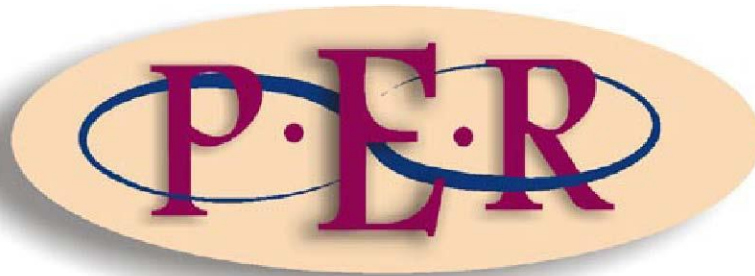


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A SOUTHERN AFRICA PERSPECTIVE**

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PROCUREMENT UNDER THE UNCITRAL MODEL LAW: A SOUTHERN AFRICA PERSPECTIVE

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1 Introduction

Most of the countries in Africa can be classified as developing countries, and quite a few of them as least developed countries. Africa has a vast potential and need for economic development. Economic integration is seen as one of the driving factors that will improve the lives of its people. Regional integration is one of the building blocks for economic integration in Africa. To enable economic growth and to unlock the potential of Africa its regional infrastructure will have to be improved. This will happen mainly through investment in infrastructure by the individual states and regional economic communities themselves, assisted by the private sector and foreign aid.¹ Infrastructure will on the whole be realised through public procurement.² Public procurement will therefore directly and indirectly be one of the most important drivers of economic development in Africa.

Until recently many countries in Africa did not have and many still do not have well developed public procurement regimes. This presents a major obstacle to achieving the generally accepted goals of public procurement, which are, amongst others, transparency, competition, value for money, fairness, cost effectiveness and integrity.³

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¹ Ndulo 1996 <http://scholarship.law.cornell.edu/facpub/60> 197.

² Public procurement is regarded as the entire lifecycle of activities that are undertaken to fulfil the requirements of public bodies to acquire goods, services and construction works from outside service providers, the outside service providers generally being from the private sector. That "International Public Procurement" 3. Also see Bolton *Law of Government Procurement* 2; a 2(a) of the *UNCITRAL Model Law on International Commercial Arbitration* (1985) (*UNCITRAL Model Law*). A more limited interpretation of the scope of the definition of public procurement is put forward by Quinot. He notes that the activity of public procurement is limited to the acquisition of goods, services and construction works by organs of state, and excludes the acquisition of goods, services and construction works from organs of state. Further, Quinot contends that public procurement is limited to the acquisition of goods, services and construction works (Quinot *State Commercial Activity* 12) and excludes the acquisition of things outside these categories, for example the acquisition of land.

³ The primary objectives of public procurement are to achieve value for money within a compliant and transparent system, and the external or secondary objectives of public procurement are policy

Unfortunately corruption, as in many other parts of the world, is also rife in public procurement in Africa, and poor public procurement regimes lend themselves to be misused. This presents a serious impediment for the economic development of Africa. To exacerbate the problem, with the exception of COMESA⁴ and WAEMU,⁵ very little harmonisation of public procurement exists in the regional economic communities in Africa.

On the positive side, the *UNCITRAL⁶ Model Law on Public Procurement* has served as a benchmark for many countries in Africa in reforming their public procurement regimes. It has an important role to play in the curbing of corruption and the harmonisation of public procurement regimes in regional economic communities.⁷

In this paper the need for the harmonisation of public procurement regimes in regional economic communities will be evaluated, as will the role that the UNCITRAL Model Law has played and can play in future. To start with, the importance of regional economic communities in the development of Africa will be put in perspective. The importance of public procurement in Africa and in particular Southern Africa will be touched upon. Thereafter the influence of the *UNCITRAL Model Law* on public procurement and the harmonisation of public procurement in Southern Africa and its regional economic communities will be dealt with. In conclusion, some general ideas on the way forward will be discussed.

2 The history of economic regionalisation in Africa

The spirit of Pan Africanism, namely one of solidarity and cooperation among African leaders and societies, was already prevalent in the late 19th century.⁸ The idea that

objectives determined by government. See Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 31; Telgen, Harland and Knight "Public Procurement in Perspective" 21.

⁴ Common Market for Eastern and Southern Africa.

⁵ West African Economic and Monetary Union. See Ky *Integration by Public Procurement*.

⁶ United Nations Committee on International Trade Law.

⁷ Hereafter RECs.

⁸ The words spoken by the Ghainian president on 24 May 1963 during the meeting of 32 African countries in Addis Ababa. This meeting provided the foundations for the eventual creation of the Organisation of African Unity. Murithi *African Union* 8. Kah 2012 *JPAS* 30.

"Africa must Unite"⁹ culminated in the creation of the Organisation of African Unity.¹⁰ The OAU¹¹ represented a compromise between the then Casablanca group and the Monrovia Group.¹² The first group proposed that Africa should first integrate politically then economically. The Monrovia group supported a gradual political and economic integration. It proposed economic integration at the sub-regional level with functional cooperation leading towards a common market, and then political integration with a single Pan African Political Union.¹³ The OAU was formed as a compromise between these two groups to promote the unity and solidarity of the African states.¹⁴ Despite this ideal of closer economic cooperation, the main focus of the OAU was to eradicate colonial subjugation, end apartheid and establish independent African states.

Globalisation necessitated greater economic integration in Africa. Because of the need to direct the focus of the OAU from political liberation to economic development the *Lagos Plan of Action* for the economic development of Africa was adopted by an OAU Extraordinary Summit in 1980. This was followed by the *Final Act of Lagos*,¹⁵ which stated that these measures were a first step towards the creation of an African Economic Community.¹⁶ The commitments in the Plan of Action and the Final Act of Lagos were addressed in Abuja, Nigeria in June 1991 when the OAU Heads of State and Government signed the *Abuja Treaty Establishing the African Economic Community*.¹⁷ The need for economic integration was an important consideration in the adoption of the *Abuja Treaty*.¹⁸ The Treaty established new timeframes for Africa's regional economic integration, which would culminate in a fully integrated African Economic Community. In article 6 of the treaty a table with six stages over a period of 34 years

⁹ Biswaro *Deepening Africa's Integration* 27.

¹⁰ The OAU was created by the *Charter of the Organisation of African Unity* (1963). The Charter was signed by 32 states on 25 May 1963.

¹¹ Organisation of African Unity.

¹² Biswaro *Deepening Africa's Integration* xxv.

¹³ Biswaro *Deepening Africa's Integration* xxv; Olivier 2010 *SRSA* 27.

¹⁴ Articles 2(1)(a) and (b) of the *Charter of the Organisation of African Unity* (1963).

¹⁵ African Union NEPAD. Historical Context: Origins and Influences.

¹⁶ *Lagos Plan of Action for the Economic Development of Africa* (1980).

¹⁷ Hereafter the AEC. South Sudan, the newest state in Africa ratified the *Abuja Treaty Establishing the African Economic Community* (1991) (*Abuja Treaty*) on 15 August 2011.

¹⁸ Picasso *From the OAU to AU*.

was set out to establish the AEC.¹⁹ Article 88(10) of the *AEC Treaty* states that the "Community shall be established mainly through the co-ordination, harmonisation and progressive integration of the activities of regional economic communities".

¹⁹ Article 6 of the *Abuja Treaty*: "The Community shall be established gradually in six (6) stages of variable duration over a transitional period not exceeding thirty-four (34) years. At each such stage, specific activities shall be assigned and implemented concurrently as follows:

- (a) First Stage: Strengthening of existing regional economic communities and, within a period not exceeding five (5) years from the date of entry into force of this Treaty, establishing economic communities in regions where they do not exist;
- (b) Second Stage: (i) At the level of each regional economic community and within a period not exceeding eight (ii) years, stabilising Tariff Barriers and Non-Tariff Barriers, Customs Duties and internal taxes existing at the date of entry into force of this Treaty; there shall also be prepared and adopted studies to determine the time-table for the gradual removal of Tariff Barriers and Non-Tariff Barriers to regional and intra-Community trade and for the gradual harmonisation of Customs Duties in relation to third States;(ii) Strengthening of sectoral integration at the regional and continental levels in all areas of activity particularly in the fields of trade, agriculture, money and finance, transport and communications, industry and energy; and (iii) Co-ordination and harmonisation of activities among the existing and future economic communities.
- (c) Third Stage: At the level of each regional economic community and within a period not exceeding ten (10) years, establishment of a Free Trade Area through the observance of the time-table for the gradual removal of Tariff Barriers and Non-Tariff Barriers to intra-community trade and the establishment of a Customs Union by means of adopting a common external tariff.
- (d) Fourth Stage: Within a period not exceeding two (2) years, co-ordination and harmonisation of tariff and non-tariff systems among the various regional economic communities with a view to establishing a Customs Union at the continental level by means of adopting a common external tariff.
- (e) Fifth Stage: Within a period not exceeding four (4) years, establishment of an African Common Market through: (i) The adoption of a common policy in several areas such as agriculture, transport and communications, industry, energy and scientific research; (ii) The harmonisation of monetary, financial and fiscal policies; (iii) The application of the principle of free movement of persons as well as the provisions herein regarding the rights of residence and establishment; and (iv) Constituting the proper resources of the Community as provided for in paragraph 2 of Article 82 of this Treaty.
- (f) Sixth Stage: Within a period not exceeding five (5) years: (i) Consolidation and strengthening of the structure of the African Common Market, through including the free movement of people, goods, capital and services, as well as, the provisions herein regarding the rights of residence and establishment; (ii) Integration of all the sectors namely economic, political, social and cultural; establishment of a single domestic market and a Pan-African Economic and Monetary Union; (iii) Implementation of the final stage for the setting up of an African Monetary Union, the establishment of a single African Central Bank and the creation of a single African Currency; (iv) Implementation of the final stage for the setting up of the structure of the Pan-African Parliament and election of its members by continental universal suffrage; (v) Implementation of the final stage for the harmonisation and co-ordination process of the activities of regional economic communities; (vi) Implementation of the final stage for the setting up of the structures of African multi-national enterprises in all sectors; and (vii) Implementation of the final stage for the setting up of the structures of the executive organs of the Community."

This need to achieve an African Economic Community supported the transformation of the OAU into the AU.²⁰ In 2000 the OAU was transformed into the African Union²¹ when the *Constitutive Act of the African Union* was adopted at the Lome Summit. It entered into force in 2001. All African states with the exception of Morocco became parties to this new organisation.

With the establishment of the AU, eight Regional Economic Communities were entrusted by the AU to realise the AEC.²² They are IGAD,²³ UMA,²⁴ CENSAD,²⁵ ECOWAS,²⁶ ECCAS,²⁷ SADC,²⁸ COMESA²⁹ and EAC.³⁰ Article 3(1) of the *Constitutive Act of the African Union*³¹ has as one of its objectives the coordination and harmonisation of policies between existing and future RECs for the gradual attainment of the Union which includes the establishment of the AEC.

Article 88 of the *Abuja Treaty* and article 3(1) of the CAAU see RECs as the building blocks, pillars and implementing arms of the AU and AEC's aim of an economically integrated African continent. The various sub-regional common market zones are meant to combine in future to form the Africa-wide economic union.³²

The *Protocol on Relations between the AEC and the RECs* was entered into in 1998, followed by the adoption of the *Protocol on Relations between the AU and the RECs* in 2007. The reasons for drafting these protocols were amongst others to formalise

²⁰ Fagbayibo 2011 *SAYIL* 213.

²¹ Hereafter the AU.

²² [http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assem bly-AU-Dec.pdf](http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assem%20bly-AU-Dec.pdf).

²³ The Intergovernmental Authority on Development (IGAD) in Eastern Africa was created in 1996 to supersede the Intergovernmental Authority on Drought and Development (IGADD), which had been founded in 1986. The members are Djibouti, Ethiopia, Kenya, Somalia, Sudan and Uganda. The State of Eritrea was admitted as the seventh member of the Authority at the 4th Summit of Heads of State and Government in Addis Ababa, September 1993.

²⁴ Union du Maghreb Arabe. The member states are Algeria, Libya, Morocco, and Tunisia.

²⁵ Community of Sahel-Saharan States.

²⁶ *Economic Community of West African States*.

²⁷ *Economic Community of Central African States*.

²⁸ *South African Development Community*.

²⁹ *Common Market for Eastern and Southern Africa*.

³⁰ *East African Community*.

³¹ *Constitutive Act of the African Union* (2000) (hereafter the CAAU).

³² Saurombe 2012 *SAPL* 297. In this regard IGAD, UMA and CENSAD are still in the pre free trade phase, ECOWAS, ECCAS and SADC are in the free trade phase, COMESA is in the customs union phase, and EAC is in the common market phase of economic integration.

the relationship and coordinate the objectives of the AEC and the RECs, as they had no common instrument linking them and the AU. The former Protocol provides as a main objective to promote the coordination and harmonisation of the policies, measures, programmes and activities of regional economic communities to ensure an efficient integration of the regional economic communities into the African Common Market.³³ The latter Protocol states that the parties aim for "closer cooperation among the RECs and between them and the Union through coordination and harmonisation of their policies, measures, programmes and activities in all fields and sectors"³⁴ and "establishing a framework for coordination of the activities of the RECs in their contribution to the realisation of the AEC".³⁵ These Protocols also have as their aims to promote closer cooperation between the different RECs. In particular the 2007 Protocol states in art 3(c) thereof that one of its aims is to strengthen the RECs. Another aim is to accelerate the integration process and to shorten the periods provided for in Article 6 of the *AEC Treaty*.³⁶

In 2006 the United Nations Economic Commission for Africa³⁷ published a study on regional integration in Africa.³⁸ It concluded that the multiplicity of RECs in Africa as well as African states' multiple memberships hinders the economic integration process in Africa.³⁹ On 12 June, 2011 the Heads of State and Government of the Common Market for Eastern and Southern Africa,⁴⁰ the East African Community⁴¹ and the **Southern African Development Community**⁴² met and signed a declaration

³³ Article 3(b) of the *Protocol on Relations between the AEC and the RECs* (1998).

³⁴ Article 3(a) of the *Protocol on Relations between the AU and the RECs* (2007).

³⁵ Article 3(b) of the *Protocol on Relations between the AU and the RECs* (2007).

³⁶ Article 3(h) of the *Protocol on Relations between the AU and the RECs* (2007).

³⁷ Hereafter UNECA.

³⁸ UNECA 2006 <http://repository.uneca.org/handle/10855/5611>.

³⁹ According to Pearson: "At present Africa accounts for less than 2.5% of world trade. The level of intra-African trade is also low - 10%, compared to about 40% in North America and about 60% in Western Europe. In addition, Africa has the highest export product concentration of any continent, coupled with a high export market concentration, reflecting continued reliance on primary commodity exports mainly to the European Union, United States of America and China. Africa also ranks low on trade policy and facilitation performance, with seven African countries listed in the bottom ten most restrictive trade regimes. In general, and compared to other countries, African countries have performed poorly in terms of logistics. Markets remain fragmented and borders are difficult to cross, which prevents the emergence of regionally integrated industries and supply chains." Pearson "Trade Facilitation" 1-37.

⁴⁰ Hereafter COMESA.

⁴¹ Hereafter EAC.

⁴² Hereafter **SADC**.

launching negotiations for the establishment of the COMESA-EAC-SADC Free Trade Area.

The Common Market for COMESA-EAC-SADC comprises of 26 countries with a combined population of nearly 600 million people and a total Gross Domestic Product⁴³ of approximately US\$1.0 trillion, representing over 50 per cent of Africa's economic output.⁴⁴ The main objective of the COMESA-EAC-SADC Tripartite alliance is to strengthen and deepen the economic integration of the southern and eastern regions of Africa. This will be achieved through the harmonisation of policies and programmes across the three RECs in the areas of trade, customs and infrastructure development⁴⁵ and will lead to the advancement of the establishment of the African Economic Community.⁴⁶ From the above it is clear that the economic development, growth and integration of Africa are dependent on the successful integration of the RECs. The Tripartite alliance will play a crucial role, and the success of economic integration in Africa is dependent on the success of this Tripartite agreement.⁴⁷ One of the major goals of the Tripartite agreement is the creation of infrastructure. This has important consequences for public procurement in the region.

3 The importance of and the need for harmonisation of public procurement regulation in regional co-operation

Through the years, the importance of public procurement in the modern state has grown exponentially. It is estimated by the World Trade Organisation (WTO) that at present public procurement amounts to between 10% and 15% of the GDP of developed countries and up to 25% and more of the GDP of developing countries.⁴⁸

⁴³ Hereafter GDP.

⁴⁴ UNECA 2012 https://www.unece.org/fileadmin/DAM/trade/TF_JointUNRCsApproach/ECA_RegionalIntegrationInAfrica.pdf.

⁴⁵ SADC 2012 <http://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/>.

⁴⁶ UNECA 2013 http://www.uneca.org/sites/default/files/PublicationFiles/aria_vi_english_full.pdf.

⁴⁷ Africa aims to establish a continent-wide free trade area by 2017, and regional trade arrangements such as the Tripartite FTA by COMESA-EAC-SADC are regarded as some of the building blocks of the envisaged African Economic Community.

⁴⁸ World Trade Organisation document S/WPGR/W/39 12 July 2002 (02-3883); Working party on Gatts rules referring to: The Size of Government Procurement Markets, offprint from *OECD Journal on Budgeting* 1, 4 March 2002.

It is estimated that in Sub-Saharan Africa, at present, the amount spent on public procurement is between \$30 to \$43 billion per year.⁴⁹ In Africa the cost of construction and maintenance of infrastructure is colossal, as is indicated by findings from various survey reports. The African Infrastructure Country Diagnostic Study⁵⁰ conducted for the African continent in collaboration with the World Bank and the African Development Bank⁵¹ indicates that Africa requires about US\$ 93 billion per annum in order to cover the deficit in funding infrastructure. In order to provide sufficient infrastructure for Africa's needs, new and innovative methods of funding and deployment methods are therefore required.⁵²

If regard is had to the proposed infrastructure development in the Tripartite area, the importance of public procurement is also evident. It is envisaged that the FTA will be underpinned by robust infrastructure programmes designed to consolidate the regional market through interconnectivity facilitated by all modes of transport and telecommunications so as to promote competitiveness.⁵³ There are many reasons to open the international procurement market, including, of course, the sheer size of the market and its impact upon both the public and private sectors.⁵⁴

The Tripartite alliance⁵⁵ organised an Infrastructure Development Conference in Nairobi on 28th and 29th October, 2010. The Conference, with the theme: "Linking up Eastern and Southern Africa for Sustainable Economic Development" had the

⁴⁹ Wittig 1999 http://9iacc.org/papers/day2/ws2/dnld/d2ws2_wwittig.pdf. According to Africa Infrastructure Country Diagnostics, addressing Africa's power problems and implementing regional trade will in the near future require spending of US\$41 billion per year. Restoring Africa's ageing rail networks to good operating condition would require a one-time rehabilitation effort of US\$3 billion.

⁵⁰ Hereafter AICD.

⁵¹ Hereafter AfDB.

⁵² COMESA 2013 <http://www.comesa.int/attachments/article/1220/COMESA%20Region%20Key%20Economic%20Infrastructure%20Projects.pdf>.

⁵³ Available from <http://www.comesa-eac-sadc-tripartite.org/>.

⁵⁴ "Government procurement ranges from eight to ten percent of the gross domestic product of major OECD countries, and this share is even larger in developing countries." Ohashi 2009 *Rev Ind Organ*. "Government procurement typically accounts for between 12 and 19% of EU Member State's [GDP]." UK Department of Trade and Industry Date Unknown <http://www.dti.gov.uk/europeandtrade/key-tradeissues/procurement/page23706.html>; "Such purchases [of goods, works and services] by public bodies represent about 14% of the EU's total [GDP]." International Local Government Association Date Unknown <http://international.lga.gov.uk/europeanwork/democracy/publicProcurement/index.html>.

⁵⁵ In close collaboration with IGAD, and financial support from PRO-INVEST.

primary objective of considering key priority projects and programmes in the Eastern and Southern Africa Region on infrastructure development, including transport, ICT,⁵⁶ civil aviation and the mechanisms required for funding and investment as well as options for the successful provision of services to achieve sustainable economic growth and development.

The Conference agreed on a priority list of infrastructure projects and programmes (on a Corridor basis) that are ready for implementation and which will be coordinated at the Tripartite level jointly with IGAD.⁵⁷

The first of these is the **North-South Corridor**.⁵⁸ The NSC Programme is a flagship programme of the Tripartite alliance. It is a Model Aid for Trade Programme to implement an economic corridor-based approach to trade facilitation and the reduction of the costs of cross-border trade in sub-regions. The project prioritises access to adequate power supply to support the growing demand from industrial, commercial and domestic consumers within the corridor.

The Upper Flight Information Region:⁵⁹ **this is** another critical project of the Tripartite. It entails the development of a seamless upper airspace across the three sub regions. The main objective of the project is to enhance efficiency in the management of the upper airspace to bring down navigational costs to air transport operators and improve civil aviation safety. **Thirdly, there is the Liberalisation of Air Transport in line with the Yamoussoukro Decision,**⁶⁰ and in the fourth place, in the area of energy,⁶¹ the Tripartite alliance has prioritised the construction of the

⁵⁶ Information and communications technology.

⁵⁷ The realisation and commitment on investment on these projects will be anchored at the highest political levels of the Member States' Governments. This level of support will be sought concurrently from the policy organs of the participating RECs.

⁵⁸ Hereafter NSC. See EAC 2011 http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2.

⁵⁹ Hereafter UFIR. See EAC 2011 http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2.

⁶⁰ ECA/RCID/CM.CIVAV/99/RPT Annex I. Online available from EAC 2011 http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2 **and** UNECA 1999 <http://www.afcac.org/en/documents/conferences/July2012/yde.pdf>.

⁶¹ EAC 2011 http://www.eac.int/index.php?option=com_content&id=581&Itemid=201&limitstart=2.

missing interconnectors between the power grids in the sub region. One of these is the Zambia, Tanzania and Kenya interconnector.⁶²

An important part of the Tripartite Infrastructure Master Plan development process is the consolidation of multiple infrastructure project identification studies into a single database.⁶³ This master plan will have important implications for public procurement as the success of the FTA will to an extent depend on whether the governments are prepared to open up public procurement for competition. This is so not only because of the huge amounts spent on public procurement, but also because the private sector can hardly be expected to participate in regionalisation if the governments involved are not prepared to do the same and to set an example.

SADC produced a Regional Master Plan for Infrastructure Development aimed at mapping out and assessing the conditions for the development and implementation of priority regional infrastructure projects in southern Africa. The Regional Master Plan was an attempt to enable the co-ordination and harmonisation of all regional infrastructure development within the SADC region. The priority sectors within the Master Plan include transport, energy, telecommunications, water infrastructure, meteorology and tourism.⁶⁴ Investment in energy generation alone is estimated to require US\$ 47 billion over the next five years. The costs of surface transmission will be US\$ 26 billion. The amount of US\$ 18 billion will be needed for ports and inland waterways and around US\$ 9 billion in information and communications technology, postal systems, meteorology and water.⁶⁵

⁶² Through Tripartite coordination, an MOU has been signed between the three countries to fast-track the realisation of this missing interconnector that would link the Southern Africa Power Pool and the Eastern Africa Power Pool.

⁶³ The Tripartite Regional Infrastructure Projects Database includes the consolidated datasets from the following sources: SADC Regional Infrastructure Development Master Plan (RIDMP) - Energy, Transport and Water Sector Reports only (August 2012); EAC Tripartite / IGAD Corridor Program (TICP) (November 2012); PPIU Project Pipeline (October 2012); Trade Mark East Africa (TMEA) One Stop Border Post (OSBP) Programme (January 2013); COMESA North/East African Energy and Transport Projects (May 2013); COMESA Priority Investment Plan Database (PIP) (2010).

⁶⁴ Hagerman 2012 www.tips.org.za.

⁶⁵ UNECA 2012 https://www.unece.org/fileadmin/DAM/trade/TF_JointUNRCsApproach/ECA_RegionalIntegrationInAfrica.pdf 114.

COMESA in its Key Economic Infrastructure Projects Report dated 9 April 2013 estimates that the total investment required for the most important infrastructure projects in its area will be fifty-four billion US Dollars.⁶⁶ The estimates are as follows:

- Transport:
 - Railroads 14700 million US\$
 - Ports 7476 million US\$
 - Roads 4791 million US\$
 - Airports 1461 million US\$
- Energy:
 - Transmission lines 3613 million US\$
 - Power generating 24217 million US\$
 - Petroleum 6721 million US\$
 - Gas 2602 million US\$
 - ICT optic fibre links 635 million US\$
- Total 53763 million US\$

These infrastructure projects will in many instances span different countries. Different countries will therefore have to contribute to the same project. This immediately raises the question of in which public procurement regime the procurement will be done, as public procurements are executed within "strict limits imposed by legal rules and organisational procedures at various levels".⁶⁷ The different public procurement systems, potentially 26 of them, in the Tripartite area will clearly present a serious obstacle to the procurement of infrastructure in the region.

As an example of how complicated this problem is, in South Africa public procurement and its regulation was afforded constitutional status in 1994.⁶⁸ The Constitution⁶⁹ provides that whenever an organ of state in any sphere of government contracts for goods or services it must do so in accordance with a system which is fair, equitable,

⁶⁶ COMESA 2013 <http://www.comesa.int/attachments/article/1220/COMESA%20Region%20Key%20Economic%20Infrastructure%20Projects.pdf> 1.

⁶⁷ Telgen, Harland and Knight "Public Procurement in Perspective" 18.

⁶⁸ Section 187 of the *Constitution of the Republic of South Africa Act* 200 of 1993 and subsequently s 217 of the *Constitution of the Republic of South Africa*, 1996.

⁶⁹ *Constitution of the Republic of South Africa*, 1996.

transparent, competitive and cost-efficient.⁷⁰ Notwithstanding these requirements, section 217 of the *Constitution* also permits the implementation of a preferential procurement policy for the advancement of persons or categories of persons disadvantaged by unfair discrimination, and stipulates that national legislation must prescribe the framework for such policies.⁷¹ It will therefore not be possible to implement public procurement in South Africa in terms of any system that does not comply with these constitutional requirements.

COMESA was well aware of the need to harmonise public procurement and in 2002, with the support of the African Development Bank, established the COMESA Public Procurement Reform Project. The project aimed to harmonise public procurement rules and regulations, as well as to build the capacity of national procurement systems in the region. It conducted a baseline survey of the procurement rules and practices of its member states. The results of this survey were used to develop a COMESA public procurement strategy, which includes the basic requirements for the reform of national public procurement laws and practices. The COMESA Secretariat also established a Regional public procurement centre which provides capacity building for member states and includes a procurement information system with access to most procurement agencies of member states. The *UNCITRAL Model Law* played an important role in the development of the COMESA directives.⁷²

4 UNCITRAL Model Law

To evaluate the influence of the *Model Law* on public procurement in Southern Africa, it is necessary to determine to what extent it assisted and can assist in future to open up the national public procurement markets to regional competition and to overcome barriers to foreign competition entrenched in national public procurement rules.

Yukins and Schooner⁷³ state that initiatives to open up markets appear to proceed in four somewhat irregular phases. States must in the first instance adhere to a policy of

⁷⁰ Section 217 of the *Constitution of the Republic of South Africa*, 1996.

⁷¹ Sections 217(2) and 217(3) of the *Constitution of the Republic of South Africa*, 1996.

⁷² Karangizi 2003 https://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi_1_e.doc.

⁷³ Yukins and Schooner 2006 *Geo J Int'l L* 529.

non-discrimination against foreign participation in public procurement. Secondly, the instruments allowing international co-operation on public procurement should be harmonised. This will reduce barriers to trade, because it will reduce transaction costs for service providers across borders. It will also ease the transition to a common procurement market, based on the existence of common instruments. Thirdly, these instruments should be rationalised to ensure optimal procurement functions. Doing so will pay dividends through enhanced efficiency and, at a political level, will lend the rationalised instruments more legitimacy as a tool for development. Lastly, the harmonised and rationalised agreements must be institutionalised through their incorporation into the legal public procurement regimes of the states that adopt these procurement practices.

Arrowsmith⁷⁴ describes four categories of procurement rules that serve as barriers to nations' procurement markets. These are: measures to provide domestic industry with a competitive advantage; secondary objectives of a non-economic nature; illegitimate practices including corruption, nepotism, and patronage; and conventional domestic procurement rules concerned with the "commercial" aspects of procurement and efforts to achieve an efficient domestic procurement process.

The above criteria will be used to evaluate the influence of the *Model Law* and the progress of the harmonisation of public procurement in SADC.

In 1994 UNCITRAL developed the first comprehensive model law for the procurement of goods, services and construction, to be used as a template for countries wishing to regulate or reform their public procurement systems. During the 1998 International Conference on Public Procurement Reform in Africa held in Abidjan, as well as the High Level Forum on Public Procurement Reform in Africa held in Tunis during 2009, enabling legislation and regulations were identified as one of the four pillars of public procurement that needed to be addressed in Africa. Since the first conference many African states have brought about major revisions of their public procurement

⁷⁴ Arrowsmith *Government Procurement* 8-11.

systems.⁷⁵ In this regard the 1994 Model Law is the single most important instrument in the modernisation of public procurement in Africa.

A further driver of the modernisation of public procurement regimes was that many funders of public procurement in Africa require that there be a properly functioning public procurement system before providing such funding. Pressure was also put on states in Africa to base their procurement laws on the *Model Law*, as many legal reforms in these states are financed by international development banks.

According to UNCITRAL,⁷⁶ eleven countries in Africa, namely Gambia, Ghana, Kenya, Madagascar, Malawi, Mauritius, Nigeria, Rwanda, Uganda, Tanzania and Zambia based their public procurement reforms on the Model Law. Its influence is, however, much greater. There is no compulsion on all countries to notify UNCITRAL that they have based their public procurement regimes on the Model Law, and many of the principles used in the *Model Law* have indirectly influenced the regimes in Africa. COMESA to a large extent based its public procurement regulations⁷⁷ on the *Model Law*. Member states are required to align their domestic procurement legislation with these regulations for procurement within the set of thresholds for procurement in the common market. These regulations have indirectly influenced its nineteen member states to utilise the principles entrenched in the *Model Law*. By 2012 fourteen of the nineteen member states had aligned their public procurement systems to the 2009 COMESA Procurement Regulations.⁷⁸

The EAC⁷⁹ as an institution has not as yet addressed the harmonisation of public procurement of its member states. However, Kenya, Tanzania and Uganda⁸⁰ based

⁷⁵ Arrowsmith and Tillipman *Reform of the UNCITRAL Model Law* ch 1; Hunja "UNCITRAL Model Law"; Hunja "Obstacles to Public Procurement Reform"; Basheka "Public Procurement Reforms in Africa" 131.

⁷⁶ UNCITRAL Secretariat 1994 http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html.

⁷⁷ *COMESA Public Procurement Regulations* (COMESA Official Gazette Vol 14, No 3, Legal Notice No 3, 9 June 2009).

⁷⁸ Quinot and Arrowsmith *Public Procurement Regulation 4* who refers to African Development Bank Group 2012 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV_/COMESA_%20Project%20Performance%20Evaluation%20Report_web.pdf.

⁷⁹ Its member states are Burundi, Kenya, Rwanda, Tanzania and Uganda.

⁸⁰ UNCITRAL Secretariat 1994 http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html.

their procurement regulation on the *Model Law*. The remaining states, namely Burundi and Rwanda,⁸¹ were influenced by the *Model Law* in the modernisation of their public procurement regimes.

If regard is had to SADC,⁸² with its fifteen state members, nine - namely Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, South Africa, Swaziland⁸³ and Zimbabwe - have not based their procurement regimes on the *Model Law*. In Botswana the regulations issued in terms of the *Public Procurement and Asset Disposal Act*, 1996 show signs of provisions that are very similar to the *Model Law*. In Namibia, the *Tender Board of Namibia Act* 1996 has many aspects in common with the *Model Law*. The *Zimbabwe Procurement Act* 2 of 1999 took account of the *Model Law*. In terms of this Act regulations may be made with reference to the 1994 *Model Law*. In this regard, the regulations provide that when inviting and adjudicating tenders, the Board may take into account the provisions of the *Model Law*. Although the *Tender Board of Namibia Act*⁸⁴ was not based on the *Model Law*, many of the objectives of the *Model Law* can be recognised therein.

The South African public procurement expenditure is the largest in the SADC common market and it has the most important economic influence in the region. Although its public procurement regime is not based on the *Model Law*, the constitutional prescripts the public procurement regime must comply with⁸⁵ are similar to the goals entrenched in the *Model Law*. The *Model Law* does provide for the possibility to take into account the achievement of socio-economic objectives. Legislation, like the *Preferential Procurement Policy Framework Act*,⁸⁶ is not totally incompatible with the *Model Law*. If SADC is serious about opening up its public procurement market and ensuring

⁸¹ Rugema "Regulatory Framework for Public Procurement in Rwanda" 169-170.

⁸² Its member states are Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

⁸³ The methods contained in the Swaziland regime follow those of the *UNCITRAL Model Law*. Caborn and Arrowsmith "Procurement Methods" 266.

⁸⁴ *Tender Board of Namibia Act* 16 of 1996.

⁸⁵ Namely a system which is fair, equitable, transparent, competitive and cost-efficient.

⁸⁶ *Preferential Procurement Policy Framework Act* 5 of 2000.

economic integration, it will have to harmonise the different public procurement regimes in this economic region.

The influence of the *Model Law* on countries' procurement regimes is usually most visible in the procurement methods and procedures prescribed.⁸⁷ More than half of the *Model Law* deals with methods and procedures of procurement. Four procurement methods provided for in the 1994 *Model Law*, on which the reforms of the relevant states were based, are generally utilised. They are open tendering, restricted tendering, the request for quotations, and single-source procurement.

Two-stage tendering, the request for proposals, and competitive negotiation, which are also provided for in the *Model Law*, are not generally utilised. The reason for that is probably because most states in Africa do not wish to allow such a wide discretion to the procuring officials as is needed for these methods to work, and because such methods presuppose that the procurement officials have the necessary experience and capacity to deal with these methods, which is not always the case in Africa.

The methods for the use of consultancy services are often based on the provisions of the *Model Law*, although the influence of the World Bank guidelines is apparent.⁸⁸ With regard to review and challenge proceedings, the *Model Law* distinguishes between administrative or judicial remedies and either single or multiple remedies. African states usually adopt the system that is most compatible with their own legal systems. It is apparent, however, that the structures of challenge proceedings as well as the basic remedies that are provided for in the *Model Law* are usually followed.⁸⁹

Since the 1994 *Model Law* was drafted, there have been many developments in procurement methods - innovations in relation to e-technologies; the trend towards the harmonisation of procurement practices and regulation; the increasing move towards public-private partnerships, outsourcing and the use of concessions – and developments such as these have necessitated a revision of the 1994 *Model Law*. UNCITRAL decided during 2004 that the *Model Law* should be updated to reflect these

⁸⁷ Caborn and Arrowsmith "Procurement Methods" 266.

⁸⁸ Caborn and Arrowsmith "Procurement Methods" 267.

⁸⁹ Quinot "Comparative Perspective on Supplier Remedies" 330.

changes and other new procurement practices.⁹⁰ The new *Model Law* was finally adopted in 2011, with its accompanying guide being completed in 2012.⁹¹

As could have been expected, the 2011 *Model Law* has not yet had any ascertainable influence on public procurement in Africa. It is, however, to be expected that with the need for regional integration and especially the harmonisation of public procurement, as in the case of the 2004 version the 2011 *Model Law* will play an important role in Africa. This will in particular be the case with e-procurement, which is dealt with in detail in the 2011 *Model Law*. E-procurement requires the existence of adequate digital and telecommunications infrastructure. As more of the procurement functions are moved to electronic and digital platforms, basic infrastructure such as a dependable electricity supply, fast and reliable internet broadband services, reliable telecommunications platforms and user-friendly software is a necessity for carrying out the procurement function. Unfortunately, this infrastructure is inadequate in many African nations, where unreliable power supply, inadequate telecommunications facilities and limited broadband penetration impact negatively on the performance of the procurement function and the quality of delivery. As set out above, both SADC and COMESA intend to spend vast amounts of money on ICT infrastructure. This will impact positively on e-procurement, and should ensure that e-procurement is incorporated into the public procurement regimes of member states sooner rather than later.

The issue of framework agreements, as dealt with in the 2011 *Model Law*, will be of value in the regionalisation of public procurement.⁹² Another aspect that will be of importance for public procurement in the development of the Tripartite alliance and the rest of Africa is the use of private/public partnerships for the construction of infrastructure. It is already evident that a large portion of infrastructure will be brought about through private/public partnerships. In article 49 the 2011 *Model Law* aligns its

⁹⁰ Nicolas 2010 <http://www.ebrd.com/russian/downloads/research/news/lit102.pdf> 1.

⁹¹ See UNCITRAL Date Unknown http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf.

⁹² The guide on enacting and using framework agreements explains the complexity of the decisions required to realise the potential benefits of the three types of framework agreements permitted by the *UNCITRAL Model Law*.

procedures with its Legislative Guide on Privately Financed Infrastructure Projects (2000)⁹³ and its Legislative Provisions on Privately Financed Infrastructure Projects (2003).⁹⁴ Because of its importance it warrants specific attention.

In Africa one of the major concerns in public procurement is the combatting of corruption. Although no African country has to date acceded to the plurilateral World Trade Organisation Government Procurement Agreement,⁹⁵ its provisions regarding corruption are of significance. This agreement specifically deals with the combatting of corruption in public procurement in Article IV requiring the Parties to conduct procurement in a transparent and impartial manner that prevents corruption. This places a positive duty on the Parties to prevent corruption, and not only the duty to avoid corruption. Although the principles on which both the 1994 and 2011 *Model Laws* are based, like competition, transparency, challenge procedures and such will assist to combat corruption, a positive duty to prevent corruption is not specifically imposed. The provisions of the *Model Law* are such however, that the *United Nations Convention against Corruption*⁹⁶ can be complied with within the framework of the *Model Law*.⁹⁷ The approach by the GPA, which imposes a positive duty is preferable, however.

⁹³ Adopted by UNCITRAL on 29 June 2000, the purpose of the Guide is to assist in the establishment of a legal framework favourable to private investment in public infrastructure. The advice provided in the Guide aims at achieving a balance between the desire to facilitate and encourage private participation in infrastructure projects on the one hand, and various public interest concerns of the host country on the other.

⁹⁴ Adopted by UNCITRAL on 7 July 2003, the legislative recommendations and the model provisions are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. They supplement the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects* (UNCITRAL 2003 http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFIIP.html).

⁹⁵ Hereafter WTO GPA. During the discussions which led to GATT in 1946, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT was based, including that of non-discrimination. The discussions culminated in the first Government Procurement Agreement, which was signed during 1979 and entered into force in 1981. This agreement formed the basis of the present GPA. Although the GPA resorts under the umbrella of the WTO, it does not form part of the single undertaking which constituted the WTO, and is a separate plurilateral agreement binding only the signatories thereto.

⁹⁶ Hereafter UNCAC.

⁹⁷ The *UNCITRAL Model Law* has been designed to fulfil those requirements. See Nicholas Date Unknown <http://www.ebrd.com/downloads/research/law/lit113c.pdf>.

5 Conclusion

If regard is had to the stages⁹⁸ for opening up procurement markets referred to by Yukins and Schooner, it is clear that the states in SADC are still in the initial stages of opening up their public procurement markets for regional competition. At present no concerted efforts are made to harmonise public procurement regulation in the region. In this regard COMESA has set the example. Although COMESA is not yet in full compliance with all four of the stages identified by Yukins and Schooner, great strides have been made, and elements of all the stages have been addressed. SADC should learn from COMESA's experience. In particular, because of the influence the *Model Law* has already played in COMESA and the rest of Africa, it would be counter-productive should SADC not take the same route as COMESA.

If regard is had to the four categories of procurement rules that serve as barriers to national procurement markets, as set out by Arrowsmith,⁹⁹ it is clear that all of these are present in many SADC member states, in particular in South Africa, which is the largest economy in SADC. These barriers still exist in COMESA too, albeit to a lesser extent. What is necessary is a phased approach to address all of these barriers. This will be possible under the *Model Law*, as the 2011 *Model Law* does provide for the possibility of complying with international obligations and for states to allow for socio-economic objectives in their procurement regimes. Article 49 of the 2011 *Model Law* must be read with the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and its Legislative Provisions on Privately Financed Infrastructure Projects. This will serve as a guide to address - and in SADC harmonise - the important issue of privately financed infrastructure. Because of the prevalence of corruption in public procurement, it is suggested that this aspect be addressed pertinently as in the GPA.

⁹⁸ States must firstly adhere to a policy of non-discrimination against foreign participation in public procurement. Secondly, the instruments allowing international co-operation on public procurement should be harmonised. Thirdly, these instruments should be rationalised to ensure optimal procurement functions. Lastly, the harmonised and rationalised agreements must be institutionalised through their incorporation into the legal public procurement regimes of the states that adopt these procurement practices.

⁹⁹ These are: measures to provide domestic industry with a competitive advantage; secondary objectives of a non-economic nature; illegitimate practices including corruption, nepotism, and patronage; and lastly conventional domestic procurement rules concerned with the "commercial" aspects of procurement and efforts to achieve an efficient domestic procurement process.

There can be little doubt that the 1994 *Model Law* has already had a marked influence on public procurement regulation in Africa and that the 2011 *Model Law* will in future continue to do so. The need for the harmonisation and integration of regional public procurement is urgent, should Africa want to grow economically. For the Tripartite alliance to be successful the provision of infrastructure is a prerequisite, and this matter falls squarely in the domain of public procurement. In this regard SADC, and especially South Africa, has an important role to play. The political will to achieve integration is of the utmost importance. Public procurement is essential for economic development and the integration and harmonisation thereof on a regional basis is the first step that must be taken to bring this about. In this regard it can only be hoped that SADC and South Africa in particular will follow the example of COMESA.

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LIST OF ABBREVIATIONS

AEC	African Economic Community
AfDB	African Development Bank
AICD	African Infrastructure Country Diagnostic
AU	African Union
CAAU	Constitutive Act of the African Union
CENSAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
e-procurement	electronic procurement
EAC	East Africa Community
ECCAS	Economic Community of Central African States
ECOWAS	<i>Economic Community of West African States</i>
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
Geo J Int'l L	Georgetown Journal of International Law
GPA	Government Procurement Agreement
ICT	Information and Communications Technology
IGAD	Intergovernmental Authority on Development
IGADD	Intergovernmental Authority on Drought and Development
JPAS	Journal of Pan African Studies
MOU	Memorandum of Understanding
NSC	North South Corridor
OAU	Organisation of African Unity
PPLR	Public Procurement Law Review
RECs	Regional Economic Communities
Rev Ind Organ	Review of Industrial Organization
SADC	South African Development Community
SAPL	Southern African Public Law
SAYIL	South African Yearbook of International Law

SRSA	Strategic Review for Southern Africa
UFIR	Upper Flight Information Region
UMA	Union du Maghreb Arabe
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Committee on International Trade Law
UNECA	United Nations Economic Commission for Africa
US\$	United States Dollar
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organisation