has a clear interest in ensuring the commitments of the agreement are implemented in its neighbour's economy. This significant level of legislative push has also been noticeable case with the EC Accession countries.

In the case of the EC-ACP EPAs, it might be expected that the agreements could create a commitment mechanism and lock-in necessary reforms that promote sustainable development. However, government procurement reform requires more effective policies rather than more policy space if it is to generate economic and social benefits. The key challenge for developing country negotiators is to devise appropriate economic and social welfare policies that can be promoted through procurement policies prior to the negotiations. There is an emerging consensus of what good procurement policies are.¹⁶ They include transparency, value for money, open and effective competition, accountability and due process, fair dealing and non-discrimination. The most significant difference is in the strength of the enforcement mechanisms. The point is that the growing consensus on what constitutes a good framework for procurement is sufficiently flexible

¹⁴ E. Beth and J. Bertók, *Integrity in Public Procurement: Good Practice from A to Z* (Paris: OECD, 2007).

¹⁵ P. Collier and J. W. Gunning, 'Trade Policy and Regional Integration: Implications for the Relations between Europe and Africa', in C. Milner (ed.), *Developing and Newly Industrialising Countries* (Cheltenham: Edward Elgar, 1998), pp. 464–87.

¹⁶ E. Nwogwugwu, 'Towards the Harmonisation of International Procurement Policies and Practices', *Public Procurement Law Review*, 14 (2005), 131.

to incorporate and promote the individual policies that governments have identified as being social priorities. This facilitates good domestic policy making while utilising RTAs to side-step domestic vested interests and lock in necessary reform measures.

Conclusion

This examination of the EC-CARIFORUM EPA has identified a fundamental contradiction about the perceived role of government procurement in promoting sustainable development. The provisions acknowledge the important role of transparent and competitive procurement policy in economic and social development, but simultaneously seek to preserve the ability of the individual CARIFORUM members to forego this development opportunity. No element of non-discrimination has been introduced, even within the CARIFORUM region. Coverage is limited to central government contracts above a high threshold and the bid challenge mechanism is incomplete.

Confining the provisions' commitments to transparency is not enough to capture the potential benefits that can be generated by good procurement policies. Although it is an important element of an efficient procurement regime, it cannot in itself introduce sound purchasing decisions. Incorporating some element of non-discrimination into procurement markets introduces the competition that is necessary to ensure that prices are lower, choice is greater and service improves. This will allow for scarce government resources to be used better and to stretch further in meeting the needs of society.

Trade agreements such as the EC-ACP EPAs can and should be used to promote procurement reform within a country's broader development vision. They can overcome domestic inertia and offer the legislative impetus needed to restrict the discretion to use the awarding of government purchasing contracts as a private resource. In general, both EPAs and RTAs are sufficiently flexible instruments of state-to-state cooperation and preferences can be reduced incrementally over time. Such an agreement can initially eliminate non-discrimination only against the developing country signatories to facilitate the creation of a regional procurement market among these developing country RTA Members.

Over time, further measures to open up the regional market to European competition could be introduced. Such two-step sequencing can increase the variety of suppliers available to procuring bodies in developing countries and provide local firms with further time to improve their product offerings and productivity. As the savings enjoyed by state purchasers tend to increase as the number of bidders rises, the full benefits of procurement reform will only be achieved after implementing stage two. It must be remembered that rather than being an indispensable development tool, protecting local firms through preferential procurement policies may conversely bring potentially greater costs to state purchasers and to the end users of public services – society. That is, delays in reform will imply greater costs to the wider society.

The best way to use an RTA as commitment mechanisms to lock in incremental but far-reaching reform is to ensure the technical assistance and cooperation provisions are adequate to strengthen the domestic capacity and expertise in implementing good procurement practices. This signals a strong intention to create fair and transparent procurement markets, which in turn attracts further assistance and increases private sector confidence in the credibility and stability of these markets. To these ends, regular review mechanisms should be established within the procurement provisions to increase the probability that procurement provisions are implemented properly and on time and, should the need arise, be progressively strengthened and modified over time. Reviews

should include compliance matters, the collection of procurement-related statistics and identifying areas for capacity building and technical assistance. Both procurement reform and regional integration are ongoing processes for both developed and developing economies. North-South trading arrangements can therefore be used to provide assistance to ensure the effective implementation of procurement frameworks and respond to changing market conditions and technological developments.

This paper has argued that without reform, policy adjustments and ongoing monitoring, procurement markets can easily fail to deliver the best results for economic development and social welfare. RTAs such as an EPA are potentially well suited to address these failures because they generate pressure to reform and can be complemented with technical assistance, capacity building and cooperation to ensure these reform measures harness rather than obstruct development goals. It would serve these goals to view government procurement policy aside from the wider trade negotiations. For this would avoid trading off much needed procurement reform during negotiations on agriculture, tariffs levels or to elusive concepts such as policy space.