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International Commitments on Domestic Procurement Laws: Evaluating the Compliance Level of Nigeria to the Agreement on Government Procurement of World Trade Organisation

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Abstract

This article examines the extent of compliance of Nigerian procurement law with the agreement on government procurement of WTO (WTO GPA). It notes that while Nigerian law can be said to be in full compliance with the demands of the 2011 UNICITRAL Model Law, the same could not be said of Revised WTO GPA as Nigerian law provides domestic preferences to her domestic bidders in violation of non-discrimination requirements contained in WTO trade agreements. It discusses how liberalisation of public procurement between unequal states can lead to adverse economic problems and how such problems can be averted if developing countries take full advantage of special and differential treatment of WTO GPA. Since Nigeria is a member of WTO, it considers the possibility of Nigeria acceding to WTO GPA and how it can still protect its local suppliers by adopting a sustainable development approach in opening up its public procurement contracts to foreign markets.

Introduction

The importance of plurilateral rule[1] governing the awards of contracts by governments at the state level could not be overemphasised. Series of

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[1] The word *plurilateral* is used because procurement agreements are excluded from the multilateral rules of WTO. Tunkin explains that the plurilateral nature

negotiations in the Tokyo and Uruguay Rounds[2] of World Trade Organisation (WTO) culminated in the emergence of a plurilateral agreement[3] on government procurement (WTO GPA)which was signed on 15th April, 1994 and entered into force on 1st January, 1996.[4]Even, at that, the desire for a non-discriminatory global regulatory regime for government procurement was not satisfied by the 1994 Agreement[5] and that led to further negotiations for amendments which culminated in the formal adoption of Revised WTO GPA on 30th March, 2012 which entered into force in April, 2014.[6]Three notable defects[7] in the 1994 Agreement were addressed in the current legal regime. Pascal Lamy argues that the new regulatory regime ensures ''better disciplines for

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of the agreements means that the agreements are of interest to ''a small group of countries while its opposite, multilateral, means that the agreement is of interest to all countries''. See Grigory Tunkin, "Is General International Law Customary only?"(2003)4 *European Journal of International Law*, 534, at 537.

2 The World Trade Organisation (WTO) was established by the Marrakesh Agreement on December 15th, 1993. A separate agreement on government procurement was negotiated and concluded in 1979 during the Tokyo Round. In 1993, the agreement was renegotiated, giving birth to a new agreement on government procurement (WTO GPA) at the end of the Uruguay Round. For further research on the agreement, see Jones, "The GATT-MTN system and the European Community as International Frameworks for the Regulation of Economic Activity: the Removal of Barriers to trade in Government Procurement" (1984)8 *Maryland Journal of International Law and Trade* 53. On the negotiation of the Tokyo Round, see Bourgeois, "The Tokyo Round Agreement on Technical Barriers and on Government Procurement in International and EEC perspective" (1982) 19 *Common Market Law Review*, 5.

3 There are four plurilateral agreements: the Government Procurement Agreement, The Agreement on Trade in Civil aircraft, the International Bovine Meat Agreement and the International Diary Agreement.

4 See Article XXIV of the WTO Agreement on Government Procurement signed at Marrakesh on April 15th, 1994 (hereinafter "the 1994 Agreement").

5 Ibid.

6 See the text of the Protocol Amending the Agreement on Government Procurement (hereinafter "the Revised WTO GPA") Available at *http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm* (last visited June 16, 2015).

7 It addresses the problems of compatibility of the agreement with modern technology, the issue of corruption and discriminatory measures.

awarding government contracts'', ''better use of public resources'' and "provides a 'needed stimulus for the world economy".[8]

Indeed, WTO GPA aims to provide openness,[9] transparency[10] and non-discrimination[11] in government procurement markets in furtherance of its objective to reduce non-tariff barriers to international trade. Due to the significant impacts of government contracts on the international trade of goods and services by government and its agencies which account for a greater percentage in the world market, the exclusion of such a huge market from multilateral trade rules is likely to be a slight to WTO's principle of free trade. The outcome of that exclusion, if it persists, is equal to protectionism which WTO members are warring against by making commitments to open up their markets to all members without any form of discrimination.[12]

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8 See Mackenzie Babb, 42 WTO Members Agree to Improve Government Procurement available at *http://iipdigital.usembassy.gov/st/english/article/2011/12/20111215154240eizne kcam0.7843897.html?distid=ucs#ixzz34nizdGTg* (last visited June 16, 2015).

9 The purpose of multilateral framework for procurement law is to achieve ''greater liberalization and expansion .....of international trade'' See Annex to the Protocol Amending the Agreement on Government Procurement (setting out the Preamble). Op .cit, note 6 above.

10 It seeks to ensure that procurements are carried out ''in a transparent and impartial manner''. Ibid, see Annex to the Protocol Amending the Agreement on Government Procurement [setting out the Preamble]. Op. cit, note 6 above.

11 Ibid. See Article IV of the Revised WTO GPA.

12 The World Trade Organisation encourages trade liberalisation and fights against protectionism by using principles and rules which emanated from trade negotiations through different rounds and are enforced by a well-coordinated WTO Dispute System Body (DSB). The said rules and principles are embodied in trade agreements which include the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), supplemented by schedules of commitments to which its 150 members agreed. The most important fundamental principles are two, namely that of non-discrimination—national treatment and most-favoured-nation (MFN) treatment. National treatment requires WTO members to treat the goods and services of other WTO members as favorably as similar goods and services produced domestically. Most-favoured-nation treatment is to the effect that, if WTO members grant any advantage (such as a lower tariff) to some members, it must accord the same advantage to other WTO members. The commitment of

The attainment of the aspiration of WTO members to open up markets globally may take a long time as far as it relates to the procurement sector because of the divergent views of the members to the implementation of WTOGPA. The agreement has been considered to be in the interest of the developed countries alone, as a result of which the majority members of the organisation, which are the developing and less-developed countries, avoid full commitment to its demands. Consequentially, the move to ensure free trade in government procurements has not been generally accepted. Therefore, till date, only 40 members are signatories to WTOGPA while 19 other members are mere observers.[13] Although the majority of WTO members (from the developing bloc) are lackadaisical in their attitude to embrace WTOGPA at the multilateral level, they are spurred to embark on a spate of procurement reforms which paves the way for resurgence of national legislations to regulate the awards of contracts for the first time in their various countries at the domestic level.[14] While it is obvious that some provisions in the domestic legislations may not be compatible with the provisions of WTOGPA,[15] the pioneering attempt made by these countries to enact procurement rules should be commended.

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members to these important principles contributes in great measure to keep global markets open.

13 From the list of 43 members, only Hong Kong, China, South Korea and Singapore from the East Asian are developing countries apart from 10 other countries who are members via the European Union though the organization has 150 members.

14 Almost all African countries have enacted legislation to regulate public procurement in their countries though they are not signatories to WTOGPA. South Africa has The Preferential Procurement Policy Act of 2000 though there is an impending legislation in the form of a draft (Draft Preferential Procurement Regulations Government Gazette No 268634 Oct 2004), Uganda has The Public Procurement and Disposal of Assets Act, being the first to be passed in to law in 2003 and, in Kenya, public procurement regulations were first enacted under the Exchanger and Audit Act on the order of the legal Notice No. 51 on March 30 2001 but the new Public Procurement Law was enacted in October 2005 but became effective on the 1st January 2007 vide the Public Procurement and Disposal Regulations 2006.

15 The impetus for legislation in the area of procurement was also reinforced by the condition imposed by the World Bank, IMF and other donors that African

Nigeria is one of the countries in this category. The emergence of a new democratic government in 1999 which put an end to nearly 16 years of military interregnum signalled a spirited effort on the part of the new civilian administration to purge the country of corruption which had become the order of the day in the government and to enthrone prudency, accountability and transparency in public procurement.

To achieve that objective the president of Nigeria at that time, Chief Olusegun Obasanjo commissioned the World Bank in collaboration with some local and international consultants to undertake among other things, the studies of the country's public sector procurement structure, particularly the existing legal framework, organizational responsibilities and capabilities, and to recommend procedures and practices for new legal regime. After the submission of their reports,[16] the president evolved new policy guidelines for procurement and award of contracts in all Federal Government ministries and parastatals by issuing a circular No. F. 15775 of 27th June 2000. That circular commenced a regulatory regime for awards of contracts at the federal level through indirect method.[17] Of course, there was no specific statutory law enacted to regulate public procurement until the 4th of June 2007 when the immediate president thereafter Alhaji Umaru Musa Yaradua took an historic step to sign in to law the Public Procurement Act, 2007[18]([19](PPA).The PPA regulates public procurement of goods and

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countries must enact national laws to make their procurement transparent as condition for loans and grants.

16 The report consists of two volumes. The first volume contains a summary of findings and recommendations and an Action Plan for implementing the recommendations. The second volume contains the main text. The report can be down loaded from *http://wwwwds.worldbank.org/external/default/main?pagepk=641878358p.pk=646200093& the site p*=(last visited 12th of August 2014).

17 Certain laws indirectly regulate procurement contracts such as laws dealing with financial regulations and Appropriation Act etc.

18 The Act can be downloaded from the official site of the Bureau of Public Procurement in Nigeria – *http://www.bpp.gov.ng/?ContentPage&secid=25&sub_cnt=sectionpage&sub_cntid=110*(last visited 12th of August 2015)

services by the Federal Government in Nigeria and seeks to achieve openness, transparency, accountability and ethical standards in public sector investments by attempting to remove all vices that can corrupt government contracting.

This article analyses the extent of compliance of Nigerian law with Revised WTO GPA. It is divided into five parts. The first part is introduction while the second part is a general overview of the regulatory provision in Nigeria. Part three deals with the obligations and commitments in WTOGPA as well as the UNICITRAL Model. Part four goes further to examine the extent of compliance of Nigerian Procurement Law to the said obligations. Part four covers the extent of compliance of with Nigerian Procurement Law to WTO GPA and that of the UNICITRAL Model Law. It also discusses how liberalisation of public procurement between unequal states can lead to adverse economic problems and how such problems can be averted if developing countries take full advantage of special and differential treatment of WTO GPA. It considers the possibility of Nigeria acceding to WTO, the benefits and burdens associated with that accession. Finally, it offers recommendations on how Nigeria can open up its public procurement contracts to foreign markets and still protect its local suppliers. The conclusion is presented in part five.

General overview of the ACT

The PPA is divided into13 parts. The first and the second parts establish the managerial organs for the execution and supervision of the policies, objectives and processes of the Act. Two bodies which are specifically established by the statutes are the National Council on Public Procurement (NCPC)[20] and Bureau of Public Procurement (BPP). The

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19 The Act can be downloaded from the official site of the Bureau of Public Procurement in Nigeria – *http://www.bpp.gov.ng/?ContentPage&secid=25&sub_cnt=sectionpage&sub_cntid=110* (last visited 12th of August 2015)

20 The Act can be downloaded from the official site of the Bureau of Public Procurement in Nigeria http://www.bpp.gov.ng/?ContentPage&secid=25&sub_cnt=sectionpage&sub_cntid=110(last visited 12th of August 2015). Section2(e).

NCPC is the highest organ with statutory power to examine, approve and review the monetary and prior review thresholds for the application of the provisions of the Act by procuring entities. It has the power to deliberate on a great number of issues and policies that are to be executed by BPP which includes issues that specifically relate to the appointment of the directors of BPP, audited accounts of BPP and changes to be adopted in the procurement process for the purpose of adapting to modern technology.

The BPP possesses the executive power for the purpose of carrying out the policies, principles and objectives of the Act as well as the instructions of the NCPC. It engages in publication of the provisions of the Act[21] and details of major contracts [22] in the journals and on the internet while coordinating relevant training programmes to build institutional capacity.[23] It also formulates and supervises the implementation of general policies and guidelines relating to public sector procurement and, if necessary, apply administrative sanctions to prevent fraudulent and unfair procurement contrary to the spirit of the Act.[24] Part three deals with the purview of coverage of the Act and exceptions in certain areas. It applies to all procurement of goods, works, and services that are to be carried out by the Federal Government of Nigeria[25] with an exception that it shall not apply to the procurement of special goods; works and services involving national defence or national security except the President's express approval has been first sought and obtained.[26]

It is submitted that the statutory limitation of the Act to Federal Government and its agencies is not a complete prohibition of its application to other procuring entities outside the jurisdiction of the Federal Government. Though Nigeria has a federal system of

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21 Ibid. Section5(b).
22 Ibid. Section5(f).
23 Ibid. Section5(s).
24 Ibid. section 5(a) and (d).
25 Ibid. section 15(1).
26 Ibid.section15 (2).

government[27] with each state having power to make its own law and determine the use of its resources, the Act in this author's perception shall apply to all other states if they receive certain amount of fund from the Consolidated Revenue Fund.[28]

The main object of part four is the provision of the legislative framework for the attainment of the fundamental principles behind the Act. To achieve this, it provides not only the conditions precedent for the award of contract but principles that must be followed for the conduct of the award by the procuring entities. In section 16,[29] it provides that all public procurements shall be conducted subject to the prior review thresholds[30]in a manner which is transparent, timely, and equitable for ensuring accountability[31] with the aim of achieving value for money and fitness for purpose and thereby promoting competition, economy and efficiency.[32] Transparency is the focus of the Act in this part as it clearly insists on the requirements that will ensure its attainment. The parameters are clearly spelt out such as qualification for eligibility of bidders[33], requirements for commencement of procurement,[34] timeline requirements, technical specifications for the procured goods or services,

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27 Ibid. See also Sections 4, 5 and 6 of the 1999 Constitution of the Federal Republic of Nigeria.

28 Ibid. See also PPA,section15(1b), all entities outside the foregoing description which derive minimum 35% ofthe funds appropriated or proposed to be appropriated for any type of procurement described in this Act from the federation share of Consolidated Revenue Fund.

29 Ibid. section 16.

30 Ibid. section 16(1)(a).

31 Ibid.Section16(1)](d).

32 Ibid.Section16(1)[(e)(f).

33 Ibid.section16 (6)among other things the bidder must possess the professional and technical qualification as well as financial and human resource capability to carry out the particular procurement. He must also have fulfilled its obligations to pay taxes, etc.

34 Ibid. section 16(1]) deals with procurement planning, the procuring entity shall ensure that funds are available to meet the procurement obligations and that a "Certificate of ' No Objection' to Contract Award has been obtained from the BPP.

criteria for the exclusion of bids,[35]the conduct of procurement proceedings, factors for evaluation of offers, contractual terms[36] and selection of the winning bids.[37] Strategic planning process and implementation are the main thrust of part five. After the Procurement Planning Committee of a procuring entity[38]has critically assessed the needs, it must identify the goods, works or services that are to be required to meet such needs and carry out the essential market and statistical surveys so as to arrive at minimal cost implications for the proposed procurement.[39] Implementation processes are geared towards achieving transparency as solicitation for bids must be advertised and the oversight mechanism is buoyed by the invitation of two credible persons as observers.[40] Contracting responsibilities are not only corporate, it is also personal. The accounting officer of every procuring entity has overall responsibility to supervise the conduct of all procurement processes[41] and shall be liable for failure of his procuring entity to comply with the provisions of the Act.[42]

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35 Ibid. Section 16(8). Any evidence of an act done or promise given by any supplier, contractor or consultant to a current or former employee of a procuring entity or BPP in an attempt to influence any action, or decision making of any procurement activity will occasion an exclusion of bids of such bidders.

36 Ibid. sectin16 (26)One of the requirements is that the all procurement contracts shall contain provisions for arbitral proceedings as the primary forms of dispute resolution.

37 Ibid. section 16(17)''a contract shall be awarded to the lowest evaluated responsive bid from the bidders substantially responsive to the bid solicitation''.

38 Ibid. section 60 defines a procuring entity as ''any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation''.

39 Ibid. See section 18 generally.

40 Ibid. section 19(b) ''to invite two credible persons as observers in every procurement process one person each representing a recognised ;(i) private sector professional organisation whose expertise is relevant to the particular goods or service being procured, and(ii) non-governmental organization working in transparency, accountability and anti-corruption areas, and the observers shall not intervene in the procurement process but shall have right to submit their observation report to any relevant agency or body including their own organizations or associations''.

41 Ibid. section 20(1)in the case of ministries, the Permanent Secretary is the accounting officer and in the case of extra-ministerial departments and

The methods of procurement are dealt with in parts six and seven. The statutorily-accepted method is by open competitive bidding where a defined criterion is set by a procuring entity for the purpose of giving equal opportunity to every interested bidder. Other prescribed methods of procurements like two-stage tendering,[43] restricted tendering,[44] request for quotations,[45] direct procurement[46] and emergency procurement[47] could only be used in certain circumstances[48] to meet the varying challenges that the procuring entity might encounter depending on the nature of goods, works and services to be procured and the situation at hand. Procurement rules are couched differently in part eight for both ascertained and unascertained services in such a way to ensure transparency and value for money. The provision deals with contents of

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corporations the Director-General or officer of co-ordinate responsibility is the accounting officer.

42 Ibid.

43 Two stages of tendering are prescribed, the first one is without a price but it affords opportunity to a procuring entity to negotiate with the contractors or suppliers on any aspect of their tenders. The successful bidders will be asked to submit final tenders with prices on each set of the specification.

44 Section 40 of PPA. For the purposes of subsection (2), of this section, the procuring entity shall cause a notice of the selected tendering proceedings to be published in the procurement journal.

45 Here quotations shall be obtained from at least 3 unrelated contractors or suppliers and they shall not be allowed to change or vary the quotation being the only quotation allowed by law.

46 The procuring entity invites a proposal or price quotation from a single supplier or contractor.

47 The procuring entity is given a liberty here to engage in direct contracting of goods, works and services.

48 Two stage tendering can be used where it is impossible to formulate detailed specifications for the goods or works or characteristics of services to be procured etc. Restricted tendering can be used only 'if(a) the goods, works or services are available only from a limited number of suppliers or contractors;(b) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured' see section 40[1] Id. Also a procuring entity may opt for a request for quotation where the value of the goods or works to be procured does not exceed a sum that is set in the procurement regulation while direct and emergency procurements can be resorted to in times of dangers, war, insurrection or when the supplier has exclusive right of supply of the goods to be procured. See sections 39, 40.41, 42and43 Ibid.

the requests for proposals which must include the name and address of the procuring entity, and the manner, place and deadline for the submission of proposal[49] as well as the evaluation of proposals where price or quality is a factor.[50]

Setting clear rules for procurement of public goods is not an end in itself; verification and oversight of the procurement process are important complement if the object of the Act is to be achieved. Mechanism to detect non-compliance with the rules must be put in place and this is effectively done, not only when appropriate sanctions are meted out to culprits, but also when there is a sound verification procedure which allows bidders and the public to verify the conformity of procuring entity decisions with the procurement rules. That is the main thrust of part nine as it provides for a bi-partite administrative review from the accounting officer to BPP with a short-time interval to file the complaint[51] and adequate remedies[52] if complaint is successful. That is not the end of redress for an aggrieved bidder as he can seek recourse to remedial action in the court of law.[53]

The Act covers every aspect of government's commercial activity. Apart from rules that regulate procurement of goods and services, part 10addresses disposal of public property. Its object is to ensure that public properties are sold through open competitive bidding.[54]Furthermore, to ensure integrity of procuring entities, part 11provides rules to prevent undue influence on the procurement process. To this end, it mandates BPP to stipulate a code of conduct with the approval of NCCP for all

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49 See section 46 of the PPA.

50 Ibid. See section 50, 51 and 52.

51 Ibid. See section 54 of the Act.

52 Ibid. Remedies include nullification of the procurement proceedings and cancellation of the procurement contract.

53 Ibid. Section5497)'Where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with decision of the Bureau, the bidder may appeal to the Federal-High Court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliverer a decision'.

54 Ibid. section 55 and 56.

players in the procurement sector.[55]Offences like collusion,[56] procurement fraud,[57] direct and indirect lobbying,[58]splitting of tenders,[59] bid-rigging,[60] altering of procurement documents,[61] use of fake documents,[62]and deliberate refusal to allow BPP or its officers to have access to any procurement records[63] are created by the Act and effective sanctions prescribed. Miscellaneous which deals with the fixing of seal and interpretation of words are in the last part (13).

Obligations in WTO GPA

The Revised WTO GPA has two major features which can take care of other subsidiary features: transparency and non-discrimination.[64] The

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55 Ibid. section 57(1)''The Bureau shall, with the approval of the Council, stipulate a Code of Conduct for all public officers, suppliers, contractors and service providers with regards to their standards of conduct acceptable in matters involving the procurement and disposal of public assets''.

56 Ibid. section 58(4)(a)'entering or attempting to enter into a collusive agreement, whether enforceable or not, with a supplier, contractor or consultant where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case has there not been collusion between the persons concerned'.

57 Ibid. section 58(4) (b)an agreement between two persons to conduct, or an attempt to conduct, procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favour, agreement, bribery or corruption.

58 Ibid. section 58 (4) (c) "directly, indirectly or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract".

59 Ibid. section 58(4) (d]) for the purpose of evasion of monetary thresholds set.

60 Ibid. section 58(10) (a)and (b): this offence will be proved if offers submitted have been pre-arranged or conduct between two or more persons has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process which eventually leads to escalation or increase in costs or loss of value to the national treasury.

61 Ibid. section 58(4) (f) with an intent to influence the outcome of a tender proceeding.

62 Ibid. section 58(4)(g] 0 to encourage the use of fake document for procurement is also an offence within this section.

63 Ibid. Section 58(4) (h).

64 Other features as spelt out in the preamble like attainment of "'effective multilateral framework for government procurement'', ''the integrity and predictability of government procurement systems''; ''the need to take into account the development, financial and trade needs of developing countries, in particular the least developed countries''; ''avoiding conflicts of interest and

agreement expects the parties to create a transparent, effective and fair competitive procurement system in their countries.[65] Therefore, the treatment of tenders, bidding procedures and award criteria must be clear, fair and open to all.[66]Information is important to the attainment of transparency in public procurement, therefore, procurement agencies must publish thenotices of impending procurements or bids and the award information, after the contract has been awarded in an accessible medium, probably in an ''appropriate paper or electronic medium''.[67]Obstruction to international trade is forbidden, therefore, they must lay down any technical characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures 'in terms of performance and functional requirements, rather than design or descriptive characteristics''.[68] Unless the award of the contract is prohibited by public interest, contracts must be awarded to the most competent supplier that has capacity to undertake the contract based on the evaluation criteria stipulated in the original tender if the supplier has made the lowest bid or has the ''most advantageous tender''.[69]However, in a situation where a supplier offers an abnormal price lower in comparison with other tenders for the same contract, the procuring agency must ascertain the capability of the said supplier to perform the terms of the contract[70] if it is an open bidding,[71]they must ensure that the period for the receipt of bids is not less than 40 days from the date of the invitation to bid.[72]The same deadline of 40 days shall apply to selective tendering.[73]

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corrupt practice" and ''the use of, electronic means for procurement'' are subsumed in those two major features.

65 See Article XVI of the revised WTO GPA, above note 6.

66 Ibid, Article XV.

67 Article VII and Article XVI (2).

68 Article X.

69 Article XV (5).

70 Article XV (6).

71 Ibid, note that the bid is open to all interested suppliers.

72 Article XI (3).

Furthermore, each party must provide for a prompt, effective and non-discriminatory system of redress.[74] An aggrieved bidder should be able to challenge the outcome of the procurement and the violation of procurement procedures if any. The challenge should be heard by a court or by an impartial and independent review body with no affinity with the procuring agency.[75] Where another body other than judicial bodies ''initially reviews a challenge'', the aggrieved supplier should have access to appeal ''to an impartial administrative or judicial authority that is independent of the procuring entity''. In any case, the judicial body must have the power to order interim measures and award adequate damages and compensation for loss suffered.[76]

From the inception of WTO, the major preoccupation is to achieve free trade and put an end to every form of discrimination in the global trade.[77] The underlying principle of every provision of agreement entered in to by the members of WTO has a twinge of non-discrimination as its objective. Therefore, non-discrimination is the most important principle of WTO. The kernel of most-favoured-nation (MFN) treatment is non-discrimination which purports to accord same treatment in form of tariff rates or other perquisites to like products that emanate from members irrespective of the origin of the goods. Consequently, Article IV[78] outlaws preferential treatment, provides that WTO members should extend MFN treatment to like products of other members with respect to tariffs, internal regulations on exports and imports, domestic taxes and other charges and must treat all their locally-established suppliers equally without bias against those suppliers that have affiliation with foreign companies or ownership.

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73 Ibid. Where some specific suppliers or companies are invited to bid.

74 See Article XVIII (1).

75 Ibid. Article XVIII (4).

76 Ibid, Article XVIII (5&6).

77 See Marrakesh Agreement Establishing the World Trade Organisation, pmbi, el.3, Apr, 15, 1994,1867 U.N.T.S. 154 (1994)hereinafter WTO Agreement.

78 See Article IV: (1 &2) of the revised WTO GPO. See also Julia Ya Qin Defining Nondiscrimination Under the law of the World Trade Organisation. Boston University International Law Journal Vol. 23: 2005.

Mosoti explains the implication of this provision as follows:
The non-discriminatory element in the WTO GPA, rooted in the maximization of competition, generally ensures that procuring agencies do not treat suppliers differently because they may be different nationality, ownership, affiliation, or origin. In this regard, preferential prices and offsets are prohibited, as is any form of favoritism for domestic suppliers. In general, an open and competitive tendering process of public procurement is encouraged with limited tendering allowed for exigencies'[79]

A glimpse of the UNICITRAL Model Law

The 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services[80] was replaced with UNICITRAL Model Law on Public Procurement in 2011[81]and the Guide to Enactment of the text in 2012.[82]The revision was actuated by a desire to inculcate electronic procurement mechanisms, modern commercial practices and utilisation of advantages that have been gained from the use of the 1994 Model law into the new procurement framework.[83]

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79 Victor Mosoti, "The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for Development in the poor World?" (2004) 25(2)*University of Pennsylvania Journal of International Law* 593 at 627.

80 The 1994UNICITRAL Model Law, which is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)) is available at *http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf* (last visited June 16th 2015).

81 The 2011 text is available at *http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf*. (Last visited June 16th, 2015).

82 See Sixty-seventh Session, Supplement No. 17 (A/67/17), para. 46. The text of the Guide is available at *www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html*. (Last visited June 16, 2015).

83 See Guide to the Enactment of the UNCITRAL Model Law on Public Procurement Paragraph 1on History, purpose and mandate at *http://www.uncitral.org/pdf/english/texts/procurem/construction/Final-MU-CONSOLIDATED-Guide-post-WG-session-may-2012.pdf*(last visited 16th June 2015)

The 1994 Model law was actually meant to help states with moribund domestic laws and practices on procurement law to reform their laws and assist states with none existing law on procurement to establish their own law.[84]Another objective of 1994 Model was for the harmonisation and unification of trade law[85]and aimed to remove the clogs to free flow of international trade by creating access for foreign entities to participate in procurement at the national level by ensuring a domestic procurement legislation that addresses those issues.[86]The1994 Model was best suited to developing countries or countries with transition economies[87] since in those countries a preponderant portion of procurement is performed by the public sector[88] as a means of providing social services which are essential to their nation's economic and social development. Contrarily, the 2011 Model caters for the interests of all countries, whether developed, developing or least-developed. Notably, in spite of those little differences, both models are still essentially the same. The 2011UNICITRAL Model, like 1994 Model, provides regulatory enactment for the attainment of six objectives[89]in its preamble which are competition, transparency,[90]fairness of procurement process, economy efficiency and international trade. It recommends open tendering as the principal method of selecting the winning bidders with whom the government directly or through its agents seeks to enter procurement contract.[91]The tendering process is structured to achieve transparency as the UNICITRAL Model law provides equal opportunity for suppliers and

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84 Ibid.

85 See also, Herrmann, 'The Role of UNCITRAL', ch 2 in Fletcher, Mistelis, and Cremona (ed), *Foundations and Perspectives of International Trade Law* (London Sweet & Maxwell 2001).See further, Sue Arrowsmith,"Public Procurement: An Appraisal of the UNICITRAL Model Law as a Global Standard" (2004) 53*International and Comparative Law Quarterly*, 17-46.

86 See Guide to the UNICITRAL Model Law, op. cit (note 88).

87 Countries that are just transiting into to free market economy.

88 See Guide to the UNICITRAL Model Law, op. cit (note 88).

89 See preamble to the 2011 text, op. cit (note 86).

90 Ibid.

91 Article 28(1) of the 2011 text. Op. cit (note 86).

contractors to prepare their tenders.[92]In fact, it attempts to open procurement market for all without regard to nationality.[93]

However, in certain cases, it allows the procuring entity to limit participation on the basis of nationality, if the limitation is compatible with the procurement regulations or any other law of the state.[94]According to Sue Arrowsmith, this discretionary power to exclude suppliers on grounds of nationality has become an instrument in the hands of nations to use procurement to attain industrial and economic development.[95]Even though the 2011 UNICITRAL Model law, unlike the 1994 Model, does not expressly exclude national defence or national security from the application of its regulatory regime,[96] the procuring agencies may still consider social, economic, environmental and security consideration in determining the lowest evaluated tender and grants a margin of benefits to domestic goods.[97]Although it is discriminatory against foreign bidders, the major advantage of this method of exclusion is that it is not an outright exclusion.[98]In addition, another advantage is that the foreign bidders are not put in the dark as to the margin of discrimination against them as that must have been expressed in the invitation to tender or solicitation for bids as well as in the record of the proceedings of the procuring entity.[99] Furthermore, to ensure public access to procurement information, the legal texts on procurement shall

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92 Ibid. Chapter III of the text and Articles 7,8&9.

93 Ibid. Article 8(1).

94 Ibid. Article 8 (2&3).

95 Sue Arrowsmith, ''National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?'' in Sue Arrowsmith & Arwel Davies, (eds) *Public Procurement: Global Revolution* (London, Kluwer Law International, 1983)5; See also Mosoti, op. cit (note 84).He noted that the power of states to exclude foreign bidders is an ''element of a multilateral compromise''.

96 See Article 1 of the 2011 text. Op. cit (note 86).

97 Ibid. See Articles 2(o), 9 (2) (b) and 11.

98 This is explicit form of discrimination where discrimination takes the form of ''preferential price margin'' or ''domestic contents requirements''. On this, see Francis Ssennoga''Examining Discriminatory Procurement Practices in Developing Countries'' 6(2006) *Journal of Public Procurement*, 218-249 at 219.

99 2011 Text. Article 8 (3) (4) (5) and Article 9. Op. cit (note 86).

be made accessible to the public.[100] Apart from the general preference to open tendering as a means of conducting procurement, other methods can be adopted if found appropriate. Thus, the UNICITRAL Model law provides for alternative methods in the form of restricted tendering; request for quotations; request for proposals without negotiation; two-stage tendering; request for proposals with dialogue; request for proposals with consecutive negotiations; competitive negotiations; electronic reverse auction; and single-source procurement.[101]

Mechanism for enforcement of rules and regulations and redress of grievances are Siamese twins that go hand in hand. They constitute an important factor that should not escape the mind of an astute lawmaker and consequentially should be part and parcel of a good legislation. The UNICITRAL Model law is not found wanting in this aspect as it provides for a review process[102] that has the capacity of achieving two related objectives of "self policing and self-enforcing", by providing a regulatory regime that stays the award of contract once an aggrieved supplier has challenged the procurement process.[103] This will enable the res to be preserved so that the review process will not be an exercise in futility.

Similarly, the review process protects the interests of all the stakeholders in the procurement process and attempts to harmonise class and individual interest with equity and equilibrium. It gives opportunity to all suppliers, contractors, the government and even the procuring agencies to join in the challenge proceedings as participants.[104]The interest of the contractor and supplier to seek justice for loss or injury they might sustain in the procurement process is equally balanced with the interest of the government and the procuring agencies not only to see the contract awarded but to maintain the integrity of the procurement process.

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100 Ibid. Article 5.
101 Ibid. Article 27(1).
102 Ibid. Articles 64 to 67.
103 Article 65.
104 Ibid. Article 68.

Level of compliance to international commitments

The UNICITRAL model law

The procurement law in Nigeria is enacted by the drafters of the Act to follow the best practice in the public procurement sector in line with the UNICITRAL Model law. The Act indeed complies with the requirements of UNICITRAL Model law in its entirety and makes minimal use of its flexibility to suit the Nigerian environment.

The major method of procurement in Nigeria is by open competitive bidding[105] which is the same as tendering in the Model Law with all of its features and characteristics the same. In case of impossibility to use the major method, the PPA in Nigeria prescribes other methods such as two-stage tendering[106], restricted tendering,[107] request for quotations[108] and direct procurement,[109] which are nothing but a carbon copy choice from the pool of alternatives in the model. The last alternative method in PPA, which is emergency procurement,[110] is the same with a single-source procurement of Article 52 in the UNICITRAL Model because, in both, goods and services are procured from ''a single supplier or contractor'' in the words of PPA.

A synthesis of the criteria set by PPA in section 16(6)[111] and (7)[112])[113]on the legal requirements of bidders in juxtaposition with Article 9 of

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105 Section 24(1) of the PPA. Section 24(2) defines open competitive bidding : ''Any reference to open competitive bidding in this Act means the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder. Equal simultaneous information and opportunity to offer the goods and works needed''.

106 Ibid .section 39.

107 Ibid. section 40.

108 Ibid. section 41.

109 Ibid. section 42.

110 Ibid. section 43.

111 The focus of 16(6) is on professional and technical qualifications, financial capability, possession of equipment and other relevant infrastructure, adequate personnel to perform the obligations of the procurement contract, legal capacity of the contractor and the supplier to enter into the procurement contract. It also provides that the impending bidder must not be ''in receivership or be the subject of any form of insolvency or bankruptcy proceedings or the subject of any form of winding up petition or proceedings''. Finally, they must have fulfilled their

UNICITRAL Model will make one to conclude that the Nigerian law adheres strictly with the instruction in Article (6)that '' the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable.'' Although section 23(1) of PPA gives power to the board[114] to determine the ''precise criteria upon which it seeks to give (premium)consideration'' for the purpose of choosing the successful bidders which is in line with Article 9(2)of UNICITRAL Model that ''Suppliers or contractors shall meet ... the ... criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement, ''the PPA complies with the safeguards mechanism[115] in the model by insisting that such criteria must be stipulated in the prequalification documents and in the request for proposals[116]and that all the suppliers and contractors must have access to such information at a reasonable time.[117]It also protects the contractors and suppliers from unscrupulous officers who may want to change the

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''obligations to pay taxes, pensions and social security contribution'' and must not ''have any director who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification off acts relating to any matter''.

112 It provides: " The procuring entity may require a bidder to provide documentary evidence or other information it considers necessary as proof that the bidder is qualified in accordance with this Act and the solicitation documents and for this purpose any such requirements shall apply equally to all bidders''.

113 It provides: " The procuring entity may require a bidder to provide documentary evidence or other information it considers necessary as proof that the bidder is qualified in accordance with this Act and the solicitation documents and for this purpose any such requirements shall apply equally to all bidders''.

114 Tenders Board is the procuring entity which is responsible for the award of procurements, goods, works and services, See sections 22(1)and (3) of PPA.

115 Article 9(4) of the UNICITRAL Model.

116 Sections 23(1) and 46(1)of PPA.

117 Ibid.

rules (criteria) in the middle of the game to suit their cronies by making a total prohibition of such a fraudulent move.[118]

The provisions for evaluation and comparison of tenders in PPA are compatible with the UNICITRAL Model with same objective in both which is to choose the lowest evaluated tender as the successful bid for goods, works and services where price is a factor[119] and even, where price is not a factor, the PPA opts for consideration of quality, particularly for procurement of services.[120] Similarly, section 54 of the PPA[121] which prescribes administrative and judicial review is also in consonance with Article 64(2) of the UNICITRAL Model. Consequently, complaint is likely to go through three stages, which are through the accounting officer,[122]the BPP and the courts. A bidder may seek review for any act or acts of omission on the part of the procuring entities or officers or for any breach by them of the procurement rules. However, bidders must exhaust administrative remedies before seeking judicial remedies at the federal high court.

It is important to note that participation in a bid is one thing, wining the bid is another and what determines who wins is the criteria used by the procurement agency to evaluate the bids. In this, it is obvious that certain provisions[123] in the UNICITRAL Model could be used as discriminatory tools by states (if they are trade protectionists) against foreign suppliers or contractors but in spite of that opportunity to take the path of

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118 Ibid. section 16(15): "The criteria stipulated as the basis upon which suppliers or contractors would be evaluated shall not be changed in the course of any procurement proceeding".

119 See Article 43(3bi) of the UNICITRAL Model and Sections16 (17), 24(3)33(1) and 51(1) of the PPA.

120 See Section 52(1) of the PPA.

121 Ibid.

122 Each procuring entity has an accounting officer who is charged with the supervision of the conduct of all procurement processes such as the planning, organisation and evaluation of tenders and compliance of procurement processes with the provisions of the law. See sections 20 of the PPA.

123 The provisions are exceptions to the rule; see for example Article 11 (3a) and (b) and Article 43(3bii) of the 2011 text. Op. cit, note 86.

protectionists, the PPA opts for quality and cost as the primary criteria.[124] Similarly, the PPA is compatible with Article 1 of the UNICITRAL Model by subjecting contracts on national defence and national security under the procurement regulations, though on pre-condition that the approval of the president of Nigeria is sought and obtained.[125] The implication of that provision is that the public and the civil organisations might demand transparency in the procurement of public contracts in that sector (defence and security), and if such a clarion call persists, a listening president might be tempted to subject them to procurement rules unless there is security reason to do otherwise.

WTO GPA

As discussed in the preceding part, procurement law in Nigeria complies essentially with UNICITRAL Model law in its entirety. However, this is not so with WTOGPA. This is because Nigeria as a country seeks to use procurement law to advance economic development, a policy which is not unique to almost all developing countries of the world. Sue Arrowsmith expresses the universality aspect of this policy as follows:

Another important aspect of procurement procedure in many states is the use of the economic muscle provided by government procurement to support wider industrial, social or other policies which are not directly connected with the procurement itself. Thus, so far as industrial policy is concerned, in order to boost domestic industry and employment, general preferences have sometimes been given to national industry in awarding procurement contracts, either by reserving particular contracts for domestic products or suppliers only although more commonly by operating a preference for bids meeting specified domestic contents requirements, in terms of use of domestic products or labor in the

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124 Sections16 (17), 24(3)33(1) 51(1) and 52(1) of the PPA.

125 Id. See section15 (2) of the PPA. It must be noted that Article 1 of the 1994 UNICITRAL Model exempts contracts on defence and security from procurement regulations but Nigeria law subjects them to procurements rules subject to approval. And it is now made compatible with Article 1 of 2011 which subjects all public contracts to procurements rules.

contract, or for firms which are deemed national firms in terms of their location or ownership[126]

Accordingly, the PPA provides for domestic preferences in favour of domestic bidders[127] with the BPP as the determinant factor of the quantum of the margin of preferences to be given at any particular time.[128] No doubt, those domestic preferences are violation of WTO GPA provisions and Nigeria cannot be a signatory to that agreement with an albatross on its side. The question is this: Will Nigeria be content for ever being a member of the WTO and not a signatory to WTO GPA? The answer to this question goes beyond a narrow consideration of the interest of a particular country; it has metamorphosed to a collective issue of how far the interests of the developing countries can be protected in WTO GPA? A lot has been written on the lukewarm attitude of the developing countries of WTO to accede to WTO GPA,[129] the effect of which could make the agreement to be debunked and lampooned as that of the technically-strong members of WTO who are developed countries.

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126 Sue Arrowsmith, op. cit (note 100).

127 Section 34(1) of the PPA provides that ''A procuring entity may grant a margin of preference in the evaluation .of tenders. When comparing tenders from domestic bidders with those from foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad'. Section 49(2) reiterates the same thing when it also provides that "A procuring entity may accord a margin of preference for domestic consultants or service providers, which shall be calculated in accordance with the regulations and guidelines as issued from time to time by the Bureau and shall be reflected in the record of the procurement proceedings''

128 Section 34(4)''The Bureau shall by regulation from time to time set the limits and the formulae for the computation of margins of preference and determine the contents of goods manufactured locally''.

129 See Rainer Kattel & VeikoLember "Public procurement as an Industrial Tool: An option for developing Countries?'' 2010 (10) *Journal of Public Procurement* 368-404. See also 2009 Annual Report on procurement Supplement: Procurement from developing Countries and economies in transition available at *http://www.reliefweb.int/rw/lib.nsf/db900sid/ASAZ-88PCKV/$file/UNOPS_Jul2010.pdf?_openelement*(Last visited 29 of September 2015).

Therefore, to attract developing countries as signatories to the agreement, the agreement provides that the economic interest of the developing countries to protect their balance-of-payment, establish or promote domestic industries and encourage economic development shall be considered favourably in the implementation and general administration of the entire provisions of the agreement.[130] Consequentially, ''the development, financial and trade needs of developing countries, in particular least-developed countries'' must not be sacrificed at the altar of ''national treatment'' and each party is enjoined to do something to ''facilitate increased imports from developing countries'' while preparing or applying rules, regulations and practices that have bearing to government procurement.[131] In addition, while there is prohibition of the use of offsets as criterion for ''qualification and selection of suppliers, products or services, or (for)the evaluation of tenders and award of contracts''[132] to all signatories, the developing countries are exempted from that general prohibition due to special consideration of their general policies relating to their overall development.[133]

With those exemptions, the reason behind the lackadaisical attitude of developing countries in embracing WTOGPA has been addressed. They can now take advantage of this privilege. On this premise, Mosoti has argued forcefully that this is the convenient time for developing countries to join WTO GPA.[134] Nigeria should not be an exception to heed such a clarion call because of the benefits it offers to developing countries. These benefits include the procurement of higher quality goods as a result of competition,[135] access of local suppliers to foreign markets,[136]

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130 See Article V (1) of the WTO GPA. Op. cit (note6).

131 Ibid. Article V (2).

132 Ibid. Article XVI.

133 Ibid. Article XVI (2): ''a developing country may at the time of accession negotiate conditions for the use of offsets, such as requirements for the incorporation of domestic content''.

134 Mosoti, op. cit, (note 84).

135 See, Francis, op. cit (note 103) 228.

136 The problem with this opportunity is that most of the local suppliers cannot compete favourably with foreign suppliers ''due mainly to high costs of

"sufficient allocation of resources through increased competition"[137] and budgetary savings to government.[138]In contrast, it has been argued that ''opening up domestic markets leads to job losses as domestic firms are out competed and lose'' businesses.[139]Thus, oppositions to multilateral agreement on procurement are still raging from several developing countries (particularly India, Pakistan and Egypt) to relief organisations, such as OXFAM.[140] Their contention is that the developing countries could not achieve a "level playing field" by opening up their public procurement but ''are likely to lose ground to expanding industrial countries''.[141] The relief organisations and developing countries are of the opinion that the "growing industries of developing nations will be at a disadvantage if large and established foreign companies are allowed to bid for government contracts alongside their own domestic firms''.[142]

Admittedly, liberalisation of public procurement between unequal states (e.g. developing and developed countries of the world) can lead to adverse economic problem such as extinction or total paralysis of local industries.[143] However, this adverse economic problem can be averted if developing countries take full advantage of special and differential treatment of WTOGPA[144] which enables them to cater for their economic

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production arising out of poor production techniques and lack of expertise''. Ibid at 220.

137 Ibid at 226.

138 Ibid at 226 &228.

139 See Francis, op. cit (note103) 227.

140 See Government Procurement Summary at the Global Trade Negotiations Home Page Centre for International Development at Harvard University *http://www.cid.harvard.edu/cidtrade/issues/govpro.htm*(last visited 28 of September 2015).

141 Ibid.

142 Ibid.

143 See Francis op. cit (note103) 232.

144 On how developing countries should take advantage of this special and differential treatment of the WTOGPA, see Anna Caroline Muller 'special and differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions' in Sue Arrowsmith; Robert D Anderson (eds)*The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge, Cambridge University Press,2011) 339-376.

and social interests, while opening up their public procurement markets to ''all suppliers irrespective of their country of origin''.[145]This is ''a form of waiver from the non-discrimination requirements contained in WTO trade agreements''.[146] Unfortunately, most developing countries have not been prudent enough to harness this advantage. Consequently, WTO has found it difficult to attract developing countries in spite of the waiver. A writer comments on the frustrating effort of WTO to attract developing countries into WTO GPA as follows:

It would appear that the current S&D provisions in the GPA have not been effective in attracting developing country membership. So what else needs to be done to make it easier for them to join? How could developing countries safeguard themselves and yet not exclude the GPA option and how should they negotiate for GPA membership?[147]

However, since the purpose of this paper is to encourage developing countries, particularly Nigeria, to take advantage of this waiver, it is important to discuss how the Nigerian government can maximise this opportunity. The first thing is to adopt a sustainable development approach in opening up its public procurement contracts to foreign markets. In order to do that, it must honestly reassess its development prospects for multilateral trade. What sectors of economy should be opened up for foreign markets and what sectors should be protected from such markets? This will help in determining which sectors to open up, the margin of commitments in those sectors and those sectors to be excluded from global procurement markets. The essence is to take advantage of special and differential treatment of WTOGPA to address the negative effects of free procurement markets on the national

145 Ibid at 345 to 347.

146 Ibid at 344.

147 Margaret Liang Government Procurement at GATT/WTO; 25 Years of Plurilateral Framework, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019730* [last visited 28 of September 2015]. She suggested that among other things that more flexibility should be granted to developing countries in the use of offsets and coverage exclusions in Article V. In addition, technical assistance and capacity building should be provided to developing countries.

economy.[148] Nigeria has no problem with transparency provisions of the WTOGPA.[149] Its problem lies with how to protect local suppliers from being dominated or driven to extinction by big foreign suppliers. That is the why it adopted the UNICITRAL Model law to protect its local suppliers. Fortunately, WTO has revised its procurement agreement to include special and differential treatment which developing countries can employ to attain the same purpose. In view of the foregoing, it is suggested that Nigeria should start the process of accession into WTOGPA immediately.

Conclusion

This paper has examined the Nigerian procurement law which became operative in 2007. Its features are highlighted in comparative appraisal. It has shown that Nigerian procurement law complies with the UNICITRAL Model law but the same could not be said of WTO GPA as Nigerian law provides domestic preferences to domestic bidders in violation of non-discrimination requirements contained in the WTO trade agreements. It discusses how liberalisation of public procurement between unequal states can lead to adverse economic problems and how such problems can be averted if developing countries take full advantage of special and differential treatment of the WTO GPA. Since Nigeria is a member of the WTO, it considers the possibility of Nigeria acceding to the organisation the benefits and burdens associated with that accession. Finally, it offers recommendations on how Nigeria can open up its public procurement contracts to foreign markets and still protect its local suppliers.

148 See Anna Caroline, op.cit, (note 148)376; Francis, op.cit, (note 103) 234.

149 See s25 of the PPA. Op. cit, (note 18).