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Comprehensive Review of the AFDB's Procurement Policies and Procedures

Summary of Literature on Governance in Public Procurement

ORPF

GOVERNANCE IN PUBLIC PROCUREMENT

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This summary has been prepared by a Consultant and the views expressed herein are those of the Consultant and not of the Bank.

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ACRONYMS

CPAR	Country Procurement Assessment Report
CTB	Central Tender Board
DAC	Development Assistance Committee
DTB	District Tender Board
EU	European Union
FMA	Financial Management Agent
GATT	General Agreement on Trade and Tariffs
GJLOS	Governance, Justice, Law and Order Sector
GPA	Government Procurement Agreement
IASC	Inter-Agency Steering Committee
JVP	Joint Venture on Procurement
LAC	Latin America and Caribbean region
MAPS	Methodology for Assessment of Procurement Systems
MOF	Ministry of Finance
MoJCA	Ministry of Justice and Constitutional Affairs
MTB	Ministerial Tender Board
NSSF	National Social Security Fund
OECD	Organization for Economic Cooperation and Development
PCO	Program Coordination Office
PPCRAB	Public Procurement Complaints, Review and Appeals Board
PPD	Public Procurement Directorate
SIDA	Swedish International Development Agency
SWAP	Sector Wide Approach
TCC	Technical Coordination Committee
TG	Thematic Group
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

SUMMARY OF LITERATURE ON GOVERNANCE IN PUBLIC PROCUREMENT

I. OBJECTIVES

1. The objectives of this Paper are to review, analyse, synthesise, and to summarise background documentation available in the public domain concerning the theme of **governance in public procurement**, which could be of relevance to, and could inform the Bank's review of its procurement policies, procedures and processes.

II. FINDINGS

2. A number of books and articles from the public domain served in the preparation of this Summary, notably: Effective and Transparent Governance of Public Expenditures in Latin America and the Caribbean, and Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid.

3. To begin with, the book entitled ***Effective and Transparent Governance…*** observes that among the most important functions of governments are the management of public resources as well as the planning for the future allocation of such resources. Thus, the integrity of public financial management and procurement arrangements affect the level of trust that citizens have in their governments. And, transformational leaders realise that a country's competitiveness in the world, its ability to attract foreign investors, and its cost of borrowing are affected by the quality of these core public finance activities.

4. Furthermore, the key to the achievement of quality public spending are sound public expenditure management arrangements that include: (i) comprehensive and transparent legal frameworks for public financial management and procurement; (ii) institutional frameworks, made up of agencies with clearly defined responsibilities and adequate numbers of suitably qualified professional staff; (iii) leadership that takes seriously its accountability for efficient management of public resources; (iv) procurement arrangements that are supportive of governments' strategic goals and that are based on explicit principles of economy, efficiency, competition and transparency; and (v) independent scrutiny, including from civil society, of governments' stewardship of public resources.

5. Indeed, ***Effective and Transparent Governance…*** posits that public procurement is one of the fastest changing government functions, because procurement has moved from being an administrative function, to become a strategic responsibility that plays a critical role in public expenditure management, the quality of governance, the promotion of economic development and commercial integration. But, the pace and progress of this evolution has been uneven, and in many developing countries, there are still vestiges of the concept of procurement as a process function. Also, in most

countries, procurement has not been fully integrated and aligned with the strategic vision and objectives of the government, thus becoming an obstacle to, instead of a support in, meeting those objectives.

6. Historically, and until the early 1990s, the procurement function was typically confined to the application of rules for government purchase of goods, services, and works. Procurement units were housed in individual ministries, and individual government agencies worked in isolation, with responsibilities limited to the processing of purchase orders, or administering competitive bids. These units delivered contract award recommendations for approval by senior officials, and subsequent processing by the legal or financial units in the organisation. The units were generally under-staffed with officers who had no formal education in the subject. The function itself was regarded as a backroom activity, which received little or episodic attention only when there was a procurement scandal, or mishap.

7. In comparison, the modern concept of procurement is that of an essential support to good public sector performance, and to achievement of the country's economic and social goals, i.e.: an integral part of public expenditure management. For, appropriate budgeting and professional procurement are crucial to responsible and transparent administration of public funds. Procurement is moving away, from being a mere processing task, to a management and knowledge-based activity that supports good governance and enhanced accountability. The function encompasses the entire process, from determination of needs, to asset management and disposal. It includes substantive involvement in the formulation of procurement policies, to promote a wide range of government objectives, such as environmental protection, and socio-economic development.

8. The procurement profession itself is being deeply affected by this evolution. At the operational level, procurement officers are less likely to be the administrators of an activity requiring the mere knowledge and application of rules. Instead, they now increasingly need to be managers of a process requiring an array of skills, guided by ethical and accountability principles. The old procurement bureaucrat is gradually being replaced by a well-trained contract or logistics manager whose job is not only to apply the rules, but to be able to operate within a sophisticated market of ever-increasing commercial and technological complexity. At the policy level, decision makers are more aware of the potential impact that government procurement has on efficient use of resources and service delivery, on conferring legitimacy and credibility on the government, and on supporting economic and social agendas.

9. According to ***Effective and Transparent Governance…*** important developments in the early 1990s triggered this change in perspective of procurement. Some of these events forced governments to focus on procurement as a means to adapt national systems to international trade agreements, and to new business concerns. In addition, the rising concern of civil society with corruption, and the increased demand for accountability and results, put politicians on notice of the importance of procurement as a

strategic government function. Key event during the period that served as important drivers in reforming procurement are:

- The creation of the European Union (EU). The multiplicity of national procurement systems were an impediment to free trade, and this forced governments to focus on aligning their national systems. The European Commission issued a green paper on public procurement (the New EU Public Procurement Directives), to open the discussion with the private sector, the contracting bodies and other stakeholders.

- The General Agreement on Trade and Tariffs (GATT) and the Uruguay Round culminated in the signature of the Government Procurement Agreement (GPA), in April 1994, and the creation of the World Trade Organisation (WTO), in 1995. The GPA introduced a multilateral framework for government procurement that aimed to achieve greater liberalisation, and expansion, of world trade.

- In 1994, UNCITRAL published the Model Law on Procurement of Goods, Construction and Services. This was "in response to the fact that, in a number of countries, the existing legislation governing procurement is inadequate and outdated", resulting in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of governments to obtain value for money in the use of public funds.

- In the mid-1990s, international development institutions shifted the focus of procurement due diligence, from supervising borrower compliance with their policies and procedures, to one of systemic analysis, risk assessment, and policy advice on how to improve national systems.

- Technological innovation, beginning in the early 1990s, made available new tools for electronic procurement that revolutionised the way governments could do business. These technologies made it possible to minimise or eliminate interaction between procurement officials and bidders, thus reducing the opportunity for collusive practices. The new technology also permitted more efficient procurement methods (such as reverse auction, and catalogue purchasing under framework contracts), wider competition, as well as the possibility of better monitoring of procurement, and more informed planning.

- In 2006, the OECD/DAC's Joint Venture on Procurement (JVP), prepared a standard diagnostic tool to assess public procurement systems: ***Benchmarking and Assessment Methodology for Public Procurement Systems***. Upon its finalisation, the tool was given the new title of ***Methodology for Assessment of Procurement Systems*** (MAPS). The tool has evolved into an internationally accepted set of standards for good procurement for utilisation by governments.

10. Based upon the foregoing factors, ***Effective and Transparent Governance…*** takes a broad look at the status of procurement in the LAC region, and observe that there are issues that undermine the credibility and legitimacy of government procurement regardless of market size. The issues of lack of

transparency, frequent corruption scandals, and substandard quality of products or construction, always attract the interest of the media and negatively affect public trust in the government.

11. Following this, ***Effective and Transparent Governance…*** analyses the Country Procurement Assessment Reports (CPARs) of LAC countries, by using the MAPS, which, as indicated earlier, seeks to assess procurement systems against international standards along four dimensions, or pillars, namely : (i) legal and regulatory framework; (ii) the institutional architecture; (iii) operations management; and (iv) independent oversight. Details are:

    i. The Legal and Regulatory Framework covering: the Use of Rules to Influence the Market; unprofessional Approaches to Procurement Regulation; Multiplicity of Regulations; Systems overburdened with Process; and, Excessive or Scant High-Level Regulation.

    ii. The Institutional Architecture on: Unifying Vision and Interagency Coordination; System Management; and E-Procurement.

    iii. Operations Management with regard to: Budget Planning and Execution; Dispute Resolution; Availability of Information Human Resources; and Decentralisation.

    iv. Independent Oversight concerning: the Supreme Audit Institutions; Civil Society Oversight; as well as Access to Information.

12. In concluding, ***Effective and Transparent Governance…*** recapitulates the status of governance in the LAC region, by reiterating that the initial wave of reforms derived from four main factors, viz.: (a) the entry of new administrations following extended periods of authoritarian rule; (b) the search for debt relief; (c) a demand for good governance; and, (d) broader participation in the global economy.

13. With respect to remaining challenges, ***Effective and Transparent Governance…*** sets out a priority of themes or areas of focus for the LAC region, including: (i) Management for Results; (ii) Legislative Framework for Procurement; (iii) Internal Controls and Internal Audit; (iv) Procurement Staffing and Capacity Building; (v) Budget Execution Reporting; (vi) External Audit; (vii) Legislative Oversight; and, (viii) Civil Society Participation.

14. And, finally, concerning the way forward, ***Effective and Transparent Governance…*** recounts lessons learned from reform programmes worldwide, namely: (a) Country Owned Vision; (b) Sustained Leadership; (c) Consensus and Inclusivity; (d) Sequence and Timing; and, (e) Basics First; while advising that *"…reformers should focus on the basics on which reform is built, not on particular techniques…. and should build institutional mechanisms that support and demand a performance orientation for all dimensions…*".

15. Still on the subject of **governance in procurement**, the article entitled ***Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*** sheds a different kind

of light on the topic, albeit a little dated, since its reference events occurred in the late 1990s and early 2000s. Notwithstanding this caveat, the article provides a peculiar historical insight into governance in Kenya, during the period.

16. According to ***Development Partners and Governance…*** [in 2006] it was widely accepted in international development circles that aid, also known as development assistance, had not achieved its primary goal of alleviating poverty. Rather, the number of people living in extreme poverty had increased. The ineffectiveness had been attributed to factors such as the policy of donor countries of tying aid to specific conditions, the provision of aid against the background of persistent protection of markets in donor countries, and bad governance in recipient countries.

17. Therefore, donor countries had sought to improve the effectiveness of aid, particularly by abandoning stand-alone projects (as it occurred previously) in favour of "Sector Wide Approaches" (SWAPs), realising that conditioned aid rarely persuaded developing countries to reform their policies, and that these governments were often "…*overwhelmed by the sheer number of donors and donor projects, with the result that public expenditure* became *an unplanned aggregation of donor projects lacking a coherent framework of policies, priorities and service standards...*"

18. The new thinking was that it would be better if development partners provided direct budgetary support to sector-wide reform programmes initiated by developing country governments. Since these governments would "own" such programmes, the hope was that they would be more committed to their realisation. The idea was thus to transform the provision of development assistance into a partnership between the donors and the recipients. Furthermore, by harmonising their procedures through the use of SWAPs, the donor countries – then going by the name of "development partners" – would considerably ease the administrative burden imposed on developing countries by "appropriations in aid", that is, financial support for stand-alone projects.

19. While SWAPs promised to enhance the effectiveness of aid, a major drawback was that they invariably sought to bypass national public accounting and procurement systems on the ground that the latter were ineffective and corrupt. On the other hand, there was much evidence that these systems, in many cases, merely facilitated the use of public procurement as a resource for political patronage, and for unjust enrichment of corrupt public officials. However, if the development of local public accounting and procurement capacity was instrumental for the effectiveness of aid, then the case for the maintenance of parallel accounting and procurement regimes ceased to be persuasive. This was especially the case where, as in Kenya, considerable effort had been made to reform the national procurement system. The maintenance of parallel procurement systems was not only inefficient, but also provided avenues for corruption, since the lines of accountability were attenuated. At the very least, there was a case for the harmonisation of the parallel systems.

20. But, in response to concerns that SWAPs were bypassing national frameworks for accountability, development partners often argued that they were primarily accountable to their taxpayers, and that it was up to the recipient governments to worry about being accountable to the local electorate. Again, an argument which was not entirely persuasive since this accountability relationship implicated the effectiveness of aid. Because there was no framework through which the local electorate could hold such governments to account, aid funds had invariably not been used for their intended purposes. Accordingly, there was a strong case for reformed national frameworks to ensure the accountability of SWAPs to the citizens of developing countries, since the local electorate could not demand accountability directly from the development partners.

21. ***Development Partners and Governance…*** observed that the emergence of SWAPs had to receive particular consideration in the context of public procurement, the governance of which they implicated in significant respects. Public procurement often constituted the largest domestic market in developing countries. Depending on how it was managed, the public procurement system could thus contribute to the economic development of these countries in a significant way. Indeed, public procurement was the principal means through which government met development needs such as the provision of physical infrastructure and the supply of essential medicines. Many governments used public procurement to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities.

22. Because the use of the public procurement system to pursue these developmental goals entailed an enormous exercise of governmental discretion, public procurement was often an extremely controversial subject. This was especially the case in developing countries where "…*the ability to exercise discretion in the award of government contracts* was *a source of valued political patronage…*", and where procurement was "…*a means for the illicit transfer of funds from governmental to private hands…*"

23. SWAPs implicated the governance of public procurement in developing countries since a considerable part of many public contracts were financed by the development partners, as part of either bilateral or multilateral development assistance. While it was estimated the global pool of development assistance then averaged $60 billion annually, a significant proportion of the amount remained tied to the procurement of goods and services from the donor countries, leading many commentators to question whether developing countries were the real beneficiaries of development assistance.

24. ***Development Partners and Governance…*** reviewed Kenya's first SWAP—the Ministry of Justice and Constitutional Affairs (MoJCA)'s Governance, Justice, Law and Order Sector (GJLOS) Reform Program—and its procurement regime in the context of ongoing public procurement reform efforts. It advanced two principal arguments. Firstly, SWAPs such as the GJLOS Program constituted a form of trans-governmental regulation and should be subject to national administrative law frameworks. Secondly, the

GJLOS Program's procurement regime was inefficient and unlikely to be effective since it created administrative structures that were not only unwieldy, but also ran parallel to the national system. It therefore needed to be harmonized with the national system. Further, the said procurement regime was not sufficiently democratic as it was not accountable to the Kenyan people, and did not facilitate the meaningful participation of key stakeholders. In the interests of accountability, the private firm entrusted with the task of administering this procurement regime should have been subject to the jurisdiction of the national public procurement regulatory authority since it was exercising a public function.

25. The article therefore took a bottom-up approach to the development of institutional mechanisms for creating accountability in the domestic implementation of international regulatory decision-making. As a first step towards ensuring adequate responses to the need for global governance, developing countries in particular needed to enhance the effectiveness of their administrative law frameworks. The idea was for administrative law to facilitate the accountability of developing country governments to their citizens by creating "…*domestic forums, flows of information, and political processes necessary for an effective and creative citizenship...*" By doing so, administrative law would enhance the participation of the citizens of developing countries in the politics of development assistance.

26. The bottom-up approach was particularly compelling in the governance of development assistance as it was both practical and more likely (than the top-down approach) to facilitate the immediate democratization of aid administration. The top-down approach was not workable at that time, since there was no treaty regime governing the administration of aid. Nor was such a regime likely to emerge soon thereafter since donor countries preferred the status quo because it enabled them to control the course of development assistance. The democratization of aid administration needed therefore to become the responsibility of national administrative law. In particular, by establishing procedures for public notice and comment and facilitating the review of the exercise of administrative action (such as procurement) in development assistance, national administrative law could greatly enhance the democratization of aid administration.

27. On the subject of democracy and the administration of development assistance, ***Development Partners and Governance…*** observed that there was a proliferation of international regulatory mechanisms over the previous decade or so, responding to the urgent need for global governance, in an increasingly interdependent world. Some of the global regulatory mechanisms, such as the World Trade Organization (WTO), were formally established by treaty; but others, such as the Basel Committee of national bank regulators, were largely informal intergovernmental networks of domestic regulatory officials, and often incorporated private sector and civil society entities. The regulatory mechanisms had developed out of the realization that the *"…consequences of globalized interdependency…*" in many areas of interaction such as trade and financial regulation "*…could not be effectively addressed by separate national regulatory and administrative measures…*"

This resulted in a shift of many regulatory decisions, from the national level, to the global.

28. Administrative law scholars were concerned that the shift had created a "*…democracy deficit…*," since the international regulatory mechanisms "…were *not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty…*" Yet, the international institutions and regimes that engaged in global governance exercised immense powers and regulated vast sectors of economic and social life. Thus, their decisions increasingly and directly affected individuals and firms, in many cases without any intervening role for national government action.

29. Alarmed that these global governance institutions and regimes enjoyed too much de facto independence and discretion, administrative law scholars called for the recognition of a "…*global administrative space*…" and the establishment of a "*…global administrative law…*," consisting of principles, procedures, and review mechanisms to govern decision-making, and regulatory rule-making by these institutions and regimes.

30. The emergence of the sector-wide approach to the administration of development assistance was to be examined against this background. A SWAP was a sector development programme in which "*…all significant funding for the sector supported a single sector policy and expenditure programme, under government leadership, adopting common approaches across the sector, and progressing towards relying on government procedures to disburse and account for all funds...*" Thus the central idea of SWAPs was that donor interventions were to be consistent with the recipient government's sectoral strategies and budgets that had been developed under the latter's leadership. At least in theory, emphasis was to be placed on shared accountability and multiple-partner collaboration, under the umbrella of developing country leadership. From a democracy viewpoint, SWAPs promised to shift the locus of accountability, from donors, to the core institutions of developing countries.

31. SWAPs sought to enhance the accountability of donors and recipient governments to the beneficiaries of aid. Under the traditional project-by-project approach to aid, donors had been mainly concerned with their own project management needs and reporting requirements. Each donor could account to its government about the performance of its portfolio of projects in developing countries, and was able to point to particular achievements that had been realised in developing countries, as a direct result of its project support. But, since the main flow of accountability was outward—from the developing country to the donor—the citizens of developing countries were effectively excluded from the accountability framework. This gave a developing country government considerable leeway in the management of aid. Thus such a government had strong incentives to use development assistance funds in ways that favoured "*…narrow elites and particular social, ethnic or economic classes...*" By shifting the locus of accountability, from the donors, to the recipient governments, SWAPs sought to make it more difficult

for aid administration to ignore the impact of governance in developing countries on development assistance.

32. Nevertheless, the shift to SWAPs had not been easy, given the strong incentives that donors had to stick to the traditional approach. Firstly, bilateral donors "*…like*d *to plant their flags*…," i.e., attribute particular development results exclusively to their own inputs. Indeed, while many donors cited a "*…moral and humanistic obligation…*", to help poor countries develop economically as their principal motivation for contributing aid, unstated national security and economic considerations—such as maximizing their influence in the international arena and securing markets for their firms—were often controlling. Secondly, because they controlled huge sums of money under the traditional approach, the principal agents of the donor agencies exercised immense power and influence in developing countries. It was thus understandable that many of them were reluctant to cede such power and influence under SWAPs, which sought to rely on recipient governments' procedures for disbursement and accounting of aid monies.

33. From the viewpoint of global administrative law, SWAPs constituted "*…regulatory networks…*" of governmental officials, which determined how development assistance funds were utilized. They also made rules and decisions that affected individuals and firms. For instance, they determined who could participate in procurement involving the funds under their control. Because these funds constituted a core part of the development expenditures of developing countries, where public procurement was the largest domestic market, SWAPs had the potential to effectively determine the fortunes of domestic firms—hence the need to enhance their accountability, especially to local constituencies.

34. The need to enhance the accountability of SWAPs arose given the variations in their structures and administration. Indeed, SWAPs had been described appropriately as "*…an approach rather than a blueprint...*" In some cases, developing country governments took leadership in setting out the vision and strategy for a sector, and then sought donor support, while, in other cases, government agencies used their alliance with donors to drive through a sector policy and programme, even where there was no strong public support. In yet other cases, donors simply developed their own strategies, which they then "*sold*" to developing country governments. In effect, SWAPs tended to be fairly informal networks of donors and influential developing country officials. Even more importantly, perhaps, was the fact that each of these models of reform strategy formulation had different implications for participation by local constituencies, and the eventual success of the proposed reforms.

35. SWAPs raised questions of participation and accountability, since decisions were made by the recipient governments, their agencies, and donor representatives. Typically, the management structures did not effectively incorporate private sector and civil society representatives. This was a cause for concern, given the dearth of institutional frameworks of accountability in many developing countries. For example, the administration of development assistance tended to be characterized by secrecy, and members of parliament were invariably excluded from the decision-making process.

36. Within SWAPs, there was also worrisome donor ambivalence over the use of recipient government procedures and systems. While the donors were quick to acknowledge that there were significant efficiency savings to be gained by relying on local systems, they were exceedingly reluctant to do so due to lack of confidence in local capacities and integrity. As a result, the local systems continued to be bypassed and continued to remain undeveloped, thereby limiting the success of SWAPs. The fact that local capacities were undeveloped and lacked integrity also continued to be cited by some donors, in order to retain control over the administration of development assistance. The donors claimed that this was only an interim measure, but since it weakened government systems, the transition periods tended to be rather protracted.

37. The procurement of goods and services under the GJLOS program provided a useful illustration of this phenomenon. Whereas donors supported the reform of the national public procurement system, in principle, they continued to insist on the use of their own procurement regimes, in cases involving the use of their money. In order to enhance the usefulness of SWAPs, therefore, measures that mandated reliance on developing country government procedures, to disburse and account for aid funds, needed to be implemented.

38. In order to appreciate the achievements of public procurement reforms in Kenya, a historical overview of the practice, prior to the commencement of reforms, was necessary.

39. Thus, on the matter of the political economy of public procurement in Kenya, ***Development Partners and Governance…*** stated that the bulk of corrupt practices in Kenya had occurred in public procurement. Sixty per cent of government revenue was spent on procurement, and it was thus easy to understand why public procurement had been at the centre of corruption.

40. This corruption had been facilitated by opaque and unaccountable regulations. Until the early 1970s, public procurement in Kenya had largely been undertaken by the British firm Crown Agents, since local supplies were inadequate, and most of the needs of the new government could only be met from external sources. Thereafter, the government had established supply offices within its ministries and departments, and had appointed supply officers to take charge of procurement for their respective ministries and departments. The Ministry of Finance (MOF) had been given overall responsibility for regulating public procurement. As the resulting centralized public procurement system was not subject to any particular law, the MOF had issued regulations and guidelines, in the form of circulars to ministries and other public agencies, from time to time.

41. The principal instrument in this regard had been the Government Financial Regulations and Procedures (Financial Regulations), which dealt with administration of government finances, including procurement. The Financial Regulations had established a Central Tender Board (CTB), comprising members appointed by permanent secretaries in the ministries they represented. The CTB had responsibility for procurement of goods and services valued at Kshs. 2,000,000 and above. Under the regulations,

Ministerial Tender Boards (MTBs) were responsible for procurement of goods and services valued at below Kshs. 2,000,000.

42. Some government departments, such as the Department of Defence, had been allowed to run their specific tender boards, which operated on the ceilings and powers of the MTBs. District Tender Boards (DTBs) had been established to cater for procurement at the lower levels of government. DTBs had been inter-ministerial and were made up of representatives of government ministries in the districts. They had the same powers as MTBs. In addition, the Financial Regulations applied to the tender boards of local authorities, public enterprises, public universities, and other institutions of learning, and cooperative societies.

43. MOF had also issued circulars, from time to time, setting out the details of public procurement procedures and policies, e.g., circulars that raised the procurement thresholds and reviewed adjudication procedures. They had also dealt with matters of policy.

44. The above centralized procurement system had had several deficiencies. Firstly, the Government Contracts Act had provided that "*…public officers* could *not be sued personally upon any contracts which they make in that capacity…*," and thus, since there were no sanctions against government officers who breached them, the system had been vulnerable to abuse, and the incentive to engage in corrupt procurement deals strong. Secondly, procurement policies and procedures had been scattered in various government documents. Thus, for example, it had been difficult to comprehend the Financial Regulations, without the benefit of the Treasury circulars. Again, vague procurement procedures and policies meant that the system could easily be abused or manipulated by unscrupulous public officers.

45. Common corrupt practices in public procurement had included public officers—often under the influence of powerful politicians and businessmen—only inviting preferred firms, favouring certain firms at the short-listing stage, designing tender documents to favour particular firms, and releasing confidential information. This state of affairs had been exacerbated by the fact that the procurement system was manned by junior officers, who were therefore powerless to correct any anomalies, and could easily be manipulated by their seniors and powerful politicians. Corruption in public procurement had also been facilitated by the lack of transparency in the system; the applicable procedures had been invariably inaccessible to the public.

46. To make matters worse, Kenyan law had not prohibited public officials from participating in private enterprise. Indeed, the civil service was at the time, by far, the most important launching pad for businessmen, as it gave senior government officials and politicians access to public resources, including lucrative public procurement contracts. The participation of public officials in private enterprise had thus been a key source of corruption in public procurement, since the rules established to guard against conflicts of interest had invariably been breached.

47. Furthermore, there had been no provision for dissatisfied bidders, or the general public to appeal against the procurement decisions of the various tender boards where, for instance, there had been irregularities in the process. The system had only allowed for appeals by accounting officers (usually permanent secretaries), in the relevant government ministries, departments, and agencies.

48. Appeals against the decisions of the DTBs had to be made to the CTB; those against the MTBs had to be made to the relevant permanent secretaries; while appeals against the CTB and Department of Defence tender board had to be made to the permanent secretary to the Ministry of Finance. Thus, while the permanent secretaries had typically appointed the members of the tender boards, they never participated in their deliberations. Nevertheless, by providing that only permanent secretaries could appeal against the decisions of tender boards, the Financial Regulations had given these government officials sufficient incentives to manipulate the system by, for example, only appealing against decisions they found unacceptable for parochial reasons. Moreover, no role had existed for independent judicial review, since the decisions of the administrative appeal bodies had been deemed final.

49. Quite apart from deficiencies related to transparency and accountability, inefficiency had also marred the system. Characterized by overspending, this inefficiency had been attributed to poor planning and packaging of procurement contracts by accounting officers, and their failure to check on existing inventory, as well as lack of supervision and monitoring of project implementation. Cases where goods and works inferior to the specifications had been accepted by the government had been quite common. Indeed, in some cases no goods or works had been delivered at all. And, in yet other instances, contracts had been varied upwards from the originally quoted price, often with the connivance of senior government officers. Thus, for example, a building constructed by the National Health Insurance Fund had cost more than twice the originally quoted price. Lead times had also been exceedingly long. The Minister for Trade, for example, had reported that it took his ministry nine months to buy a paper shredder.

50. These deficiencies had contributed to huge losses in public procurement, hastening the call for reform. The local business community had complained that inefficiencies in public procurement were contributing to an unsuitable business environment, as they resulted in, for example, poor physical infrastructure and inefficient services. At the same time, the donor community had also begun to make reform of the public procurement system a condition for lending as part of the structural adjustment process. Led by the World Bank, these donors sought to *"...harmonize the national procurement system with international procurement guidelines, in order to make the processes more transparent and to devolve procurement to local entities*..."

51. On the matter of the Public Procurement Reforms, ***Development Partners and Governance…*** observed that, in 2001, following recommendations of consultants, the government had enacted the Exchequer and Audit (Public Procurement) Regulations (Procurement Regulations). Because the consultants realized that it would take a long time for such a law to be

enacted, due to lack of support in government circles for a stringent procurement system, they had recommended the promulgation of procurement regulations under the Exchequer and Audit Act, which empowered the Minister for Finance to make regulations governing public procurement.

52. The Regulations had applied to all "*public entities*" and superseded all previous government circulars and other instruments dealing with public procurement. As an exception to this general rule, however, the Regulations had not applied where the Minister for Finance decided, in consultation with the head of the procuring entity, that "…*it* was *in the interest of national security or national defence to use a different procedure*…"

53. The Regulations had sought to streamline the procurement process, by abolishing the CTB, and establishing the Public Procurement Directorate (PPD), as "…*the central organ for policy formulation, implementation, human resource development and oversight of the public procurement process…*" The PPD had thus taken over general responsibility for public procurement, from the Minister for Finance. Its functions had included: monitoring the overall functioning of the public procurement process; and advising the minister; preparing procurement manuals; advising and assisting procurement entities in undertaking procurement; inspecting the records of procurement entities; and training procurement officers.

54. Under the new, decentralized system, each public entity had constituted a procurement entity, and had been required to establish a tender committee to undertake its procurements. Provided that the PPD had been given sufficient autonomy and enforcement powers, the decentralized system should have ensured the establishment of an efficient and accountable public procurement system.

55. The Regulations had been based on the UNCITRAL Model Law and had embraced the principles of sound public procurement in significant respects. Among other things, they had established open tendering as the preferred procurement procedure, requiring that specifications be drawn objectively, prohibiting the discrimination of candidates, mandating the advertisement of tenders, and requiring the evaluation of tenders transparently and on the basis of objective criteria.

56. Efforts had also been made to open up the public procurement system to public scrutiny. The Regulations had required that all procurement regulations and instructions of the Minister of Finance must be "…*promptly made accessible to the public*…" Further, procurement entities had been required to maintain records of their proceedings, which records they were, upon request, to have availed to candidates who participated in those proceedings.

57. The Regulations had also provided for the Administrative Review of procurement decisions, which formed a critical part of the efforts to ensure transparency in the procurement process. Pursuant to the Regulations, the Minister had established a "Public Procurement Complaints, Review and Appeals Board" (PPCRAB, or Board), to adjudicate complaints submitted by

"*…any candidate who claim*ed *to have suffered, or risk*ed *suffering, loss or damage due to a breach of a duty imposed on the procuring entity...*"

58. The Board's rules of procedure had required aggrieved bidders to submit requests for administrative review to the PPD, stating the reasons for the complaint. The PPD had power to dismiss complaints, but where it had not done so, it was required to promptly give notice of the complaint to the procuring entity and interested candidates, and call a meeting of the Board within twenty-one days. The Board was then required to have given a decision within thirty days from the date of the said notice and to state the reasons for its decision.

59. The remedies that the Board could grant included: (i) declaring the legal rules or principles governing the subject-matter of the complaint; (ii) prohibiting a procuring entity from acting unlawfully; (iii) requiring a procuring entity to act lawfully; (iv) annulling an unlawful act or decision of a procuring entity; (v) revising such decisions or substituting its own decisions for such decisions; (vi) or terminating the procurement proceedings.

60. Despite this review process, the Board had been precluded from entertaining any complaints once a procuring entity had concluded and signed a contract with the successful bidder. Parties dissatisfied with the Board's decision could seek judicial review in the High Court.

61. Although the bidder protest mechanism established by the Regulations had had a number of shortcomings, it had contributed immensely to the restoration of credibility to the public procurement system. The Board had handled well over one hundred cases, at a critical point. Both local and foreign firms had actively participated in its proceedings, and had given it good reviews. Indeed, the Board had been unique in many respects, compared to Kenya's other regulatory and administrative bodies. Above all, the Board had stopped a considerable number of corrupt and irregular procurements.

62. A perennial problem that bedevilled the procurement system had been ministerial interference with the tender process. While the Regulations had not given government ministers, other than the Minister for Finance, any role in the procurement process, ministers had nevertheless intervened and influenced the award of tenders. Many government ministers simply had had no regard for stipulated laws and regulations, and had often used their residual powers, such as the power to suspend or fire public officers, to pursue their own interests. The threat of being suspended or fired had in many cases intimidated public officers into obeying illegal ministerial directives. Indeed, where ministers had wanted to manipulate the procurement process, they had used such powers to demand information from the procuring entity, which they had then published and used to cancel tenders, then turned around to claim that the process had been compromised and needed to be restarted.

63. In one such instance, the Minister for Communications had sought to interfere with the Communications Commission of Kenya's tender for a license to install and operate the country's second fixed telecommunications service. The

Minister had unlawfully obtained confidential information on the tender and had then purported to terminate it. The Board determined that the Minister had breached the confidentiality of the procurement process and interfered with the independence of the procuring entity.

64. Such decisions of the Board might not end the problem of ministerial interference with the procurement process. Nevertheless they had highlighted instances where ministers had exceeded their powers and had exposed their misdeeds to public scrutiny.

65. Apart from exposing corrupt practices in the procurement process, the Board had done a good job of ensuring that procuring entities adhered to the Regulations and had developed very good case law on public procurement. Where a procurement entity had not followed the Regulations, the Board had typically required it to re-tender under the supervision of the PPD. In the short run, this might delay procurement processes. On the whole, however, the delays were expected to become fewer as procurement entities became familiar with the Regulations.

66. Indeed, it had been expected that the prospect of being required to re-tender could serve as an incentive for procurement entities to comply with the Regulations.

67. It had been noted, however, that by precluding the Board from entertaining complaints once a procurement entity had concluded a contract with the successful bidder, the Regulations might be encouraging corruption. Presumably, the idea had been to prevent endless litigation and facilitate speedy conclusions of tender processes. But in practice, this had frustrated the efforts of the Board to stop irregular and corrupt tenders.

68. The case of *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund* had provided a good example. The National Social Security Fund (NSSF) had sought to tender for the provision of various insurance services. At some point during the tendering process, the Minister for Finance had written to the NSSF proposing that the tenders be awarded to certain firms. Indeed, one of the parties awarded a tender had not even submitted a bid. The NSSF had made its awards on June 30, 2003, and immediately thereafter notified the "successful" bidders, on the ground that its insurance covers were expiring that very day. But the unsuccessful bidders were not notified until seven days later, by which time the NSSF had signed contracts with the successful bidders.

69. The Board had found that the tender process to have been fatally flawed and annulled the tender awards. The NSSF had appealed to the Board on the ground that the applicants' complaint should not have been entertained in the first place, since contracts had come into force by the time the application was lodged. The Board noted that it had been established as "an administrative review board" specifically mandated to deal with complaints submitted by bidders, not procuring entities. In its view, the review contemplated in the Regulations had been a review of a procuring entity's decision. Accordingly, the Board had determined that it did not have the jurisdiction to entertain the

NSSF's application, reasoning that "…*upon the issuance of its decision in respect of an appeal or complaint, the Board* could *become functus officio*..."

70. An obvious flaw of the new public procurement regime had been that it had no firm legal basis. The Minister for Finance could simply bring the regime to an end by repealing the Regulations. For, the Minister for Finance had retained a great deal of power that could be used to frustrate the reform efforts. In 2003, for instance, the Minister had suspended all procurement officers and public tenders, to allegedly purge the procurement system of corruption. Many had believed that the real reason for this action, however, had been for the Minister to assume control of public procurements. Since suspended officers had included those of the PPD, the operations of the procurement system had virtually been brought to a halt, and decisions had been made by permanent secretaries, in total disregard of the Regulations. Fortunately, the Minister had not suspended the operations of the PPCRAB, and the Board had been able to stop many of the ensuing corrupt and irregular procurements.

71. There had therefore been an urgent need to enact a law on public procurement, if the gains of the emerging regime were not to be lost. Several attempts had been made to enact such a law, but these had not succeeded largely because the Ministry of Finance had been opposed to the creation of an independent authority as it wants to retain control of public procurement.

72. The latest such attempt was the Public Procurement and Disposal Bill of 2005, which had been debated in Parliament. This Bill was similar to the Regulations, in many significant respects, although it sought to make a number of useful changes. Firstly, it provided that a procuring entity could engage the services of other persons to assist it in its work. The government lacked the capacity to design appropriate specifications and evaluate bids, and thus, should be able to take advantage of expertise available in the private sector. Secondly, the Bill gave the Director much needed powers, including that to inspect the records and accounts of procuring entities and contractors, order investigations of procurement proceedings, and cancel contracts, or terminate procurement proceedings, pursuant to such investigations (except where a matter had been before the Review Board), and to debar firms from participating in procurement proceedings. The Bill also introduced stringent penalties for persons who inappropriately influenced the evaluation of tenders, induced the employees or agents of procuring entities, misrepresented material facts, colluded to inappropriately influence the tender process, or failed to disclose conflicts of interest.

73. Another avenue for corruption was the exemption of national security and defence procurements from the Regulations. Typically, the Minister for Finance had resorted to this exemption, even where the procurements strictly speaking had had little, or nothing, to do with national security or defence. The result was that the tendering process had then been shielded from public scrutiny. Nevertheless, a number of corrupt security procurements had been exposed by the media. By far the most controversial of these procurements was the Anglo Leasing Scandal, which involved the acquisition of tamper-proof passports by the Ministry of Home Affairs, and the construction of forensic laboratories for the police force. The Bill sought to seal this loophole

by embracing security procurements. In the meantime, government had established an inter-ministerial committee to oversee security procurements, in response to public outcry.

74. Corruption was also facilitated by the lack of a comprehensive policy on public procurement. Such a policy would, in particular, have enabled effective participation of indigenous firms. In the absence of an objective policy, however, successive governments had simply used public procurement as a political patronage resource. Thus, only a few indigenous firms had benefited from governmental efforts to give incentives to local firms to participate in public procurement.

75. The composition of the PPCRAB and its relationship with the PPD also needed review. Three permanent secretaries—those in the Ministry of Finance, the Office of the President, and the Solicitor-General—had been members of the PPCRAB. Because these senior government officers sat on the boards of a number of government agencies and corporations, there was potential for conflicts of interest. In *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund*, for example, the Permanent Secretary in the Ministry of Finance was accused of influencing the procurement process to favour certain bidders—and yet he was able to sit in judgment of his own decision. Again, there had been a need for the PPCRAB to be granted autonomy from the PPD to facilitate a clear separation of the regulatory and adjudicatory roles. Once that had been done, the PPCRAB could also be granted jurisdiction to review the decisions of the PPD/Authority, in light of the immense powers that the latter will have once the proposed Bill was enacted.

76. A further source of inefficiency and corruption was the decision to exempt development agreements from the provisions of the Procurement Regulations, which led to the maintenance of parallel procurement regimes and attenuates the lines of accountability. The Regulations provided that "*…to the extent that these Regulations conflict*ed *with an obligation of the government under or arising out of an agreement with one or more other States or with an International organization, the provisions of that agreement shall prevail...*" The result was that, in sector-wide development assistance programs such as GJLOS, in which procurement was undertaken by a private entity answerable only to donors, there was virtually no accountability to local constituencies.

77. Thus, by the advent of SWAPs (and despite the shortcomings highlighted above), reform efforts had achieved much in a relatively short time, especially with respect to enhancing the accountability of public procurement, and establishing a functioning bidder protest mechanism. Accordingly, sufficient progress had been made towards the attainment of a sound public procurement system for SWAPs to accelerate the devolution of procurement to national entities. Contrary to that, the GJLOS Reform Program had raised serious concerns about efficiency and democracy in the administration of aid. In particular, there had been a clear need to harmonize its procurement regime with the public procurement system established by the Procurement Regulations.

78. In respect of the GJLOS Reform Program and its procurement regime, ***Development Partners and Governance…*** examined, firstly, the Program's efficiency, democracy, and institutional structures. Thus, about: (i) the Nature of the Program, its objective was to strengthen the capacities of the institutions in the governance and legal sector for "…*efficient, accountable and transparent administration of justice*..." It covered some thirty government departments. It had been developed out of a realization that the institutions in the governance and legal sector needed to address their inadequacies on a sector-wide basis in order to be effective.

79. The Program was based on a Memorandum of Understanding (MoU) between government and development partners. The MoU provided that most development partners would provide funding through a basket fund (GJLOS Basket Fund), while others would do so bilaterally. Regarding bilateral funding, development partners had undertaken to "…*strive to establish funding agreements that were compatible with the provisions of [the] MoU*…" for harmonization. Further, the MoU had set out the terms and procedures for the joint management, funding, monitoring, and evaluation of the Program, through the appointment of a Financial Management Agent (FMA).

80. The institutions established to assist in running the Program, had included: the Inter-Agency Steering Committee (IASC); the Technical Coordination Committee (TCC) and its Management Committee, the Program Coordination Office (PCO); the Thematic Groups (TGs), and the Donors' Coordination Forum. Because of its considerable size, the TCC had a Management Committee, to provide coordination and decision-making oversight, with respect to the thirty departments. Given this set-up, the Program's institutional framework was unwieldy. Indeed, consultants hired for its review unsurprisingly found that "…*the absence of a clear program management structure detailing linkages between organizations and their functions* had been *causing confusion...*"

81. Furthermore, under the Program's efficiency, democracy, etc., (ii) an assessment was made on its effectiveness and accountability, with the observation that corruption tended to thrive in environments characterized by institutional confusion, which facilitated neither program effectiveness nor accountability. There were therefore concerns about the Program's democratic shortcomings. Firstly, vast financial resources had been allocated thereto. It was scheduled to last five years and to cost about $15 million, seventy five percent of which was covered by development partners.

82. Secondly, since GJLOS was Kenya's first SWAP, it was considered in many circles as a test case. The expectation was that it could be replicated in other sectoral reform programs. Given that development partners were funding virtually government's entire development expenditure budget, the governance of the Program considerably implicated future administration of development assistance in Kenya, especially, had donors achieved consensus on basket funding.

83. However, there were concerns about the effectiveness and democratic character of the Program. As a SWAP, its effectiveness could be assessed by

the extent to which it ensured government ownership and leadership, and strengthened government's capacities and efficiency. The Program did not succeed on either count. For, while MoJCA "…*increasingly exerted its authority*…," other critics thought that "…*donors* had *too much influence and only* paid *lip-service to the notion of government leadership…*" and had been "…*too involved in the detail of GJLOS*...." This was evidenced by the frequent meetings between donors, the PCO, and the FMA. Thus donors, rather than national constituencies, were the main point of accountability. Also, was felt that development partners had undue influence over the PCO, the Program's executive organ.

84. Besides, the Program was not sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems were noted because of the poor linkage between the Program and the Ministry of Finance, where GJLOS was "…*not well known or understood*..." Indeed, officers of the Ministry of Finance acknowledged that they had not developed financial management systems appropriate for SWAPs.

85. Perhaps the most important unfulfilled outcome was the Program's efforts to strengthen government's financial management and procurement capacities. Because Development Partners were convinced that government's financial management and procurement systems were cumbersome and corrupt, they insisted on the appointment of the FMA, which in effect, therefore, created financial management and procurement structures that bypassed the national systems. With respect to financial management, while the FMA was contracted to improve government's capacities, it appeared that neither indicators nor a timetable for doing so had been provided. The Review Team thus "…*found no evidence of the FMA proactively identifying financial management capacity gaps and filling them*..."

86. Furthermore, bypassing national financial management system weakened government's financial management capacity, since disbursements took place outside of the national system. As a consequence, a vicious cycle developed whereby government's financial management system was bypassed and weakened, thereby justifying the continued demand for an FMA.

87. The participation of non-state actors, namely private sector and civil society organizations (CSOs), had also been problematic. Their participation was not only unstructured, but there were concerns that the Program may be crowding out CSOs. Participation of private sector organizations was drawn from the high end of the sector, thus the absence of effective representation from SMEs was notable.

88. Conversely, government only invited participation from a number of CSOs it thought were implementing projects similar to those proposed under GJLOS, and others who "…*had shown an interest in working with government*..." Because this select group of CSOs were thereby guaranteed access to the Program's resources, the government was perceived as using the Program to dispense political patronage. Indeed, according to the report of the advisory team, many of the CSOs "…*had personal relationships with the new*

leadership in MoJCA and sector departments, many of whom came from civil society..." In addition, in some cases, CSO actors were hired as consultants for the Program, but had apparently not been sourced transparently. Furthermore, a number of CSO actors felt that only a select group of CSOs had access to information on the Program.

89. This problem stemmed from the fact that the role that CSOs were supposed to play in the Program was not clear, whether they were partners, service providers, or program monitors. Especially, for those that sought to provide services, the modalities for accessing GJLOS funds required clarification. Indeed, a scenario in which GJLOS funded CSOs directly was undesirable since it would have given MoJCA the resources with which to compromise the independence of CSOs, effectively crowding them out of the governance and legal sector.

90. Still under the GJLOS Reform Program and its procurement regime, ***Development Partners and Governance…*** posits that the said regime raised serious questions of accountability and participation. For, according to the MoU, procurement arrangements under the Program were to have complied with government's Procurement Regulations, but prior to the enactment of the procurement legislation, the Program "…would *adopt procurement procedures of the FMA*..."

91. Furthermore, the MoU provided for the appointment of a Procurement Agent to assist with this work. Thus, despite the elaborate and fairly democratic procurement system established by the Procurement Regulations, it was somehow thought best to create a parallel procurement regime. Unfortunately, however, the parallel regime only resulted in lengthening the procurement process.

92. To carry out the procurement function, the FMA developed a set of guidelines (Guidelines) in consultation with donors and government. Although the Guidelines sought to embrace the principles of sound public procurement, they raised several issues.

93. Firstly, the Guidelines established KPMG, a private firm, as the procuring entity. Thus, it was the responsibility of KPMG to develop procurement plans, after receiving approved work plans, and to tender for the goods and services. According to the Guidelines, KPMG was to prepare and compile the tender documents, although the implementing agencies had responsibility for preparing technical specifications. Furthermore, the FMA was to determine the responsiveness of bids, and to coordinate the evaluation of responsive bids, by establishing an evaluation panel.

94. Quite apart from the fact that this arrangement concentrated responsibility for the procurement needs of some thirty government departments in one institution, it was also quite troublesome, from a public law viewpoint. For, since it was managing public resources, the FMA was, for all intents and purposes, exercising a "public function." However, the FMA was only accountable to the Basket Fund Donors, through their leader (SIDA), with which it was under contract. In addition, since it was not established as a

"Procuring Entity" under the Procurement Regulations, the exercise of its procurement powers under the Program was removed from the purview of national accountability mechanisms. On the other hand, since the exercise of FMA powers affected "vital interests" of the citizenry, it should have accorded with principles of good administration—such as participation, accountability, and fairness.

95. In particular, the need for KPMG to be accountable to national constituencies arose because of concerns that it exercised its powers arbitrarily. There were allegations that, as an accounting firm, KPMG did not have the requisite public procurement management capacity. Furthermore, concerns were expressed that, in some instances, KPMG acted beyond its mandate, by interfering with activities in work plans, and suggesting ways of implementing them.

96. Secondly, the Guidelines did not provide for a bidder protest mechanism. They merely granted that "…*applicants who* felt *they* had *been evaluated unfavourably, or* had been *disadvantaged in evaluation either by error or due to an irregularity,* might *register a written complaint with the FMA within five working days from the date of notification of award*..." The FMA was then required to immediately inform SIDA of the complaint and respond to the complainant "…*within a reasonable time*..."

97. Furthermore, the Guidelines provided for the automatic disqualification of bidders, where they had attempted to influence the outcome of the selection process. But, there were no provisions for bidders to contest such disqualification. In addition, the Guidelines provided for the suspension of "suppliers" from the FMA supplier lists. However, FMA was required to give such suppliers a hearing. Those aggrieved with the FMA decision could appeal to SIDA.

98. In either case, there could be no convincing reason why the decisions of FMA should not have been subjected to scrutiny by the PPCRAB, which had by then developed good jurisprudence on public procurement. Indeed, the procurement guidelines of development agencies such as SIDA typically provided that dissatisfied bidders "…might *have recourse to procedures established under the cooperation partner's national legislation*..." In the case of GJLOS, however, it was not clear whether the procedures in question should have been those of the Procurement Regulations or the GJLOS Procurement Guidelines.

99. Finally, under the GJLOS Reform Program and its procurement regime, ***Development Partners and Governance…*** observed that, concerning administrative law and aid administration, the experiences of the GJLOS Program illustrated the need for a national law on aid administration, establishing clear institutional and accountability frameworks, and also structuring the participation of local stakeholders. Such a law could also require government to keep an inventory of all development assistance agreements and to facilitate public access thereto.

100. As noted earlier, development assistance was typically driven by the national security and economic interests of donors, who thus set most of the agenda

and the conditions of cooperation. This was the case even with initiatives such as SWAPs, which sought to enhance the effectiveness of aid. Furthermore, aid policies typically did not recognize the "…*enormous diversity that exist*ed *in recipient countries*…;" instead, they assumed that these countries were homogenous. In this scenario, and despite much talk about local ownership, participation, and partnership, the formulation of aid policy remained donor-led. Indeed, because meaningful local participation could have led to citizens of developing countries expressing preferences that could conflict with the priorities of donors, participation remained little more than a buzzword.

101. According to ***Development Partners and Governance…***, while donors made notable efforts to end the policy of tying aid, they still ensured that their firms got business, by pursuing unofficial or tacit agreements with recipient governments. In fact, the procurement policies of donors undermined the development of local firms, which were invariably passed over in favour of international ones.

102. For that reason, development assistance was not free, and could only work for developing countries if their governments integrated aid within national development strategies. For this to happen, each government should establish "…*organizations with the will and capacity to set policy priorities, negotiate with donors, and determine when to accept or reject donor proposals*..." Preferably, they should centralize aid planning and management so that there could be only one institution charged with negotiating and securing aid. Indeed, Botswana's success in using aid effectively at the time was attributed to its adoption of this approach.

103. To achieve the envisaged integration of aid within national development strategies, ***Development Partners and Governance…*** urged developing countries to enact laws on aid administration, to ensure that the formulation and administration of aid were efficient, accountable, and participatory. While it could be expected that governments keen to maintain aid as a patronage resource would resist attempts to make aid administration transparent, such laws could offer effective means through which citizens could debate and counter the narrow interests of donors and government elites.

104. In conclusion, ***Development Partners and Governance…*** states that the sector wide approach to development assistance should be encouraged and developed further, especially since it promised to enhance the accountability of aid administration to citizens of developing countries. Nevertheless, the experience with SWAPs at the time had raised concerns that ought to be addressed, if the case of the GJLOS Program was anything to go by. There was apprehension that donors continued to exert too much influence by being too involved in the details, which could only work to the detriment of the SWAP objective of ensuring governmental leadership and ownership of development assistance. Furthermore, such donor influence meant that the main flow of accountability continued to be outward, i.e., from developing countries and SWAP institutions to development partners.

105. In addition, development partners did not achieve sufficient consensus on the need to harmonize their accounting procedures, and policies on whether or

not to untie aid. As noted earlier, the policy of tied aid was not only inefficient, but also worked against the efforts of developing countries to gain a foothold in international trade.

106. By far the most significant concern was the ambivalence of development partners over the use of recipient government administrative procedures and systems. While donors acknowledged the need to rely on national procedures and systems, they were exceedingly reluctant to do so, arguing that the procedures and systems were inefficient and corrupt. Thus, they created parallel structures, which only served to undermine national systems. Even more worrisome, the parallel structures bypassed national accountability mechanisms. In the case of the GJLOS Program, the private firm responsible for procurement was entirely unaccountable to national constituencies.

107. There was thus a need for development partners to demonstrate some faith in national reform efforts, especially where, as in the case of Kenya's public procurement reforms, tremendous gains had been made, in an effort to establish a credible system that needed only to be consolidated.

108. Last but not least, ***Development Partners and Governance…*** advises developing countries to establish clear and democratic legislative frameworks for the administration of aid, as these would not only ensure better and participatory engagement with development partners, but would also enhance accountability to their own citizens.

III. APPLICABLE LESSONS

109. The two documents entitled Effective and Transparent Governance of Public Expenditures in Latin America and the Caribbean, and Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid together demonstrate how important developments in the 1990s and 2000s (including the EU, WTO, SWAPs, alignment, harmonisation, etc.) triggered changes in perspective of public procurement. Some of these events forced governments to focus on procurement as a means to adapt national systems to international trade agreements, and to new business concerns. In addition, the rising concern of civil society with integrity, fraud and corruption, and the increased demand for accountability and results, put politicians on notice of the importance of procurement as a strategic government function.

110. In terms of additional studies to be undertaken, it would appear that the current material would be sufficient, for the time being.

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