

## PART XIV

### INTERNATIONAL TRADE

## A MODEL OF TRADE RESTRICTIVENESS INDEX: ITS APPLICATION AND IMPLICATIONS IN PUBLIC PROCUREMENT

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**ABSTRACT.** Public procurement is characterized as a distorted market granting limited access to foreign suppliers and contractors. However, the different impediments existing within the public procurement policies and their relative significance in restricting effective international competition are not very well known. This paper, through the process of developing a model of Trade Restrictiveness Index, identifies weighs and scales 17 impediments existing within the public procurement policies. It also reveals that implicit restriction which emanates mainly from lack of transparency imposes greater level of restriction in the market. As a final attempt of applying the model, comparison of the public procurement policies of selected COMESA<sup>†</sup> countries, has shown that with rated index of 1, the procurement policies of Kenya and Uganda are rated most restrictive while Rwandas' is found to be least restrictive.

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## INTRODUCTION

In most countries, Government procurement represents significant proportion of economic activities. The market covers a substantial amount of public spending, which in OECD member countries alone was measured to be in excess of 15% of GDP (OECD, 2010). The share is believed to be much higher in developing and least developed countries, where development of basic infrastructure is still the prime focus of governments.

However, despite the general presumption that liberalization of market increases global economy and welfare and broader competition is identified as a key in curbing procurement costs (World Bank, 2008), public procurement market has remained inaccessible to foreign suppliers and contractors (Trionfetti, 2000). Tough reasons for discrimination have been discussed at various occasions, the details and nature of impediments (“taking restrictive” or “not taking unrestrictive” measures) and their relative level of restrictiveness are not empirically studied, at least to the best knowledge of the writer. Thus, the prevailing uncertainty within the public procurement environment could affect policy makers and the public at large in determining which actions of the public procurer affect broader competition and at what extent, which ones can be related with “justifiable” governments’ other objectives and which ones are against public interest for economy and efficiency etc.

In this paper, an attempt is made to identify and analyse overt public procurement regulatory impediments that imposes restrictions on the access and winning chance of foreign bidders by developing a Model of Trade Restrictiveness Index applicable to public procurement market (TRI-PP, here after).

Using the model (‘TRI-PP’), the public procurement policies of six member states of the COMESA were measured and compared. Bringing 19 Eastern and Southern African states including Egypt, Libya and Sudan from the northern part under the umbrella of one organization, COMESA has a vision of integrating and creating one regional economic community to cater for a population size of more than 400 million and GDP of over \$ 360 Billion. As part of this effort and targeting the opening up of the government procurement market for regional players, it is trying to harmonize the public procurement system of the member countries. Hence,

detail assessment and comparison of the procurement policies of the member countries is believed to facilitate the ongoing effort for harmonization.

The remaining part of the paper is organized into six sections and the first section discusses issues related to restrictiveness in public procurement, the second and third sections discuss the research methodology and findings, the fourth section deals with evaluation and comparison of the public procurement policies of selected COMESA member countries and the fifth section provides conclusion followed by appendix.

### **ISSUES RELATED WITH RESTRICTIVENESS IN PUBLIC PROCUREMENT**

Given the huge volume of public spending, an open market geared towards free competition is considered to have benefits of substantial budgetary savings (up to 8% of total cost), innovations and higher quality procurements, positive impact on local private business behaviour, raise competitiveness of the economy as a whole and foster good governance (World Bank, 2008). As a result, "Open Competition" is one of the most shared mottos in public procurement.

However, in practice, public procurement market is recognized for being uncompetitive and restrictive. OECDs' estimate shows that not more than 7% of public procurement of the member countries of the group is open for international competition. In some cases, public procurement market is even considered as a stumbling block to free movement of goods and services. (Ghemawat, 2007). Despite the unprecedented result attained in opening up markets in all other sectors, the success with regard to public procurement market is rather very limited. Until the Tokyo Round of Trade Negotiations which has resulted to the first effort to bring public procurement under internationally agreed rules under the GATT code in 1996, public procurement has been deliberately omitted from main multilateral trade rules (Mattoo, 1996). After eight rounds of negotiation, the only achievement of the WTO with regard to public procurement, so far, is the Agreement on Government Procurement (GPA) which is a voluntary plurilateral arrangement signed by few member

countries to give reciprocal access among the signatories. Developing countries consider the GPA as an arrangement skewed towards firms of developed nations which are having asymmetrical cost advantage over firms of their own. Thus, their involvement is very limited and the resistance is very rigorous. Currently, as of February 2012, only 41 out of the total 153 member nations have signed the GPA and the majority (more than 90%) of them are from developed economies. In the last five years, only 4 countries have acceded and joined the GPA.

Furthermore, during times of crises, public procurement liberalization agreements remain vulnerable to political opportunism. The “Buy American” legislation issued for the implementation of the stimulus package in response to the recent economic crises, procurement response to the crises of Hurricane Katrina, procurement to meet the needs of the 2003 Iraq invasion and aftermath (Schwartz, 2010) exemplify the vulnerability and fragility of the GPA and other regional procurement agreements.

The motive for restriction in public procurement is associated mostly with government’s industrial/social policy goals, national security considerations and minority development (Evenett and Hoekman, 2004). In some instances restrictions are imposed in consideration of specific or temporary public goals; the “Buy American” legislation adopted to stimulate the economy hurt by the recent shock (Schwartz, 2010), “Affirmative Procurement” adopted in South Africa to create business opportunity for marginalized section of the society (Bolton, 2006). It is also considered as a tool to nurture comparative advantage and create national champions. Weiss and Thurbon (2006) have cited cases of Boeing, IBM, Caterpillar, Lockheed and Motorola which were benefiting from the “Buy American” programs and became national champions and leaders in their respective sectors.

The use of public procurement as a policy tool is normally adopted through the rule of “Set Aside” “Price Preference Margin” and “Local Content Requirements”. These are explicit restrictions which are mostly backed by clear provisions in the legal documents. Hence, they are transparent and are mostly attached to certain government objective. It is not unusual to see some of these restrictive measures, particularly price mechanisms, are

adopted in the procurement financed by multilateral organizations. For instance, the World Bank allows borrowers of developing countries to award bids to locals even if the price of the locally manufactured goods/services and local contractors is higher than that of the foreign land up to a certain margin (a margin of 15% for goods and 7.5% for works) and encourage the use of nationals as “key staff” in the procurements of Consulting Services (World Bank, 2010). In general, the use public procurement as a tool for promoting social policies (Arrowsmith, 1995 cited in Bolton, 2006), to counterbalance asymmetrical commercial power (Ssenoga, 2006) and to provide positive interaction between economic, social and political policies (Kashap, 2004) are recognized by most as legitimate objectives which governments’ should not be denied of, as far as it is implemented in an optimal and transparent manner.

However, restrictiveness in public procurement cannot be associated only with the so called “legitimate” social/industrial objectives. Besides the vulnerability of the policy to the influence of lobbyists and interest groups, inefficient and illegitimate procurement procedures are among the major causes of restrictiveness. Opaque procurement system and discretionary procurement procedures (Evenett and Hoeckman, 2004), corruption and nepotism (Arrowsmith (2003), cited in Yukins and Schooner (2006)) are fertile grounds to limit the access and winning chance of foreign bidders especially the least cost providers. Indeed, it is evidently clear that causes for discriminatory behaviour in public procurement are various in natures and some of them with no justifiable grounds and others inherently bear the risk of favouring the few at the expense of the majority. Therefore, those that are claimed to promote “legitimate objectives” may need to be applied with proper scrutiny and in an optimal manner while those which lack economic or other justifications should be avoided so that the economy as a whole benefit both from the competition and protection.

## METHODOLOGY

The methodological approach followed by OECD in setting-up Trade Restrictiveness Index (TRI) in Service Sectors; Construction

Sector (OECD, 2009); Professional Services (OECD, 2008); and FDI (OECD, 2006); has served as a research framework in developing TRI-PP. Accordingly, the development of the index (TRI-PP) has passed through two stages: Identification and Scaling, and Classification and Weighting of the impediments using primary and secondary data. Furthermore, attempt is made to upgrade the theoretical basis of the study using “Delphi” method.

Preliminary listing and scaling of impediments have been made through Desk Study on the provisions of articles of the GPA and Procurement Guidelines of the World Bank. In recognition of governments right in promoting other “legitimate” objective, optimal level of restrictiveness in comparison to selected benchmarks, as far as applicable, are considered as a “non restrictive” scenario. As a result, semi-structured questionnaire was prepared and commented independently by two experts and, then, administered with seven additional local and international experts . Following advanced “Delphi” techniques (Donohoe and Needham, 2009); the experts were purposely selected for their rich experience in the subject, all of them, at the time, were actively involved in formulating and advising public procurement policies and kept anonymous during the entire process. Based on the respondent’s comments, amendments have been made to the list and scale through addition, deletion and modification, as appropriate. The revised and tiered impediments were finally circulated and as a collective thought of the group, a partially completed model with 17 tiered impediments were developed.

As a final stage in the process of developing the model, a weight has been assigned to each of the impediments establishing an aggregate index of 100% or 1. For the purpose of fixing the weight, another semi structured questionnaire has been administered on ten experts who were attending advanced training on public procurement in Mbabane (Swaziland) from September 06, 2010 to October 01, 2010. These respondents were also experienced procurement professionals and trainers from Kenya, Zambia, Malawi, Tanzania and Mozambique. Based on the responses, computation of weights has been carried out by taking mean values of the expert opinions. The two successive stages of identification and weight fixing have produced the generic model TRI-PP. (Appendix 1).

To enhance functionality, the impediments were classified into 'Explicit' and 'Implicit' and the 'Implicit' category into further sub classification of 'Non Transparency' and 'Local Inclination' following the Classification and Measurement" procedures outlined in Simon (1969); *Defining Purpose, Setting Criteria and Measuring and assigning the impediments to the appropriate category.*

Evaluation and comparison of COMESA countries' public procurement policies is restricted only to those countries whose procurement policies were accessible through authentic web sources. In this way, six countries (Kenya, Uganda, Zambia, Ethiopia, Rwanda, and Malawi) were selected from the group and their procurement documents (Proclamation and Directive) that were valid at the time of the study have been collected and reviewed. Details of the evaluated countries policy stance and reference detail of the documents and articles and the assigned scale as per the TRI-PP model is provided in Appendix 2.

## DEVELOPING THE TRI-PP

### A) Identification and Scaling

#### *ICB Threshold and Contract Splitting:*

Setting higher ICB threshold reduces the volume of market accessible to foreign bidders. However, lower or moderate level of ICB threshold is also meaningless unless it is complemented by rules of explicitly forbidding "Contract Splitting". But due to the need to accommodate other optimal government's objectives and to balance the cost of transaction with volume of contract, the scale under this impediment was developed against a benchmark threshold. Whilst the benchmark and the scale should be adjusted based on the procurement environment it may be applied, for purpose of measuring the procurement policies of the COMESA countries, this study has used the minimum ICB threshold applied by the World Bank for projects it finance in each of the evaluated countries.

The impediment is scaled into five layers. The highest level of restrictiveness is defined as a scenario where the ICB threshold

of the country is set above the ICB threshold applied by the World Bank for all procurement categories (Goods, Works and Services) and when the law does not explicitly forbid contract splitting.

***Margin of Price Preferences:***

By artificially raising the competitiveness of domestic suppliers, margin of price preference limits the winning chance of foreign bidders. It is also one of the common features of public procurement policies of most countries and is widely used as a tool to promote domestic manufacturers. But finding an optimal level of margin of price preference that may create balance between efficiency and other government objectives is a matter that needs a thorough case by case consideration. In view of this, this indicator should also be modified to fit into the specific environment in which the model is intended to be applied. For this study, the margin of price preference allowed by the World Bank is used as a benchmark. Scaled into three layers, price preference margin greater than the benchmark for all procurement categories is defined as the most restrictive scenario.

***Requiring Local Content as Qualification/Evaluation Criteria:***

“Local content” as an impediment is considered to be imposed in the form of mandatory local value added or joint-venture or partnership with locals and could be used as a Qualification or Evaluation criteria. It obviously forces foreign bidders to forgo their optimal solution to the bid and hence, discourages participation and/or increases costs of bidding. Scaled into five layers, a scenario where “Local Content” is defined as qualification criteria for all types of procurement is identified as most restrictive and rated 1.0.

***Sub-National Government and/or Parastatals Procurement:***

Some countries exempt procurements conducted by sub-national governments and parastatals from applying the national public procurement rules. The lack of transparency and absence of regulatory framework expose the procurement activities of these entities to the influence of interest groups and corrupt politicians. As a result, the process of fair and open competition would be compromised disfavoring cost efficient suppliers as a whole (both local and foreign). However, access to the local

network and information asymmetry disfavours foreign bidders more than the locals. Scaled into three layers, a scenario which exempts the application of the national rules to the procurement of both sub-national governments and parastatals is defined as most restrictive and rated 1.0.

***No or improper Publication of General Procurement Notice (GPN) Or Procurement Plan:***

This impediment deprives bidders of important information of volume, timing and type of procurement planned to be undertaken during a certain period. While the local bidders could have network and location advantage, absence of formal and appropriate communication is to the disadvantage of foreign bidders who may not get the information at all or get it at a higher cost than the locals. Scaled into four layers; absence of explicit provision demanding publication of the GPN or Procurement plan is identified as most restrictive scenario and rated 1.

***Improper Publication of Specific Procurement Notice (SPN):***

Publicizing SPN through a media that is not accessible to all potential bidders is also defined to be discriminatory. Some procurement laws and regulations require SPN to be posted through a national media which is accessible only to locals or on a website with no international recognition as a business website. In this circumstance, foreign bidders may not access the information at all or forced to establish and maintain local linkage at an additional cost which inflates their bid and limit chance of winning. In a scale of four, a scenario in which publicizing the SPN is not a requirement of the law is defined as most restrictive and rated 1.

***Shorter Tender Floating Time:***

Because of the physical and other distances, foreign bidders require more time to prepare and submit responsive bids. Hence, allowing shorter tender floating time is more discriminatory to the access and winning chance of foreign bidders than locals.

For purpose of this study and to facilitate the comparison among members of the COMESA countries, the level of restrictiveness is benchmarked based on the World Bank procurement guideline which considers complexity and type of

procurement as determinant factors in setting minimum tender floating time. As a result, a scale of five layers is identified and a scenario which, in comparison to the benchmark, allows less “minimum tender floating time” (both for simple and complex procurements and for all procurement types) is considered as most restrictive and rated 1.

***Inaccessibility of the procurement Laws, Regulations and Standard Bidding Documents:***

The public procurement documents are sources of knowledge of the procurement environment and provide the road map for potential suppliers in submitting responsive bids. Bidders cannot be encouraged to submit bids in an unknown environment. However, as part of the daily business experience, local bidders could have better knowledge of the local procurement environment than the foreign bidders. Some countries, however, neutralize these local advantages by posting their procurement Rules, Regulations and Standard Bidding Documents (SBDs) on official websites and thus making the procurement environment and the legal framework known to all. But failure to do so creates asymmetry of information and hence, is discriminatory.

Depending up on the amount of information and the media of communication, a scale of three layers is defined; Failure to publicize all the public procurement documents on the official website is considered to be most restrictive.

***Leniency in the use of International Language:***

The cost of bid preparation and contract implementation would be lower if bids and contracts are processed in the bidder's own language. However, this is quite unlikely in the context of international trade. Most procurement laws provide explicit provisions that require use of international language in case of sourcing from the international market. However, leniency of the law results to a discretionary practice and hence, is discriminatory against foreign bidders. Scaled into two layers, absence of explicit statement in the law/regulation on the need to use international language is considered most restrictive and rated 1.

***Improper Publication of Award:***

Publicizing award information is a feature of transparent public procurement system. In addition to building bidders confidence, it provides vital information of why bids were not accepted. Though this information is required by all bidders, the locals have the location and network advantage to get award information at a lower cost.

Scaled into four layers, a scenario in which procurement laws and regulations do not require 'publication of award' is considered to be most restrictive and rated 1.0.

***No or incomplete use of Standard Bidding Documents (SBDs):***

Enhancing predictability, SBDs allow bidders accustom themselves with the general bidding and contracting provisions so that responsive bids can be prepared within a short time and at low cost. In the absence of SBDs, the cost of bid preparation would be much higher for foreign bidders due to uncertainty and absence of local know how of the legal and commercial rules of the procuring country. This may discourage participation or inflates the bid price of the foreign bidder. Scaled into four layers, absence of SBD for all types of procurement is determined to be most restrictive and rated 1.0.

***Leniency of the Law in the use of International Standards:***

When requirements are expressed in the buyer's national standard, foreign bidders, if they bid at all, incur familiarization and adaptation costs. Hence, use of national standard is discriminatory favouring locals. However, explicit policy statement requiring use of international standards, inter alia, helps to establish a level playing field and avoid discretionary practices. Scaled into two layers, lack of explicit provision requiring use of international standards is considered restrictive and rated 1.

***Use of Limited Type of Currencies for Bidding and Payment:***

The risk associated with exchange rate fluctuation would be minimal if bidders are allowed to bid and receive payment in a currency in which cost of supply is paid. While buyers, in normal circumstances, like to accept bids in local currency, limiting the currencies of bidding and payment adversely affects wider participation and winning chance of foreign bidders'. Based on the currency options provided in the law, the indicator is scaled

into three layers. A scenario which allows use of local currency only is determined to be most restrictive.

***Use of National Law to Settle Disputes:***

Countries may prefer use of national laws in settling disputes that may arise during bidding or contract implementation. But national laws are unknown and complying with them would be costly to foreign bidders. As a result, it limits participation and winning chance of foreign bidders.

Based on the scope of application, the impediment is scaled into three layers. A scenario which require use of national law to settle disputes for all types of procurement is considered to be most restrictive and rated 1.0.

***Mandatory Requirement to use Local Agent:***

With slight difference from the afore stated “Local Content” requirement due to purpose to the buyers and relatively marginal value it may add to the foreign bidders, complying with the requirement and involving local agent obviously inflate the price of the foreign bidders in the form of fees payment. As bidders cannot win contracts with inflated price, the foreign bidder may eventually lose interest to participate. Hence, the impediment may limit the winning chance of foreign bidders and it may eventually deter the foreign bidder from participation.

Based on scope, the impediment is scaled into three layers : mandatory requirement to use local agent in all types of procurement and in none of the procurement are considered as a most restrictive and unrestrictive scenarios and rated 1.0 and 0 respectively.

## **CORRUPTION**

It is the only impediment that is not governed by wording in the procurement policy. Though corruption affects the access and winning chance of all bidders (especially low cost providers), due to information asymmetry and lack of access to local networks, its effect is considered to be more severe against foreign bidders. In developing the scales and to facilitate comparison, the corruption perception index (CPI) developed by Transparency International,

(2009 report), is applied. The scale is developed based on the country's overall rating as given in the CPI and the relative level of corruption among the evaluated countries.

***Bidder's prior Registration:***

Some public procurement policies set prior registration as a condition to bid. The registration process could be easy or complex which might require passing through rigorous administrative procedures. Due to the obvious reasons of distance and lack of local network, meeting such requirements is costly and difficult to foreign bidders than to the locals. Based on the need and timing of the registration requirement, it is scaled into four layers; 'Prior registration' as a condition to bid is considered to be most restrictive and rated 1.0.

**B) Classification and Weighting:**

The following table provides the weight as assigned to each of the identified impediments with an aggregate score of 100% or 1.

**Table 1- Public procurement policy impediments and assigned weight**

S.N.	Impediment(s)	Assigned Wight.
<b>1. Explicit or Direct Discrimination</b>		
1	Higher ICB threshold and leniency of the law in forbidding contract splitting	0.1975
2	Allowing higher price preference margin to local bidders	0.1125
3	Requiring local content as qualification/evaluation criteria	0.0975
4	Mandatory requirement to use local agent	0.0333
<b>2. Implicit or Indirect Discrimination</b>		
<b>2.1 Non Transparency</b>		
5	Improper publication of Award	0.0310
6	Excluding sub national/parastatals procurement from	0.0925

	the national system	
7	No or Improper publication of GPN or Procurement Plan	0.0459
8	Improper publication of SPN	0.0472
9	Shorter Tender Floating Time	0.081
10	Level of corruption in the public sector	0.0333
11	Inaccessibility of procurement law, regulation and SBDs	0.0378
12	No or incomplete use of SBDs	0.0297
13	Prior registration requirement to bid	0.0310
<b>2.2 Local Inclination</b>		
14	Leniency of the procurement law in the use of International standard	0.0437
15	Use of local or limited type of currencies for bidding and payment	0.0356
16	Use of national law for dispute settlement	0.0333
17	Leniency of the procurement law in the use of International Language	0.0172
<b>Weight</b>	<b>Total</b>	<b>1.0000</b>

### ***Explicit or Direct Discrimination***

The 17 impediments were classified into two obvious categories of 'Explicit' and 'Implicit' impediments. The purpose of this classification was to identify those impediments which might be associated with promoting government's other social/industrial objectives. Thus, as a rule, impediments that are caused due to an explicit procurement policy statement resulting to one or both of the following conditions are identified under this category.

- 1) Favouritism towards local bidders, citizens or products.
- 2) Favouritism against foreign bidders, citizens or products.

As a result, the first four impediments listed in the above table were assigned under the category for Explicit or Direct Discrimination. Though the impediments belonging to this group are few in number, in aggregate terms, the category assumes more than 44% of the total level of restrictiveness. The two dominant impediments of setting higher ICB threshold and price preference margin alone and jointly take 31%. However, considering the general presumption of linking restrictiveness in public procurement widely with governments other objectives, the remaining 56% of restrictiveness is still excessively high in distorting the competitive functioning of public procurement markets.

### ***Non-Transparency***

The remaining 13 impediments which were categorized under “implicit” were further classified into “Non Transparency” and “Local Inclination” sub categories. The objective of identifying the “Non- transparency” sub-category is to identify the level of restrictiveness caused due to failure in providing information regarding public procurement and its proceeding. The following rules are adopted to identify impediments associated with this sub category.

- 1) Impediments that creates asymmetry of information against foreign bidders
- 2) Impediments that create asymmetry of access to the procurement proceeding

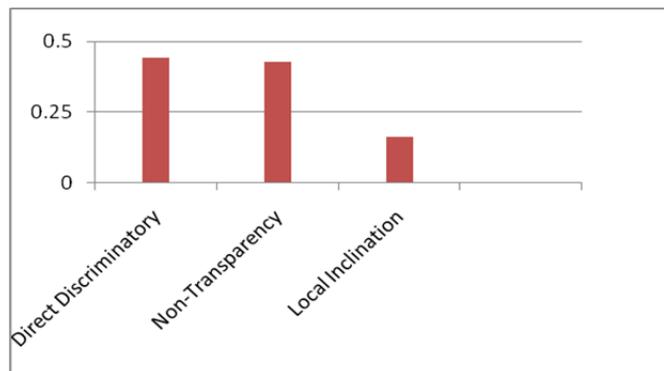
Hence, 9 impediments representing 42% of the aggregate level restrictiveness were measured positive to one or both of the above rules and hence, classified under the ‘Non-Transparency’ category. Unlike the impediments identified under ‘Direct Discrimination’, these impediments cannot be associated with any of the social or industrial objectives of the government and are a result of opaque or inefficient procurement policy framework. Thus, they are apparently more harmful to competitiveness of the market and ‘Value for Money’ procurement.

### **LOCAL INCLINATION**

The remaining impediments which are basically a result of governments' interest to protect, develop or conform to other national interests were categorized under the Local inclination subcategory. It is impractical to directly associate these impediments with either preference to local bidders (or products) or to the inefficiency of the procurement system. In fact, applying some of these impediments, in some situations and from the perspective of the procurer, may have technical or economic justification. But when applied as a rule and indiscriminately, it limits government procurement from accessing global knowledge and innovation while it affects the access and winning chance of foreign bidders in government contracts. The aggregate level restrictiveness of impediments under this sub category is slightly above 16% of the total level of restrictiveness of the public procurement policy.

The following graph shows the relative importance of the three categories of impediments existing within the public procurement policies.

**Figure 1: Relative level of restrictiveness of the three categories of impediments**



## EVALUATION AND COMPARISON OF COMESA COUNTRIES USING TRI\_PP

This section provides the measurement and comparison of the TRI-PP of six COMESA member countries.

**Table 2: Country Aggregate Level of TRI-PP**

Country	TRI-PP
Kenya	1
Uganda	1
Zambia	0.594
Ethiopia	0.534
Malawi	0.41
Rwanda	0.371

Accordingly, Kenya and Uganda are found to impose highest level of restriction on foreign bidders. The Public Procurement Act (2005) and the Public Procurement and Disposal general Manual (2009) categorize ICB as an alternative procurement method applied only in exceptional circumstances. Clause 86 of the Act states that ICB procedure would be implemented *“If there will not be effective competition unless foreign persons participate....”* It further stresses that National Competitive Bidding (NCB) is the preferred and the default procurement method, while ICB is sought only in the absence of competitive market locally. Hence, when ICB procedure is an exception than a rule, measuring against the other impediments become irrelevant as the system, by rule, is fully restrictive. As a result, Kenya is assigned with the maximum restrictiveness index value of 1.0.

Similarly, as per the Clause 80.2 of the Public Procurement and Disposal of Public Asset Act (2003), Uganda has restricted the application of ICB only to a situation where there is lack of competitiveness and the ability to obtain *“Value for Money”* procurement through the local market. The Article reads *“Open International Bidding is used to obtain maximum possible competition and ‘value for money’ where national providers may not necessarily make this achievable”*. Though the procurement law also allows foreign bidders to bid in a locally floated tender, it is impractical to participate and win government contracts that are specifically formulated, packaged and specified to address the domestic market and domestic suppliers. Hence, the public

procurement policy of Uganda is also considered to be most restrictive, and assigned with an index value of 1.0.

However, all of the remaining four countries evaluated under this study, are found to accept ICB as a rule applicable for procurements above a certain threshold. Therefore, a detail evaluation of the procurement laws and regulations of each of these countries against the proposed model was carried out (see Appendix 2), and indices of restrictiveness (TRI-PP) were computed.

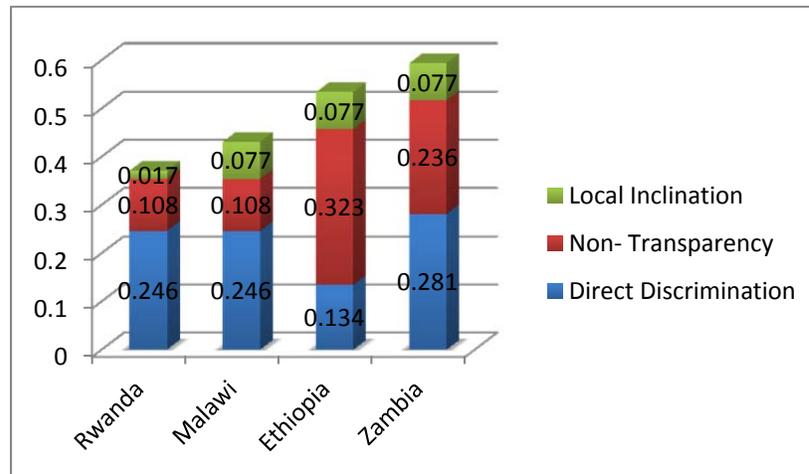
Accordingly, Rwanda appeared to be having the least restrictive public procurement policy, followed by Malawi, Ethiopia and Zambia, with restrictiveness indices of 0.371, 0.41, 0.534 and 0.594 respectively.

**Table 3: Level of restrictiveness by category of the evaluated COMESA member countries**

Country	Direct Discrimination	Non-Transparency	Local Inclination	Aggregate TRI-PP
Ethiopia	0.134	0.323	0.077	0.534
Rwanda	0.246	0.108	0.017	0.371
Malawi	0.183	0.15	0.077	0.41
Zambia	0.281	0.236	0.077	0.594

The details of the evaluation and comparison revealed that the countries levels of restrictiveness are inconsistent across all the categories, as shown in Table 4 and in the following chart.

**Figure 2: Level of Restrictiveness by category**



As we can see in the above table and the corresponding chart, Rwanda has the second most restrictive public procurement policy in terms of Direct Discrimination. But due to relative leniency of the procurement policy with regard to the other categories, in aggregate, it is measured as the least restrictive of all the countries evaluated. As a result, Rwanda has much better chance of achieving the principal objective of procurement 'Value for Money', while promoting the 'social' or 'industrial' objectives more aggressively than the others. This implies that governments optionally have sufficient room to fix politically insensitive policy factors and still achieve a great deal of openness in the public procurement market.

On the contrary, the public procurement policy of Zambia has been found to be most restrictive in aggregate terms and in all the categories except 'Non Transparency' in which it was measured as second most restrictive next to Ethiopia. Zambia's restrictiveness in terms of 'Direct Discrimination' can be attributed more to the mandatory local partnership requirement it imposes on foreign bidders. According to Article 26.6 of the *Zambian Public Procurement Act (2008)*, "...foreign bidder shall partner with a citizen, local supplier or bidder".

Ethiopia, second most restrictive in aggregate, appeared to have the most restrictive public procurement policy in terms of

'Non-Transparency' and 'Local Inclination'. The lack of openness and oversight in the procurement proceedings of parastatals has exceptionally contributed in raising the level of restrictiveness of the country in terms of 'Non- Transparency'. Its lowest level of restrictiveness in terms of 'Direct Discrimination' could also be attributed to the highest level of ICB threshold applicable in Ethiopia for majority of World Bank financed procurements.

Malawi is reported to be relatively consistent and moderate on restrictions under all the categories. Its public procurement policy has been evaluated to be the second least restrictive in terms of 'Direct Discrimination' next to Ethiopia. It is also the second least restrictive in terms of 'Non-Transparency' next to Rwanda. However, similar to Ethiopia and Zambia, the public procurement laws and regulations of Malawi incline more towards local than international standards and in the use of national laws to settle disputes.

## CONCLUSION

The paper has presented a model (TRI-PP) to be used for measuring the level of trade restrictiveness applied in public procurement policies. The model has been formed from 17 procurement regulatory impediments and 62 scales which can sufficiently assess detail policy elements that potentially restrict the access and winning chance of foreign bidders in government contracts differently than the locals. Classification and analysis of the impediments has also shown that while government's explicit restriction on foreign bidders cannot be reversed easily and shortly, significant level of openness and competition can be achieved through policy framework that sponsors transparent procurement system.

Focusing on selected member countries of the COMESA, the application of the TRI-PP model has shown that the procurement policies of Kenya and Uganda, as referred to the specific legal framework cited in this paper, are most restrictive mainly for considering ICB an exception than a rule. From the assessment and comparison of the public procurement policy of the remaining countries (Ethiopia, Malawi, Rwanda, and Zambia), Rwanda appeared to be maintaining the least restrictive procurement

policy followed sequentially by Malawi, Ethiopia and Zambia. While these conclusions are derived from the aggregate restrictiveness score achieved by each of the evaluated countries, it is also noted that few but critical policy provisions are capable of eroding the score the country might have achieved otherwise; For instance the manner ICB is treated in the policy of Kenya and Uganda, the governing legal framework for procurement of parastatals in the case of Ethiopia, mandatory local partnership requirement in Zambia.

The model is proved to be useful to assess public procurement policies in detail and identify the pitfall that hinders the attraction of free international competition. However, in its present shape it is neither comprehensive nor fit to all procurement environments and at all times. Hence, while updating and customization are very important, future research should also address non-policy factors and procurement practices which are both important in the operation of public procurement markets and in the manner they attract foreign bidders.

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### APPENDIX 1

#### Model of TRI-PP

weight	Categories, Scales and Relative Weight of possible impediments existing within public procurement Laws/Regulation
0.1975	1) Setting higher ICB thresholds and failure to explicitly forbid Contract splitting
	1.0 ICB threshold above WB limit for all categories of procurement and splitting procurement package not explicitly forbidden in the law
	0.75 ICB threshold above WB limit for all categories of procurement and splitting

	procurement package is explicitly forbidden in the law
	0.50 ICB threshold above WB limit for some categories of procurement and splitting procurement package not explicitly forbidden in the law
	0.25 ICB threshold above WB limit for some categories of procurement and splitting procurement package is explicitly forbidden in the law
	0.0 ICB threshold equal or below WB limit for categories of procurement and splitting of procurement packages is explicitly forbidden in the law
0.1125	2) Allowing higher Price Preference margins to Local suppliers
	1.0 Gov't gives price preference margin to domestic suppliers above WB allowed limit for all procurement categories
	0.50 Gov't gives price preference margin to domestic suppliers above the WB limit for some of the procurement categories
	0.0 Gov't gives price preference margin to domestic suppliers less or equal to WB limit for all procurement categories
0.0975	3) Requiring Local Content as qualification and/or evaluation criteria
	1.0 Gov't rule allows local content to be used as qualification requirement in all type of proc
	0.75 Gov't rule allows local content to be used as qualification requirement in some type of proc
	0.50 Gov't rule allows local content to be used as evaluation criteria in all type of proc
	0.25 Gov't rule allows local content to be used as evaluation criteria in some type of proc
	0.0 Gov't rule does not allow local content to be used either as qualification or evaluation criteria in all type of proc
0.0925	4) Not applying government procurement rule on subnational government and parastatals procurements
	1.0 Gov't procurement rule does not apply to the procurement of subnational governments and parastatals
	0.50 Gov't procurement rule does not apply to the procurement of either subnational government or parastatal
	0.0 Gov't procurement rule apply equally to all procurements of Federal,

	Subnational governments and parastatals
0.0459	5) No or improper publication of General Procurement Notice or Procurement Plan
	1.0 Gov't procurement rule does not require publication of GPN or approved PP
	0.66 Gov't procurement rule require publication of GPN(APP) in a media accessible to nationals
	0.33 Gov't procurement rule require publication of GPN (APP) in a website that have no wider recognition in the international trade
	0.0 Gov't procurement rule require publication of GPN (APP) in internationally recognized business website
0.0472	6) Improper publication of Specific Procurement Notice
	1.0 Government rule does not require publication of SPN
	0.66 Gov't rule require publication of SPN in a media accessible to nationals
	0.33 Gov't rule require publication of SPN in a website that is not widely known in the international trade
	0.0 Gov't rule require publication of SPN in internationally known business website/ brochures
0.081	7) Shorter Tender Floating Period
	1.0 The minimum tender floating time is below the WB limit for both standard and complex procurements in all procurement categories
	0.75 The minimum tender floating time is below the WB limit for both standard and complex procurements in some of the procurement categories
	0.50 The minimum tender floating time is below the WB limit either for the standard or complex procurements in all procurement categories
	0.25 The minimum tender floating time is below the WB limit either for the standard or complex procurements in some of the procurement categories
	0.0 The minimum tender floating time is equal or above the WB limit both for the standard and complex procurements in all of the procurement categories
0.0172	8) Leniency of the procurement rule in demanding the use of international language for bidding and contract implementation
	1.0 Gov't procurement rule does not require ICB procedures to be conducted in

	one of UN acknowledged international language
	0.0 Gov't procurement rule require ICB procedures to be conducted in one or more of UN acknowledged international language
0.0378	9) Inaccessibility of the procurement Laws, Regulations and SBD
	1.0 Rules and Regulations governing public procurment are not publicized in the website of a responsible body
	0.5 Some rules and regulations (not all) governing public procuremnt are publicized in the website of a responsible body
	0.0 Complete set of rules and regulations including SBD are publicized in the website of a responsible body
0.0297	10) No or incomplete use of Standard Bidding Documents
	1.0 Gov't does not have SBD for any of the procurement types
	0.66 Gov't has SBD for some of the procurement types
	0.33 Gov't has SBD for all types of procurement types
	0.0 Gov't has SBD for all types of procurment types including for specialized procurments
0.0437	11) Leniency of the procurement rule in the use of international standards to specify requirements
	1.0 Gov't procurement rule does not require bidding documents to specify preferably International Standards than National Standards
	0.0 Gov't procurement rule does require bidding documents to specify preferably International Standards than National Standards
0.0356	12) Use of limited type of currencies for bidding and payment
	1.0 Government rule requires bids to be quoted and payments to be made in local currency only
	0.50 Gov't rule requires bids to be quoted and payment to be made through a limited type of currencies
	0.0 Gov't rule permits bids to be qouted and payment to be made through any type of currencies
3 0.033	13) Use of National law for Dispute settlement

	1.0 Gov't rule requires disputes to be settled through national law for all categories of procurement
	0.5 Gov't rule allows dispute to be settled through International Commercial arbitration for some categories of procurement
	0.0 Gov't rule allows dispute to be settled through International Commercial arbitration for all categories of procurement
0.0310	14) Improper Publication of Award
	1.0 Gov't rule does not require publication of award
	0.66 Gov't rule require publication of award in a media accessible to nationals
	0.33 Gov't rule require publication of award in a website having no recognition in the international business
	0.0 Gov't rule require publication of award in a business website/ brochure having international recognition
0.0333	15) Mandatory requirement to use Local Agent
	1.0 Government rule requires the use of local agent to participate for bid in all types of procurement
	0.50 Government rule requires the use of local agent to participate for bid in some types of procurement
	0.0 Government rule does not require the use of local agent to participate in any types of procurement
0.0333	16) Level of corruption in the public sector
	0.0 Very High level of corruption in the public sector with CPI of 0-1.9 of the latest publicized report
	0.75 High level of corruption in the public sector with CPI 2-3.9 of the latest publicized report
	0.50 Moderate level of corruption in the public sector with CPI 4- 5.9 of the latest publicized report
	0.25 Minimal level of corruption in the public sector with CPI 6-7.9 of the latest publicized report
	0.0 Very low level of corruption in the public sector with CPI 8- 10 of the latest publicized report

0.0310	17) Bid accepted only from registered bidders
	1.0 Registration is required and bids is accepted only from prior registered bidders
	0.66 Registration is required and bidders are allowed to register when they bid
	0.33 Registration is required if contract is awarded
	0.0 Registration is not required to bid for government contract

## APPENDIX 2

*Country condition, Source of information and scale assigned*

Factor	Country	Benchmark/ Best Accepted Practice	or	Country Condition	Source of the information (A,R,D,)*	Assigned scale
Setting higher ICB threshold and allowing contract splitting	Rwanda	Works-\$ 500K		FRW 1.2 Billion= USD 2,040K <sup>§</sup>	R- Article 13	0.75
		Goods-\$100k		FRW600 million = USD 1,020k		
		Services-\$100k		FRW 600 million= USD 1,020K		
		Contract Splitting		Forbidden in the law	A-Article 12**	
	Zambia	Works- \$ 300,000K		K 15 Billion= USD 3 Million <sup>††</sup>	***	0.5

\* It is the source of information to define country condition and (A) refers to the procurement Act, (R) refers to the regulation and (D) refers to the Procurement Directive of the respective country

§ Exchange rate of 1 USD to 588 RWF is applied

\*\* According to Article 177 of the Act (2007), splitting of tenders to avoid application of appropriate procurement procedure entails to a disciplinary sanctions and a fine of 300000RwF.

†† An exchange rate of 1 USD to 5000 ZMK is applied

‡‡ Data is sourced from the power point presentation made by Zambia on the 5<sup>th</sup> COMESA procurement technical committee meetings

		Goods- \$300K	K 3 Billion= USD 600,000		
		Services-NA	K 1 Billion= USD 200,000		
		Contract Splitting	Forbidden in the law	Article-42(1)(C), 42(3) (ACT)	
	Ethiopia	Works- \$5000k	Birr 50 million= \$3125K <sup>§§</sup>	Article 17.2.A (Dir)	0.25
		Goods-\$500K	Birr 10 million=\$625K	Clause 17.2.B (Dir)	
		Services-\$500K	Birr 7 million=\$437k	Clause 17.2.D (Dir)	
		Contract Splitting	Forbidden in the law	Clause 17.2.C (Dir)	
	Malawi	Works- \$3000K	USD 6.7 million	****	0.5
		Goods- \$500K	USD 660,000		
		Services- \$500K	USD 330,000		
		Contract Splitting	Forbidden in the law	Article 3.4 (A)	
Price	Rwanda	Works- 7.5%	10%	(Reg)-	0.87

§§ An exchange rate of 1 USD to 16 Birr is applied

\*\*\* Data is sourced from the power point presentation made by Malawi on the 5<sup>th</sup> COMESA procurement technical committee meetings

Preference Margin		Goods-15%	10%	Article 14		
		Services	10%			
		Consultancy Ser.	10%			
	Zambia		Works- 7.5%	-		0.75 †††
			Goods-15%	20% for SME and 15% for others	Article 1.9.1 - G	
			Services			
			Consultancy Ser.			
	Ethiopia		Works-7.5%	7.5%	Article 16.20.2 (D)	0.75
			Goods 15%	Up to 25%		
			Services	-		
			Consultancy Ser.	7.5%		
	Malawi		Works-7.5%	10%	Article 84(2) (Reg)	0.75
			Goods 15%	20%	Article 83(8)(b)-(Reg)	
		Services				
		Consultancy Ser.				
Local content as qualification/evaluation	Rwanda	used as evaluation criteria for consultancy	Comply	Article 37 and 64 (5) of the act	0	

††† As the price margin granted for local bidders is not indicated in the legal documents (except for the procurement of goods), it is roughly assumed that at least one among the remaining three types of procurement, might have higher price preference margin than the standard. Hence, a score of 0.75 is assigned considering higher price preference margin in two of the procurement types

on criteria		service procurement only			
	Zambia	>>	Used as qualification criteria for all types of procurement	Article 26.6 <sup>+++</sup>	1
	Ethiopia	>>	comply	Article 28 (Act) and Article 18 (Dir)	0
	Malawi	>>	Comply	Article 97.2 D	0
Excluding sub-national or parastatals procurement	Rwanda	Apply	Comply	Article 2 & 3 (A)	0
	Zambia	Apply	comply	Article 3.1 (Act)	0
	Ethiopia	Apply	Not comply	Article 3.1 (Act)	1
	Malawi	Apply	Comply	Article 3.1 (A)	0
Publication of GPN or PP	Rwanda	Publicize on International Business website	Publicize but on Internet of PE, Website of RPPA	R-Article3	0.33
	Zambia	>>	Not comply	Not mentioned	1
	Ethiopia	>>	Not comply-optional	Article 14 (D)	1
	Malawi	>>	Not comply	Not mentioned	1
Publication	Rwanda	Publicize on	"at least one	A-Article 47	0.16

<sup>+++</sup> Zambian procurement Act (2008), article 26.6 states that "foreign bidder shall partner with a citizen, local supplier or bidder"

of SPN		International Business website	international newspaper with the most widespread circulation” §§§ “ internet website where it is available”	R- Article 13	5
	Zambia	>>	Publication in local gazette and embassies, any regional or international media	Article 1.5.6 (G) and Article 26 (5) (a) Act	0.83
	Ethiopia	>>	Publication by the Agency website	Article 6.5 (D)	0.5
	Malawi	>>	Internationally recognized paper and internet	Article 31 (A)	0
Minimum Tender floating time	Rwanda	82 days for complex and 42 days for simple procurements	45 days for all types of procurement	Article 47 of the Act	0.5
	Zambia	>>	56 days for all	Article 15.8 (G)	0.5
	Ethiopia	>>	45 days for	Annex 3 of	1

§§§International Newspapers, though it has wider coverage than local media, they have also their own limitation in accessing bidders as compared to known business websites which could be visited regularly by international suppliers. Though, the regulation has indicated the additional use of “Internet website” where available, it is not mandatory obligation of procuring entities. Hence, a midpoint value between ‘widely known’ and ‘widely unknown’ accessibility is given.

			complex and 35 days for simple	the Directive	
	Malawi	>>	45 days for all	Article 47 (2)(a) of the regulation	0.5
Use of International Language	Rwanda	Mandatory	Comply	Article 14 (A)	0
	Zambia	>>	Comply	Article 39.4 (A)	0
	Ethiopia	>>	Comply	Article 27.2- A and Article 16.13.1(b)-D	0
	Malawi	>>	Comply	Article 5 Regulation	0
Inaccessibility of the procurement laws, regulations and SBD	Rwanda	Publicize all of the documents on a website	Comply	All are publicized on <a href="http://www.rppa.gov">http://www.rppa.gov</a>	0
	Zambia	>>	Only the Act is publicized	<a href="http://www.tenderboard.gov.zm">http://www.tenderboard.gov.zm</a>	0.75
	Ethiopia	>>	All publicized	<a href="http://ppa.mofed.gov.et">http://ppa.mofed.gov.et</a>	0
	Malawi	>>	All publicized	<a href="http://www.odpp.gov">http://www.odpp.gov</a>	0
No or incomplete SBDs	Rwanda	SBD for all types of procurement including for specialized procurements	SBD for all except for specialized		0.33

	Zambia	>>	No SBD		1
	Ethiopia	>>	SBD for all except for specialized		0.33
	Malawi	>>	SBD for all except for specialized		0.33
Use of International Standard	Rwanda	Preference to International Standard as far as practicable	Comply	Article 47 (4) Act	0
	Zambia	>>	Not comply	Article 1.1.e- G- Part I	1
	Ethiopia	>>	Not comply	Article 29.3.B (A) Article 17.4. d (D)	1
	Malawi	>>	Not comply	Article 66 (R)	1
Currencies for bidding and payment	Rwanda	Accept all freely convertible currencies	Comply	Article 10 - Act	0
	Zambia	>>	Comply	No specific article limiting type of currency	0
	Ethiopia	>>	Comply	Article 17.4.E (Dir)	0
	Malawi	>>	Comply	Article 63(J)- R	0
Use of national law to settle disputes	Rwanda	Settle disputes through international commercial arbitration	The law allows for special or general conditions of contracts	Article 47.5- A	0.5

			to be governed by a kind of international experience. The SBD also provides an option to use laws other than Rwanda's		
	Zambia	>>	Not comply	Article 23-G- Part v	1
	Ethiopia	>>	Not comply	Article 17.4. h (D)	1
	Malawi	>>	Not comply	Article 156-R	1
Publication of award	Rwanda	Publicize award on international recognized business website	Internet of PE, Website of RPPAF	R-Article 9	0.33
	Zambia	>>	Through notice to bidders only	Article 53.1	0.83
	Ethiopia	>>	Publication by the Agency's website	Article 6.6 (D)	0.33
	Malawi	>>	Publication by Local Gazette	Article 173(1)-R	0.66
Mandatory requirement to use local agent	Rwanda	Not be required	Comply		0
	Zambia	>>	Comply		0
	Ethiopia	>>	Comply		0

	Malawi	>>	comply		0
Level of corruption ****	Rwanda	CPI (2009) 8-10	3.3		0.75
	Zambia	>>	3		0.81
	Ethiopia	>>	2.7		0.87
	Rwanda	>>	3.3		0.75
Accepting bids from registered suppliers only	Rwanda	Accept bid from any supplier	Comply	Article 37-Act	0
	Zambia	>>	Comply	Article 64.3 (Act)	0
	Ethiopia	>>	Not comply	Article 28.1 (Dir)	1
	Malawi	>>	Not comply. But registration can also be made during contract stage	Article 14 (Act) Article 43 (R)	0.25

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\*\*\*\* As compared to the bench mark, all of the evaluated countries are highly restrictive in terms of corruption but the determination of the scale applicable to each of the countries has also considered differences in the level of corruption among the evaluated countries.