

Public Procurement: The Development Dimension and the EPA

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The Development Dimension

- The ability of governments to procure from firms of its own choosing can be an important macro-economic instrument for development.
- Providing preferences to local producers of goods and suppliers of services and may be part of an industrial policy or an instrument to attain social objectives.
- The provision of preferences to local suppliers of goods and services also benefits local business, and spurs job creation.
- Especially powerful tool during recessions

Joseph Stiglitz, Nobel Laureate in Economics and former chief economist at the World Bank-

“Government procurement policies have important economic and social roles in developing countries which could be curtailed if governments were mandated to observe national treatment principles. The level of expenditure and the attempt to direct the expenditure at local producers is a major macro economic instrument, especially during recessionary periods, to counter economic downturn. Additionally, procurement policy might be used to boost domestic industries or encourage development in specific sectors of national interest. Social objectives could also be advanced by preferences for specific groups or communities, especially

➤ *those that are underrepresented in economic standing”*

PUBLIC SPENDING PLAYS A LARGE PART IN CARICOM ECONOMIES		
<i>PUBLIC EXPENDITURE AS A SHARE OF GDP (%)</i>	2005	2009
Guyana	55.7	49.6
Suriname	36.5	43.4
Dominica	36.1	43.3
St. Kitts and Nevis	43.8	42.0
Barbados	30.9	40.6
Jamaica	29.9	37.1
St. Vincent and the Grenadines	33.5	36.2
St. Lucia	31.5	32.8
Trinidad and Tobago	24.5	32.5
Grenada	31.1	32.2
Antigua and Barbuda	28.1	30.8
Belize	30.7	27.6
Bahamas, The	19.5	21.5
Average	33.2	36.1
Source: ECLAC calculations		

PUBLIC SPENDING IS A SIGNIFICANT POTENTIAL MARKET FOR SUPPLIERS OF GOODS AND SERVICES

Public Expenditure (USD Mn.)	2005	2009
Trinidad and Tobago	3911	7236
Jamaica	3324	4573
Bahamas, The	1228	1584
Barbados	1139	1582
Suriname	525	989
Guyana	459	622
Belize	342	388
Antigua and Barbuda	244	338
St. Lucia	271	313
St. Kitts and Nevis	192	221
St. Vincent and the Grenadines	149	212
Grenada	172	198
Dominica	108	163
Total	12064	18416

Source: ECLAC on the basis of official data.

Table 1
Expenditure by Sector - 2010
(TTS million)

Sectors	Budgeted Expenditure				Revised Expenditure			
	Consol. Fund	%	IDF	%	Consol. Fund	%	IDF	%
Economic Infrastructure	719.9	24	1513.0	37.9	706.8	19.6	1416.9	36.7
Planning/ Programme Development	17.1	0.5	0	0	11.2	0.3	0.0	0
Productive Sectors	22.0	0.7	460.0	11.6	22.0	0.6	460.0	12
Administration	1127.6	37.4	184.5	4.6	1488.9	41.1	146.1	3.8
Social Infrastructure	1122.8	37.4	1833.0	45.9	1394.5	38.4	1836.3	47.5
TOTAL	3009.5	100.0	3990.5	100.0	3623.4	100.0	3859.3	100.0

Public Procurement is an arena of contestation in international trade

- Since the 1980s developed countries have pushed for broadening the scope of international trade rules to cover new areas including services, intellectual property, investment, public procurement and competition policy
- Public procurement markets in emerging economies represent a huge untapped potential area for business for Western corporations (e.g. EU's 'Global Europe' policy)

The GPA

- The plurilateral Agreement on Government Procurement (GPA) is currently applicable to 13 WTO members , Some OCED countries and most developing countries are not parties to this agreement
- The GPA is aimed at guaranteeing that access to procurement is available to foreign products, services and suppliers in a nondiscriminatory manner.
- The EU has previously tried to push provisions aimed at ensuring transparency on public procurement at Ministerial council WTO meetings.
- It is believed that both measures aim to gently minimize resistance towards more offensive market access measures in the future.

Compliance obligations

Obligations

- 1. Non discriminatory treatment
- 2. Valuation of contracts
- 3. Technical specifications
- 4. Procurement methods
- 5. Qualification of suppliers
- 6. Invitations to participate
- 7. Time limits
- 8. Tender documentation
- 9. Award of contracts
- 10. Provision of information
- 11. Challenge procedures

Developing countries and Public Procurement

- In multilateral negotiations—WTO—developing countries have resisted the inclusion of PP in trade rules for several reasons
 - Use of PP as a development tool—fostering of industries and development of new technologies
 - Insufficient administrative capacity for compliance requirements
 - Potential conflicts with internal legislation and current procurement methods
 - Potential loss of sovereignty in case dispute settlement instruments

PP in the WTO and Bilateral FTAs

- At the Cancun WTO Ministerial in 2003, the majority of developing countries rejected inclusion of PP in the 'Doha Round' of negotiations (Along with investment and competition policy)
- However developed countries have pushed aggressively for inclusion of PP in bilateral FTAs such as the EPA and the Canada-Caricom FTA

PP and Bilateral FTAs

- Inclusion of the PP in FTAs has resulted in the liberalization of Public Procurement, which presents a number of challenges to developing countries such as;
 - Prohibition of the use of national suppliers as a policy instrument
 - High compliance cost of transparency rules , and insufficient support to overcome institutional and supply capacity constraints and
 - The asymmetrical capacities of developed vis-à-vis developing partners resulting in asymmetrical benefits
 - Lost opportunity to utilize regional procurement to develop industrial and service supply capacities.

EU's Strategic interest in Public Procurement

- PP was identified as a priority area in the European Commission's "Global Europe Strategy" which aims at maintaining the competitiveness of Europe in the global market by securing new and profitable markets for EU companies through FTAs.
- The main European business interests are in the sectors of **construction works**, services relating to **architecture, law, accounting and construction, medical and pharmaceutical devices and services and office and computing equipment**.

Public Procurement in the CARIFORUM EPA

- Title IV Chapter 3 dealing with PP is one of the most detailed in the EPA - 8 articles, 72 paragraphs and 58 sub-paragraphs
- The provisions apply mostly to Ministries of Central Government, which are listed for each CARIFORUM state
- They apply to all contracts above SDR 130,000 for Supplies & Services and SDR 5 Million for works

Overview of provisions

- The main provisions include:
 - **National treatment** (art. 167), i.e. the obligation not to discriminate against EU companies.
 - **Transparency** provisions. Require publication of all laws, regulations, decisions, as well as all administrative and judicial rulings related to procurement.
 - **Technical specifications**. Require the use of agreed international standards.

Regional Integration

- The Revised Treaty of Chaguaramas establishing the CSME calls for member states to negotiate and adopt a protocol on PP. This has not yet been completed
- The PP EPA provisions apply to all CARIFORUM states, including the Dominican Republic
- The establishment of a 'regional procurement market' under the EPA is formulated so as to include the DR. This is underlined by the 'Regional Preference' clause.
- In effect, the EPA establishes a kind of regional PP regime that encapsulates the CSME, the Bahamas and the DR.

Differing Interpretations of PP provisions

- CRNM negotiators contended that market access in PP was not granted to the EU.
- Some Caricom officials and other analysts held that the effect of Title IV Chapter 3 is to afford the EU *de facto* market access to PP

Have EU firms been Granted access to PP markets ?

- Article 167 obliges CARIFORUM governments not to discriminate among locally established suppliers on the basis of the degree of foreign ownership
- To determine what this means for the right of locally established EU firms to bid on government contracts, it is necessary to cross-reference this provision against commitments made by each government on market access and commercial presence for EU firms in services and investment in different sectors
- This not as straightforward as it might appear

Opacity of CARIFORUM's commitments

- CARIFORUM MDCs are said to have liberalised 75% of their service sectors, and LDCs 65%, under the EPA
- Rather than agreeing to a single schedule, each CF state entered its own schedule of service sectors to be liberalised, in Annex 4 of the EPA
- The system of classification is different from the system used in the EU schedule, requires cross-referencing to an international classificatory system
- Each CF state lists various reservations and exceptions for the sectors on its schedule. These are sometimes inconsistent with one another

Investment and services liberalisation combined

- It is not widely known or understood that under the EPA CF states also agreed to liberalise investment in several non-service sectors:
 - **A. Agriculture, hunting and forestry;**
 - **B. Fishing;**
 - **C. Mining and quarrying**
 - **D. Manufacturing;**
 - **E. Production, transmission and distribution on own account of electricity, gas, steam and hot water**

- The commitments are listed in a schedule entered by each country, along with the country's exceptions and reservations for specific sectors

- The schedule uses the International Standard Industrial Classification of all Economic Activities (ISIC Rev. 3.1) The ISIC classification for the five sectors designated includes extensive services activities, many of which also appear in W/120 and are subject to scheduling under CARIFORUM's services schedule (Kelsey)

Built-in expansion

➤ *Article 167 A3 and A4 guarantees 'National Treatment' --treatment no less favorable than that granted to nationals-- to EU suppliers of Goods and services, subject to decisions by the joint CARIFOURM EC council regarding which procurements will be covered by this obligation and under what conditions.*

➤ *There is therefore a presumption that over time there will be a gradual opening up of PP business to EU-based suppliers by means of decisions by the Joint Council*

Some global exceptions to PP provisions

- Measures relating to goods or services of persons with disabilities, philanthropic institutions, or prison labour.
- The acquisition or rental of land, existing buildings, or other immovable property or the rights thereon;
- The acquisition, development, production or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;
- Public employment contracts;
- Research and development services;
- The procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes, including food aid;
- Intra-governmental procurement;

A legal assessment

- CARIFORUM states' commitments are so complex that they carry “ ...a high risk of error and make(s) it impossible to assess accurately the obligations and restrictions on CARIFORUM states or the implications for the CSME and CARICOM-DR FTA.
- “However, it is clear that the EPA will impose severe long-term constraints on domestic policy and regulatory autonomy.”

- *Prof Jane Kelsey*

Challenges to CARICOM and the regional PP community

- CARICOM has yet to complete/adopt a regional PP regime that combines developmental objectives with efficiency and transparency/accountability objectives
- A detailed examination of the EPA PP provisions is needed to determine its implications from the standpoint of development and regional integration as called for by the CSME and the Revised Treaty of Chaguaramas
- The regional PP community should be proactive in developing a proposed PP regime(s) that corresponds to the circumstances of member states, developmental considerations and good governance

Sources

- Government Procurement in Economic Partnership Agreements and FTAs ;
(www.southcentre.org)
- Jane Kelsey, Legal Analysis of Services and Investment in the CARIFORUM-EC EPA:
Lessons for other Developing Countries