



Manufacturing in Myanmar  
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# CROSS ANALYSIS ON COMPENSATORY MEASURES IN INTERNATIONAL PUBLIC PROCUREMENTS CONTRACTS

This is the first step which is a cross analysis between 8 levels of criteria and the 11 selected countries.

The objectives were to make an inventory of offsets practices and determine common principles of offsets.

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## TABLE OF CONTENTS

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|   |           |
|---|-----------|
| INTRODUCTION.....   | 3         |
| CONCEPT NOTE.....   | 9         |
| <b>LEVEL 0: ECONOMIC DATA.....</b>  | <b>13</b> |
| <b>LEVEL 1: International institutions &amp; public procurement measures.....</b>   | <b>15</b> |
| <b>LEVEL 2: Regional/ multi / bilateral agreements on government procurement signed with other countries .....</b>            | <b>16</b> |
| <b>LEVEL 3: Inventory of national legislation and rules applicable at national levels on government procurement.....</b>      | <b>22</b> |
| <b>LEVEL 4: Offsets rules at national level .....</b>   | <b>30</b> |
| <b>LEVEL 5: COMPARATIVE OFFSETS REQUIREMENTS.....</b>   | <b>34</b> |
| <b>LEVEL 7: Cultural, regional and political organization .....</b>   | <b>41</b> |
| <b>LEVEL 8: Comparison between Uncitral model law on public procurement (2011) and national public procurement laws .....</b> | <b>48</b> |
| <b>AUSTRALIA.....</b>   | <b>57</b> |
| <b>BRASIL .....</b>   | <b>58</b> |
| <b>CANADA.....</b>  | <b>60</b> |
| <b>KUWAiT .....</b>   | <b>65</b> |
| <b>INDIA .....</b>  | <b>68</b> |
| <b>PERU .....</b>   | <b>71</b> |
| <b>RUSSIA .....</b>   | <b>73</b> |
| <b>SOUTH AFRICA.....</b>  | <b>76</b> |
| <b>SOUTH KOREA.....</b>   | <b>79</b> |
| <b>TURKEY .....</b>   | <b>82</b> |
| <b>UAE.....</b>   | <b>84</b> |

## INTRODUCTION

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### *What Are Offsets?*

There is no single, agreed upon definition of offsets. However, the World Trade Organization (WTO) Agreement on Government Procurement (GPA), which limits, and, outside of the defense sector, prohibits, the use of offsets by its members, defines an offset as “any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, countertrade and similar action or requirement.” Related terms include compensatory trade agreements, coproduction, barter, and buy backs. The term “offset” is most often used in the aerospace and defense industry, whereas other terms, such as countertrade, may be used in other sectors.

More colloquially, offsets are commonly defined as nonstandard contracts that require, as a condition for the sale of goods or services, that the vendor transfer a form of economic activity to the buyer’s government. In shorthand, that means that offsets are side agreements, or sweeteners, ancillary to a government contract that provide additional benefits to the buyer.

Offsets are generally used by purchasing governments to reduce the cost (at least as perceived by their constituents) of procurement from abroad and/or to achieve related or unrelated policy goals, such as advancing the state of domestic industry or broader domestic development goals. Momentum in countering the growth of offsets has stalled since the period of trade liberalization that resulted in the WTO-GPA civil offset ban in 1994. The 2012 revision to the GPA did not close the loopholes that allowed offsets to continue in the interim. More recently, in the global defense marketplace, offsets have played a particularly significant role in the competitive landscape as defense budgets in the United States and Europe have been slashed and producers seek new markets abroad. As a result, at least for the foreseeable future, it appears that offsets are here to stay, and that parties engaged in the international defense trade should understand the basics of offsets, as well as the legal and compliance pitfalls that can be associated with them.

Legal field of offsets: the World can be divided into 3 parts: **USA** (Buy American Act), **developing & emerging countries** (GPA 1994, revised 2014), **Europe** (GPA 1994, art. 18; TFEU, for civil contract 2004/17/EC/directive, 2009/81/EC/directive – for defense 2009/81/EC).

## ***THE GLOBAL FORUM COMMUNITY OF PRACTICE ON “COMPENSATORY MEASURES IN INTERNATIONAL GOVERNMENT PROCUREMENT CONTRACTS”***

### **Objectives**

A standalone Community of Practice (CoP) dedicated to the compensatory measures in international government procurement contracts was created on the 29<sup>th</sup> October 2013 in the framework of the GFLJD (Global Forum on Law, Justice and Development). The GFLJD<sup>1</sup> is a permanent, global forum, with its Secretariat housed at the World Bank, which seeks to connect experts and stakeholders from around the world, and which provides a mechanism for continual and efficient knowledge exchange as well as for the cogeneration of innovative solutions to development challenges based on efficiency, equity and justice.

The GFLJD aims to facilitate the identification, discussion, production and/or sharing of innovative and customized legal and institutional tools to address global, regional or national development challenges.

Based on the areas of interest expressed by the GFLJD Partners, five Thematic Working Groups (TWGs) and relative Thematic Working Sub-groups (TWSs) were launched in April 2012<sup>2</sup>. Along the way, new TWSs and CoPs were established.

Each TWG is to identify key challenges in its area and to generate outputs that address these challenges. All of the TWGs have made substantial progress in the identification process, as part of their work planning. Although there have been colloquia, meetings and presentations, only a few publishable outputs have been produced. In addition to standalone CoPs, the work of the TWGs is generally led by CoPs.

After submitted a concept note on offsets practices as a major development challenge, the standalone CoP on compensatory measures in international government procurement contracts was created with the commitment to produce targeted knowledge products representing innovative legal solutions to the challenges identified.

The purpose of the CoPs on offsets issues is to develop fruitful and constructive dialogue between the different methodological trends and to propose a comprehensive draft to create a model law (UNCITRAL).

The CoP has 3 areas of exploration:

- 1. Firstly, defining the relevant field:-
  - Inventorying work carried out, and attempting to define offset and its common principles and technical complexity;

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<sup>1</sup> It seeks to: (1) promote a better understanding of the role of law and justice in the development process, through structured South-South and North-South dialogues amongst relevant stakeholders and a research agenda that will facilitate and support the co-generation of knowledge; (2) strengthen and better integrate legal and judicial institutions in the development process, by carrying out relevant capacity building initiatives; and (3) provide access to an open repository of knowledge. The GFLJD will set measurable, sustainable goals for itself in these areas, and evaluate its progress. The forum is organized thematically. Partners form and lead Thematic Working Groups (TWGs) based on their expertise, comparative strengths and areas of focus. Each TWG proposes its own agenda, group composition and operating guidelines.

<sup>2</sup> There are five **Thematic Working Groups** (TWGs), which are clusters of partners organized around topics of interest:

- (1) Justice Reform / Rule of Law Reform
- (2) Law and the Economy
- (3) Environmental and Natural Resources Law
- (4) Governance and Anti-corruption
- (5) Empowerment and Equity for Diverse Communities

- Identifying advantages and inconveniences of offsets in international trade;
- Exploring the optimum scale on which to act: global, multilateral, bilateral regional or national.
- 2. Secondly, preparing research topics:
  - Exploring law and conflicting legal provisions in international government procurement tendering;
  - Systematizing the market on the basis of value added in order to set a new definition of the world market;
  - Analyzing the impact of direct offsets (delocalization) on “made in”;
  - Drawing up key offset concepts (see ECCO glossary, etc.)
- 3. Thirdly, analyzing standards, differentiating between standard types and sources, including the following:
  - Consider multilateral agreements with an eye to how, from a UN vantage point, the GPA might be improved upon through the creation of standard UN law on offsets;
  - Develop ideas on how to monetize non-monetary criteria (Article 11-4 of UNCITRAL concerning Government Procurement);
  - Explore ideas on how to draw up general offset management conditions to limit distortions.

This CoP is under the leadership of the European Club for Countertrade and Offset (ECCO). The main role of the leader is to ensure that the project progresses adequately, facilitating the participation of the members of the CoP.

The leader arranges and distributes tasks among the members of the CoP, ensuring efficient functioning of the CoP. Meetings of the CoP take place on a regular basis, with a pre-arranged schedule, to monitor progress and exchange information on the project.

### **Methodology**

Work began by asking group members to lay out their nation’s practices. Specifically, such an approach was meant to (1) **identify the different major partnership contracts**, (2) determine the different legal frameworks (BOT, FBO, offsets, etc.) and sectors (mining, water, infrastructures, etc.) involved, (3) determining which national regulations apply to these international contracts (e.g., offset contract legislation) and (4) pinpoint techniques used to create major contracts, as well as the inter-normativity phenomena at work, notably in international calls for tender.

The analysis was based on a pluralistic methodology, allowing for several different research approaches in the following countries, which have an offset program:

- Australia
- Brazil
- Canada
- India
- Kuwait
- Peru
- Russia
- South Africa
- South Korea
- Turkey
- United Arab Emirates

Work was conducted on the following different levels of information:

- Level 0: Economic Data
- Level 1: International Institutions & Public Procurement Measures
- Level 2: Regional/Multi-/Bilateral Agreements on Government Procurement signed with Other Countries
- Level 3: National Legislation on Government Procurement.
- Level 4: Offsets Rules at National Level
- Level 5: Comparative Offsets Requirements
- Level 6: Offsets and Corruption
- Level 7: Cultural, Regional and Political Organization
- Level 8: UNCITRAL Model Law on Public Procurement Comparison

Since its creation, the CoP has held 17 working sessions:

- Meeting #1 (October 29, 2013): Official launch of the CoP, when the partners established a framework for the work to be carried out in the next three years.
- Meeting #2 (January 29, 2014): Agreement of how research into international government procurement and offset practices (legal typology, national regulations, multilateral and bilateral agreements) was to be split up between group members.
- Meeting #3 (April 01, 2014): Agreement on how to explore research into international government procurement and offset practices (economical data, offsets requirement details, offsets and corruption, cultural, regional and political organization for each country, comparison with UNCITRAL Model Law on public procurement).
- Meeting #4 (July 22, 2014): Agreement on how to consider international government procurement and offset practices (economical data, offsets requirement details, offsets and corruption, cultural, regional and political organization for each country, comparison with UNCITRAL Model Law).
- Meeting #5 (October 14, 2014): Creating a cross-analysis per levels and according to the 10 countries

- Meeting #6 (January 29, 2015): Following up on added research into international government procurement and offset practices (economical data, offsets requirement details, offsets and corruption, cultural, regional and political organization, UNICTRAL comparison for each country).
- Meeting #7 (May 19, 2015): Finalizing cross analysis on research into international government procurement and offset practices (economical data, offsets requirement details, offsets and corruption, cultural, regional and political organization UNICTRAL comparison for each country).
- Meeting #8 (September 23, 2015): Presenting of the Book on the cross analysis research, and discussion on the elaboration of an UNICTRAL Model Law table of contents.
- Meeting #9 (December 10, 2015): start of phase 2- draft of the table of content of Offsets model law, based on UNCITRAL model law (article 1 to 15)
- Meeting #10 (March 08, 2016): start of phase 2- draft of the table of content of Offsets model law, based on UNCITRAL model law (article 15 to 22)
- Meeting #11 (April 12, 2016): follow-up - draft of the table of content of Offsets model law, based on UNCITRAL model law (article 22 to 25)
- Meeting #12 (May 31, 2016): start of phase 2- draft of the table of content of Offsets model law, based on UNCITRAL model law (article 25 to 29)
- Meeting #13 (July 12, 2016): phase 2- draft of the table of content of Offsets model law, based on UNCITRAL model law (article 22 to the end)
- Meeting #14 (September 27, 2016): phase 2- redaction of the articles of the Offsets model law, based on UNCITRAL model law (article 1 to 3)
- Meeting #15 (October 11, 2016): phase 2- redaction of the articles of the Offsets model law, based on UNCITRAL model law (article 3 to 7)
- Meeting #16 (November 03, 2016): phase 2- redaction of the articles of the Offsets model law, based on UNCITRAL model law (article 8 to 9.6)
- Meeting #17 (November 10, 2016): phase 2- redaction of the articles of the Offsets model law, based on UNCITRAL model law (article 9 to 12)

#### **PARTICIPANTS**

- BOHLI Lotfi – ECCO, Paris 1, Panthéon Sorbonne University (FRANCE)
- CHARVERIAT Gilles – ECCO, Paris 1, Pantheon Sorbonne University (FRANCE)
- DAGNAUD Chantal – ECCO, INSTITUTIONS & STRATEGIES FIRM (FRANCE)
- EL HARRAK Mehdi – ECCO, Paris 1, Panthéon Sorbonne University (FRANCE)

- FRANK Melanie – The Global Trade Group (USA)
- GARCZYNSKI John – ECCO, AREVA (FRANCE)
- METZGER Robert S – Rogers Joseph O’Donnell (USA)
- PAIVA Domingos, Ph.D.- ECCO, PAIVA LAW FIRM (FRANCE & BRAZIL)
- PLATZGUMMER Peter – IPW-HSG/ Centre for Security Economics and Technology (SWITZERLAND)
- SIGAL Philippe – OECD (FRANCE)
- SYLVAIN Christian – ECCO, AREVA (FRANCE)
- TAGUCHI Jean Isamu – Nagoya University (JAPAN)
- SEUNGHWAN Park- Senior Counsel- Legal Vice Presidency- World Bank (for South Korea)



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## CONCEPT NOTE

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### Objective

The roles of the Partners, as well as any procedures to be used, are defined herein.

The identification and prioritization of all themes and issues is ensured through a participatory process involving broad and regular consultation with partners.

Think-tanks, regional and international organizations, international financial institutions, governments, judiciaries, the private sector, and civil society organizations interested in the GFLJD's mission are invited to join by sending a concept note and signing a letter of endorsement, expressing their commitment to contribute intellectually and/or financially to the GFLJD therein.

A concept note on offsets has been submitted to the GFLJD Steering Committee and duly accepted.

### Concept Note

Globalization is transformative in economic, political and social terms. It broadens existing economic prospects and opens up countries to the growing world market, often revolutionizing their economies. The opening up of markets provides an opportunity to rethink economic growth modes and to identify new forms of solidarity that respond to both growing interdependence and to developing shared actions with regard to common goods.

In the absence of international and domestic regulations, **major compensatory Offset Public/Private Partnership contracts** could be used to strike a balance. Most major such contracts are government procurement contracts signed by a State, or an institution acting as proxy, following an international call for tenders. These contracts are worth millions or even billions of euros and are concentrated on activities of great value: oil, rare earths, nuclear, aeronautics, arms, transport, telecoms, water, energy, etc. These contracts are increasingly localized in emerging countries.

Given both the sums involved, as well as the economic and political importance of these major contracts, some form of **economic compensation** is often required. The resulting contracts, which represent between 10 and 25 percent of world trade, can take a variety of forms, the most well-known being the **offset contract** under which the transfer or creation of economic value-added becomes the condition for signing the main contract. Other forms include Build, Operate, Transfer (**BOT**), wherein a private investor receives a concession to finance, build and manage a service for a given period and to transfer it to a government authority at the end of that period, and Finance, Build, Operate (**FBO**), wherein an investor receives a concession to finance and manage a service and agrees to share the profits with the State with which it formed a joint venture.

These contracts are a cluster of smaller contracts. Typically, the cluster includes a **government contract** (between a government or mandated institution and a group of private foreign companies), an **offset contract** (which structures the investment needed), **framework agreements** (between private partners who perform the government contract and anticipate future agreements), **joint venture agreements** (between the private companies performing the contract in the two countries), **joint venture companies** (which create groups of companies) and numerous **private law application agreements** (corporate and sales agreements, etc.). The **governing of law** is selected by the parties (including **dispute resolution**), leaving ample scope for normativity – the contracts can be mixed, plurinational, private or public.

The advantage of these **multilateral offset** operations is that they foster local development, improve the balance of payments of the buying country and ultimately reduce that country's dependency on foreign countries working in areas which are typical State prerogatives (defense, energy, etc.). Given that these contracts promote technology transfer and ensure financial independence from international backers, these offsets have become, without doubt, one of the most important forms of international cooperation and development and one of the most significant ways of controlling globalization. These major public-private partnership contracts wherein the amounts companies are obliged to invest in development are on a par with government development aid. They are authorized by the WTO (Annex 4 of the Marrakesh agreement) for developing countries.

The purpose of this topic on "International offset contracts" is to understand how globalization creates a new form of legal normativity, and *in fine* to search how "international offset contracts" might promote development and justice in our increasingly globalized world.

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# CHAPTER 1: ANALYSIS BY LEVELS

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## **LEVEL 0: ECONOMICAL DATA**

This level gives for the last years:

- GDP;
- Amount spent on the government procurement;
- Sectoral breakdown of this amount: defense, energy, transport, telecommunication.
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## **LEVEL 1: INTERNATIONAL INSTITUTIONS & PUBLIC PROCUREMENT MEASURES**

This level identifies which countries are members of which international Institutions (UNO, WB, IMF, WTO, GPA, OECD, WCO, etc.).

## **LEVEL 2: REGIONAL/MULTI/BILATERAL AGREEMENTS ON GOVERNMENT PROCUREMENT SIGNED WITH OTHER COUNTRIES**

This level includes the following information per country:

- Regulation(s) on public procurement and/or offsets in Free Trade Agreements;
- Regional agreement(s) and article(s) on public procurement;
- Multilateral agreement(s) and article(s) on public procurement;
- Bilateral agreement(s) and article(s) on public procurement.

## **LEVEL 3: NATIONAL LEGISLATION ON GOVERNMENT PROCUREMENT: NO LEADER.**

This level includes the following information per country:

- National laws on public procurement;
- Rules applicable to public procurement;
- National procurement guidelines.

## **LEVEL 4: OFFSETS RULES AT NATIONAL LEVEL**

This level includes the following information per country on offsets rules at national level.

## **LEVEL 5: COMPARATIVE OFFSETS REQUIREMENTS**

This level includes the following information per country:

- Percentage of direct offset required
- Percentage of indirect offset required
- Threshold
- Multiplayers
- Bank guarantees
- Penalties

## **LEVEL 6: OFFSETS AND CORRUPTION**

This level, based on the analysis of Transparency International, identifies and examines officially declared cases of corruption for which countries have been indicted, and includes the following information per country:

- Classification under existing readings;
- List of cases of corruption linked to offset under active investigation.

#### **LEVEL 7: CULTURAL, REGIONAL AND POLITICAL ORGANISATION**

This level gives the country's governance in terms of the following:

- Languages(s);
- Culture and race;
- Governance structure (central government, regional/ state government);
- Application of laws (importance of national v. regional, etc.).

#### **LEVEL 8: UNICTRAL COMPARAISON**

A comparison will be made between Level 2 of each country and the UNCITRAL Model Law on public procurement.<sup>3</sup>

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<sup>3</sup> Official records of the General Assembly, Sixty-Sixth Session, Supplement No. 17 (A/66/17), Annex I from the United Nations Organization (UNO).

## LEVEL 0: ECONOMIC DATA

### Level 0 – Summary:

This level gives for the last years:

- GDP;
- Amount spent on the government procurement;
- Sectoral breakdown of this amount: defense, energy, transport, telecommunication

|  | Australia               | Brazil               | Canada          | India                 | Kuwait               | Peru                   | Russia   | South Africa       | South Korea   | Turkey                     | UAE                    |
|--|-------------------------|----------------------|-----------------|-----------------------|----------------------|------------------------|--|--------------------|---|----------------------------|------------------------|
| <b>GDP (US\$b) (2013)</b>                      | 1560.6                  | 2246                 | 1825.10         | 1,877                 | 183.22 (2012)        | 202.30                 | 2096.78  | 350.63             | 1,305.6 (2013)<br>1,377.9 (2015)                            | 820.21                     | 383.8                  |
| <b>Population (million) (2013)</b>             | 23.13                   | 200.4                | 35.35           | 1252                  | 3.82 (2012)          | 30                     | 143.7  | 52.98              | 50.22 (2013)<br>50.29(201)<br>50.50 (2016)                  | 80.6                       | 9.35                   |
| <b>Amounts Spent on Government Procurement</b> | \$2736.88 million (AUD) | 970.71 million (BRL) | \$1392.72 (CAD) | 7097.28 billion (INR) | 7775.4 million (KWD) | 11109.28 million (PEN) | 7674 billion (RUB)                                 | 1714 million (ZAR) | 11,300 million (KRW) (2013)<br>11, 428 million (KRW) (2015) | 124.231.52 thousands (TRY) | 84739.04 million (AED) |
| <b>Defense Breakdown (%GDP – 2013)</b>         | 1,60%                   | 1,40%                | 1,00%           | 2,40%                 | 3.2% (2012)          | 1,40%                  | 4,20%  | 1,20%              | 2.42% (2013)<br>2.35% (2015)                                | 2%                         | 5% (2012)              |
| <b>Energy Breakdown (US\$) 2012</b>            | N/A                     | 30767                | N/A             | 8461                  | N/A                  | 2019                   | 13 (Significant drop from prior years. 2011: 5256) | 4084 (2011)        | N/A   | 5771                       | N/A                    |
| <b>Transport Breakdown (US\$m)-2012</b>        | 26, 073                 | 21,980               | 20, 366         | 18,912                | N/A                  | 983                    | 79 (Significant drop from prior years. 2011: 4285) | 97 (2011)          | N/A   | 1562                       | N/A                    |

### Level 0 – Conclusion:

- Countries with Largest GDP: Brazil, Russia, India, Canada, Australia
- Countries with Highest Defense Expenditures: Russia, India, Brazil, Australia

- Countries with Larger (Disproportionate) Focus on Defense Spending (% of GDP): UAE (5%), Russia (4.2%), Kuwait (3.2%), India (2.4%), Turkey (2%). *These countries have high defense expenditures despite smaller GDP.*

As indicated in this table, there is no relationship between the economic data of the different countries studied; however, they all have applicable offset programs.

On offsets issues, we can notice that International Exchange balance, or the balancing trade, has a direct impact on the wealth of a country and is a factor of growth.

## LEVEL 1: INTERNATIONAL INSTITUTIONS & PUBLIC PROCUREMENT MEASURES

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### **Level 1 – Summary:**

This level identifies which countries are members of which international Institutions (UNO, WB, IMF, WTO, GPA, OECD, WCO, etc.).

|                     |   |
|---------------------|---|
| <b>Australia</b>    | UNCITRAL Model Law on public procurement (2011); UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003); UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994).] General Agreement on Trade in Services (GATS), Article XIII. The Agreement on Government Procurement (GPA) (Observer). OECD Principles for Enhancing Integrity in Public Procurement (“OECD Principles”). Guidelines on Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants (2011). WCO member since 1961. |
| <b>Brazil</b>       | UNCITRAL Model Laws; GATS Article XIII; IBRD Guidelines. WCO member since 1981. WTO member, but not a signatory to GPA or OECD.   |
| <b>Canada</b>       | UNCITRAL Model Laws; GATS Article XIII; GPA; OECD Principles; IBRD Guidelines. WCO Member since 1971.   |
| <b>Kuwait</b>       | UNCITRAL Model Laws; GATS Article XIII; OECD Principles; IBRD Guidelines. WCO Member since 1993. WTO member, but not a signatory to GPA or OECD.  |
| <b>India</b>        | UNCITRAL Model Laws; GATS Article XIII; GPA (Observer); IBRD Guidelines; International Monetary Fund member since 1945; World Customs Organization member since 1971. Not a signatory to OECD.  |
| <b>Peru</b>         | UNCITRAL Model Laws; GATS Article XIII; GPA (Observer); IBRD Guidelines; International Monetary Fund member since 1945; World Customs Organization member since 1971. <i>Not a member of the OECD.</i>  |
| <b>Russia</b>       | UNCITRAL Model Laws; GATS Article XIII; GPA (Observer); IBRD Guidelines; International Monetary Fund member since 1945; World Customs Organization member since 1971. <i>Not a member of the OECD.</i>  |
| <b>South Africa</b> | UNCITRAL Model Laws; GATS Article XIII; IBRD Guidelines. WTO Member but not a signatory to GPA or OECD.   |
| <b>South Korea</b>  | UNCITRAL Model Laws, GATS, IBRD(WB), IMF, WTO, GPA, OECD, WCO   |
| <b>Turkey</b>       | UNCITRAL Model Laws; GATS Article XIII; GPA (Observer); OECD Principles; IBRD Guidelines.   |
| <b>UAE</b>          | UNCITRAL Model Laws; GATS Article XIII; IBRD Guidelines. WTO Member but not a signatory of GPA or OECD.   |

### **Level 1 – Conclusion:**

All of the countries reviewed are UN members and therefore recognize the UNCITRAL Model Laws. In addition, all countries are members of the WTO; however, only one of the ten countries is a party to its Agreement on Government Procurement (GPA). Five of the ten countries (Brazil, Kuwait, Peru South Africa, and UAE) have not signed the GPA and four of the countries (Australia, India, Russia and Turkey) are participants to the GPA with only "Observer" status. As noted in the research of the Level 1 Working Group, the GPA is the only legally binding agreement that focuses on government procurement. Note that the GPA *expressly prohibits use of offsets*, however, the Agreement exempts "national security and defense" from the requirements.

## LEVEL 2: REGIONAL/ MULTI / BILATERAL AGREEMENTS ON GOVERNMENT PROCUREMENT SIGNED WITH OTHER COUNTRIES

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### Level 2 – Summary:

This level includes the following information per country:

- Regulation(s) on public procurement and/or offsets in Free Trade Agreements;
- Regional agreement(s) and article(s) on public procurement;
- Multilateral agreement(s) and article(s) on public procurement;
- Bilateral agreement(s) and article(s) on public procurement.

| <b>AUSTRALIA</b>                         |  |
|--|--|
| <b>Regional Agreements &amp; Article</b> | ASEAN–Australia–New Zealand Free Trade Agreement: Government procurement is excluded.  |
| <b>Multilateral Agreement</b>            | Observer of WTO GPA.   |
| <b>Bilateral Agreement</b>               | Australia–Chile FTA, 2009, Chapter 15; offset are prohibited (article 15.6). Australia–United States FTA, 2004, Chapter 15; offsets are not allowed (article 15.2.5); Australia should phase out its legislation related to offsets. Singapore–Australia FTA, 2003, Chapter 6; offsets not mentioned as such, but article 16th of the chapter related to industry development in public procurement. Thailand–Australia FTA, 200, Chapter 15; Korea–Australia FTA, 2014 (NOT INTO FORCE YET), Chapter 12; offsets prohibited (Chapter 12§4). |
| <b>BRAZIL</b>                            |  |
| <b>Regional Agreements &amp; Article</b> | Brazil is member of Mercosur, a trade regional bloc created by the Treaty of Asunción, signed on March 26, 1991. Its currently members are: Argentina, Brazil, Paraguay, Uruguay and Venezuela. The Treaty of Asunción does not explicitly provide on government procurements.   |
| <b>Multilateral Agreements</b>           |  |
| <b>Bilateral Agreements</b>              | Acting on behalf of its members, Mercosur signed bilateral (or bioregional) trade agreements with the others countries of South America, and also with Mexico, Israel, India, Egypt (not in force), Palestine (not in force), and the Southern African Customs Union/SACU (not in force). But such agreements do not include specific provisions on Government Procurement.<br>However, Mercosur Member States agreed on a Protocol on Government Procurement (Decision CMC 40/03, of December 15 and 16, 2003).                             |
| <b>CANADA</b>                            |  |
| <b>Regional Agreements &amp; Article</b> | <ul style="list-style-type: none"> <li>• Canada has signed 4121 treaties: 2819 bilateral and 1302 multilateral.</li> <li>• Full treaty list available at <a href="http://www.treaty-accord.gc.ca/">http://www.treaty-accord.gc.ca/</a>.</li> </ul>   |



|  |  |
|--|--|
| <b>Multilateral Agreements</b>           | <ul style="list-style-type: none"> <li>• Observer of WTO GPA.</li> <li>• North American Free Trade Agreement (NAFTA) Chapter 10 - Government Procurement.</li> </ul>   |
| <b>Bilateral Agreements</b>              | <ul style="list-style-type: none"> <li>• Canada–Chile Free Trade Agreement (CCFTA) Chapter Kbis - Government Procurement.</li> <li>• Canada–Peru Free Trade Agreement, Chapter 14 - Government Procurement.</li> <li>• Canada–Colombia Free Trade Agreement, Chapter 14 - Government Procurement.</li> <li>• Canada–U.S. Agreement on Government Procurement.</li> </ul>   |
| <b>KUWAIT</b>                            |  |
| <b>Regional Agreements &amp; Article</b> | Cooperation council of the Arab States of the Gulf, Greater Arab Free Trade Area   |
| <b>Multilateral Agreements</b>           | EFTA – GCC Free trade agreement. Chapter 6 on government procurement<br>Singapore – GCC Free trade agreement. Chapter 6 on government procurement  |
| <b>Bilateral Agreements</b>              | None identified.   |
| <b>INDIA</b>                             |  |
| <b>Regional Agreements &amp; Article</b> | Trade and investment treaties exist but none identified on government procurement.   |
| <b>Multilateral Agreements</b>           | Observer of WTO GPA since 10 February 2010.  |
| <b>Bilateral Agreements</b>              | None identified. A FTA between Turkey and Syria was signed in 2007 including regulations regarding public procurement but this FTA has been suspended.   |
| <b>PERU</b>                              |  |
| <b>Regional Agreements &amp; Article</b> | Andean Community Decision 439 of June 11, 1998 - Principles and Rules for Services Liberalization (articles 3 and 10).   |
| <b>Multilateral Agreements</b>           | Trade Agreement between the European Union and Colombia and Peru, signed on June 26, 2012: TITLE VI (articles 172-194).<br>Peru - Singapore and Peru – Thailand Free Trade Agreements  |
| <b>Bilateral Agreements</b>              | Peru – United States Free Trade Agreement. Chapter 9 on government procurement<br>Canada – Peru Free Trade Agreement. Chapter 40 on government procurement<br>EFTA –Peru Free Trade Agreement. Articles 7 on government procurement<br>Peru – Chile Free Trade Agreement<br>Peru – China Free Trade Agreement<br>Peru - European Union Free Trade Agreement<br>Peru – Japan Free Trade Agreement<br>Peru – MERCOSUR Economic Complementation Agreement |

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|  | Peru - Mexico Trade Integration Agreement<br>Peru - South Korea Free Trade Agreement  |
| <b>RUSSIA</b>                            |   |
| <b>Regional Agreements &amp; Article</b> | Regional Treaty - Eurasian Economic Union (Regulates Public Procurement in Section XXII of the Treaty on the Eurasian Economic Union)   |
| <b>Multilateral Agreements</b>           | WTO-GPA, observer since 29 May 2013, member of BRICKS (no written agreement so far)   |
| <b>Bilateral Agreements</b>              | Few agreements (Georgia and Kyrgyzstan), nothing about procurement.<br>Azerbaijan-Russia Free Trade Agreement   |
| <b>SOUTH AFRICA</b>                      |   |
| <b>Regional Agreements &amp; Article</b> | Signatory, no ratification of GPA; Free Trade agreement between EFTA and SACU, article 29; Complex rules at national level, protective regime, no international treaties related to public procurement.   |
| <b>Multilateral Agreements</b>           | The Southern African Development Community (SADC) Trade Agreement<br>Free Trade Agreement between EFTA and SACU. Article 29 on government procurement   |
| <b>Bilateral Agreements</b>              | Trade, Development and Cooperation Agreement (TDCA) with the EU. Article 45 and 75 on government procurement.<br>Trade Agreement between Zimbabwe and South Africa  |
| <b>SOUTH KOREA</b>                       |   |
| <b>Regional Agreements &amp; Article</b> | Bangkok Agreement (BANGKOK), General System of Trade Preferences among Developing Countries (GSTP), Protocol relating to Trade Negotiations among Developing Countries (PTN)<br><a href="https://www.wto.org/english/tratop_e/region_e/region_areagroup_e.htm">https://www.wto.org/english/tratop_e/region_e/region_areagroup_e.htm</a> |
| <b>Multilateral Agreements</b>           | The Agreement on Government Procurement (GPA)<br>Asia-Pacific Trade Agreement<br>Pacific Alliance (observer)<br>ASEAN Free Trade Area (observer)  |

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| <p><b>Bilateral Agreements</b></p>              | <ul style="list-style-type: none"> <li>• Korea-Chile FTA (Offsets prohibited Article 15.4: Prohibition of Offsets)</li> <li>• Korea-Singapore FTA (Offsets prohibited Article 16.6 Offsets)</li> <li>• Korea-EFTA FTA (Offsets not specifically addressed, but incorporation of GPA, ARTICLE 6.1)</li> <li>• Korea-ASEAN FTA (government procurement and offsets not addressed)</li> <li>• Korea-India CEPA (government procurement and offsets not addressed)</li> <li>• Korea-EU FTA (Offsets not specifically addressed, but incorporation of GPA, Article 9.1)</li> <li>• Korea-Peru FTA (offsets prohibited Article 16.3. 6)</li> <li>• Korea-U.S. (Offsets not specifically addressed, but incorporation of Revised GPA, ARTICLE 17.3)</li> <li>• Korea-Canada (Offsets prohibited as parties to Revised GPA, Article 14.4)</li> <li>• Korea-Colombia (Offsets prohibited Article 14.3.5)</li> <li>• Korea-New Zealand (Offset prohibited; Article 13.4.6.)</li> <li>• Korea-China (Offset not addressed)</li> <li>• Korea-Vietnam (government procurement not addressed)</li> <li>• Korea-Turkey (government procurement not addressed)</li> </ul> <p><b>Summary</b><br/>                 The WTO GPA exempts procurement of indispensable materials for national defense purposes. Korea's defense procurement is not fully covered under the GPA as the notes to Annex 1 of Korea's GPA provides: "... Subject to the decision of the Korean Government under the provisions of paragraph 1, Article XXIII, for MND (Ministry of National Defense) purchases, this Agreement will generally apply to the following FSC categories only, and for services and construction services, it will apply only to those areas which are not related to national security and defense."<sup>4</sup></p> |
| <p><b>TURKEY</b></p>                            |   |
| <p><b>Regional Agreements &amp; Article</b></p> | <p>Trade and investment treaties exist but none identified on government procurement.</p>   |
| <p><b>Multilateral Agreements</b></p>           | <p>WTO-GPA, observer since 4 June 1996.</p>   |
| <p><b>Bilateral Agreements</b></p>              | <p>PowerPoint from 2005 Turkey EU meeting shows bilateral Trade Turkey free trade agreements that include government procurement subjects: "Many of the free trade agreements listed include provisions about public procurement. But those provisions in the concluded agreements aiming cooperation and liberalization on public procurement. They do not include strictly any concrete commitment for Turkey to realize."</p> <p>Agreement: Turkey–EFTA Free Trade December 10, 1991 April 1, 1992<br/>                 Agreement: Turkey–Israel Free Trade March 14, 1996 May 1, 1997<br/>                 Agreement: Turkey–Romania Free Trade April 29, 1997 February 1, 1998<br/>                 Agreement: Turkey–Bulgaria Free Trade July 11, 1998 January 1, 1999<br/>                 Agreement: Turkey–Macedonia Free Trade September 7, 1999 March 7, 2000<br/>                 Agreement: Turkey–GRECO September 27, 2001- January 1, 2004 against Corruption<br/>                 Agreement: Turkey–Croatia Free Trade March 13, 2002 July 1, 2003<br/>                 Agreement: Turkey–Tunisia Free Trade May 25, 2004 July 1, 2005<br/>                 Agreement: Turkey – Palestinian July 20, 2004 June 1, 2005; Authority Free Trade<br/>                 Purpose of GRECO, which Turkey became a member of it on 1 January 2004, is to increase the capacity of its members in fighting against corruption. ref: SC05DET_11_International_AgreementsPublic</p>   |

<sup>4</sup> [https://www.pps.go.kr/simpliedownload.dom?fid=P\\_03\\_02\\_01\\_04](https://www.pps.go.kr/simpliedownload.dom?fid=P_03_02_01_04)

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| <b>UNITED ARAB EMIRATES</b>              |  |
| <b>Regional Agreements &amp; Article</b> | Cooperation council of the Arab States of the Gulf, Greater Arab Free Trade Area   |
| <b>Multilateral Agreements</b>           | Cooperation council of the Arab States of the Gulf, Greater Arab Free Trade Area.<br>EFTA – GCC Free trade agreement. Chapter 6 on government procurement<br>Singapore – GCC Free trade agreement. Chapter 6 on government procurement |
| <b>Bilateral Agreements</b>              | Morocco – UAE Free trade agreement. Article not identified   |

### **Level 2 – Conclusion:**

All ten of the reviewed countries are signatory to various Free Trade Agreements (FTAs). Some of these countries belong to regional organizations which are entitled to sign trade agreements on their behalf (Mercosur for Brazil; SACU for South Africa; GCC for Kuwait and UAE).

Only two of the ten countries (Australia and Canada) systematically include specific provisions or separate agreements on public procurement in their FTAs. Such provisions or agreements generally prohibit offsets. However, the agreements include exceptions related to national security or national defense purposes, and, therefore, governments have interpreted the prohibition against offsets to be inapplicable to defense procurement contracts.

Three of the ten countries (Peru, Kuwait and UAE) include similar provisions in some of their FTAs. Peru's FTAs with Canada and EU prohibit offsets. GCC's FTA with the European Free Trade Association – EFTA (Iceland, Liechtenstein, Norway, Switzerland), which entered into force on 1 July 2014, allows offsets on a restricted basis (i.e., based on "development needs", transparency and the "most favorable nation clause").

South Africa (SACU) and Turkey include provisions aiming at cooperation and liberalization on public procurement but without concrete commitments.

Three of the ten countries (Brazil, India, Russia) do not in general include specific provisions or separated agreements on public procurement in their FTAs.

Summary of regulation of public procurement and/or offsets in Free Trade Agreements is as follows:

- 1) Full regulation: Australia, Canada;
- 2) Partial regulation: Peru, Kuwait, United Arab Emirates - UAE (within the Cooperation Council for the Arab States of the Gulf–GCC);
- 3) Minimum regulation: South Africa (within Southern African Customs Union–SACU), Turkey;
- 4) No regulation: Brazil (within Mercosur), India, Russia.

It is also noteworthy that, in addition to bi-lateral trade agreements, all of the reviewed countries have entered into various bilateral defense cooperation agreements and/or reciprocal defense memoranda of understanding (MOUs) that provide for cooperation in defense procurement between key defense partners. Some of these agreements specifically call for cooperation on procurement projects, which can open the door to offset agreements. At the same time, some of the MOUs include commitments to reduce buy-domestic and other "protectionist" measures.

Bilateral or multilateral agreements are often ratified between neighboring countries. Only the USA and the EU have sought, for some years now, to sign agreements with non-neighboring countries.

The next free trade agreements of Kuwait and the UAE will be signed through the Gulf Cooperation Council

## LEVEL 3: INVENTORY OF NATIONAL LEGISLATION AND RULES APPLICABLE AT NATIONAL LEVELS ON GOVERNMENT PROCUREMENT

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### **Level 3 – Summary:**

- National laws on public procurement;
- Rules applicable to public procurement;
- National procurement guidelines.

| <b>AUSTRALIA</b> |  |
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| Laws             | Commonwealth Procurement Rules (CPRs).   |
| Rules            | Besides general principles (value for money, encouraging competition, promoting the use of resources in an efficient, effective and ethical manner; and making decisions in an effective and accountable manner), there are additional rules for certain types of procurement above certain amounts (procurements by Financial Management and Accountability Act agencies, other than procurements of construction services, US\$80,000; procurements by relevant Commonwealth Authorities and Companies Act bodies, other than procurements of construction services, US\$400,000; procurements of construction services, US\$7.5 million in all cases).  |
| <b>BRAZIL</b>    |  |
| Laws             | Federal Constitution, articles 37 and 175;<br>Federal Law No. 8.666/93 (Public Procurement Act);<br>Federal Law No. 8.987/95 (Public Procurement for Public Service Concessions);<br>Federal Law No. 10.079/04 (public-private partnerships – PPPs);<br>Federal Law No. 12.462/2011 (Special Regime for Public Procurements – "RDC");<br>Law 12.598/2012 (Defense Procurement).<br><br>Comment: the main regulation on Public Procurement is set out by "Laws".  |
| <b>CANADA</b>    |  |
| Laws             | <ul style="list-style-type: none"> <li>• the Department of Public Works and Government Services Act</li> <li>• the Defence Production Act</li> <li>• the Federal Accountability Act</li> <li>• the Financial Administration Act</li> </ul>   |
| Rules            | Government Contracts Regulations<br><br>Overview of Canadian Government Procurement Law: <ul style="list-style-type: none"> <li>• The Government of Canada is one of the largest public buyers of goods and services in Canada, purchasing approximately C\$6.05 billion worth every year on behalf of federal departments and agencies (federal level).</li> <li>• Public Works and Government Services Canada (PWGSC) is the government's main purchaser of goods and services (including both civil and defense sectors).</li> <li>• PWGSC procurement activities are principally carried out pursuant to the following legal framework: the Department of Public Works and Government Services Act; the Financial</li> </ul> |

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|  | <p>Administration Act; the Defence Production Act; the Federal Accountability Act; and the Government Contracts Regulations.</p> <ul style="list-style-type: none"> <li>• Subsequent purchasing is done by the 10 provincial governments (provincial and territorial level), the three territorial governments, and what is also known as the MASH sectors (municipalities, academic institutions, schools and hospitals).</li> <li>• Each provincial, municipal, and institutional purchaser has unique procurement policies and/or bylaws.</li> <li>• The Canadian government procurement process begins when a department or agency sends a requisition to PWGSC.</li> <li>• PWGSC subsequently publishes its procurement opportunities on a website called MERX (<a href="http://www.MERX.com">www.MERX.com</a>).</li> <li>• In keeping with the Government Contracts Regulations, PWGSC procurement is done by means of a competitive procurement process whenever possible, or a non-competitive procurement process (only used in special circumstances).</li> <li>• Through the competitive procurement process, PWGSC buys goods and services using the following 2 methods of supply: contracts, and standing offers and supply arrangements.</li> <li>• Contracts valued at over C\$25,000 (threshold) must follow the specific PWGSC procurement process (definition of requirement, validation of requirement, governmental approval, creation of an official Statement of Requirement (SOR), selection of procurement strategy, bid solicitation and source selection, negotiation and award of contract, final delivery of product).</li> <li>• For requirements below C\$25,000, contracting officers may request quotations from suppliers directly. These requirements are considered by PWGSC as low dollar value procurement. In this case, contracting officers will determine the most appropriate procurement strategy for each requirement to obtain best value and ensure the timeliness and cost-effectiveness of each contract. They may use various methods of supply to identify and select a supplier on either a competitive or non-competitive basis. Standing offers and supply arrangements are two types of non-binding agreements between the federal government and potential suppliers of specified goods or services. These agreements outline the terms and conditions that will apply to future requirements to be ordered on an as and when required basis.</li> <li>• The non-competitive procurement process, on the other hand, is only used in special circumstances:             <ul style="list-style-type: none"> <li>○ The need is one of pressing emergency in which delay would be injurious to the public interest</li> <li>○ The estimated expenditure does not exceed:                 <ul style="list-style-type: none"> <li>○ C\$25,000 for goods and services (contracting officers are still expected to solicit bids below this value whenever it is cost effective to do so);</li> <li>○ C\$100,000 for architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work;</li> <li>○ C\$100,000 for the Canadian International Development Agency (CIDA) service contracts related to international development assistance programs or projects;</li> <li>○ Only one person is capable of performing the work, such as when a supplier owns a copyright or a license;</li> </ul> </li> </ul> </li> </ul> <p>Existing alongside the framework of Canadian statutes, regulations and policies that implement Canada's trade obligations are trade agreements. Indeed, Canada is a signatory to international and domestic agreements that promote trade opportunities with the Canadian government for both foreign and domestic suppliers.</p> <ul style="list-style-type: none"> <li>• Canada is a signatory to two international trade treaties aimed at reducing trade barriers between the signatories: the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) Agreement on Government Procurement (GPA).</li> <li>• The procurement provisions of all trade agreements are similarly structured in that if a proposed contract meets certain criteria it is covered by the agreement; if it does not meet</li> </ul> |
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|               | <p>all the stated criteria then it is not covered. A proposed contract can be, and often is, covered by more than one agreement.</p> <ul style="list-style-type: none"> <li>• The North American Free Trade Agreement sets out Canada's commitment to reduce trade barriers between Canada, the United States of America and the Federal Republic of Mexico.</li> <li>• The use of measures to improve socioeconomic development (offsets) for procurements covered by NAFTA is prohibited.</li> <li>• A procurement is subject to NAFTA: if its value is equal to or greater than the relevant threshold; if the type of requirement is covered; if the entity for which the procurement is being done is covered, and if there is no specific exception applicable or invoked.</li> <li>• The WTO-GPA is an agreement, which aims to secure greater international competition for government procurement. It provides procurement procedures which Canada abided to.</li> <li>• The use of measures to improve socioeconomic development (offsets) for procurements covered by WTO-GPA is generally prohibited.</li> <li>• A procurement is covered by the WTO-GPA: if its value is equal to or greater than the relevant threshold; if the type of requirement is covered; if the entity for which the procurement is being done is covered, and if there is no specific exception applicable or invoked.</li> </ul>                                      |
| <b>INDIA</b>  |  |
| Laws          | <p>Commonwealth Procurement Rules (CPRs) Public Procurement Bill, 2012: not yet passed. There are only a few states in India that have drafted legislation for public procurement. With regard to the private sector's association with the government in procurement contracts, internal and individual company policies and codes of companies govern this association, creating challenges of accountability. To address some of these, the Government of India has drafted the Public Procurement Bill 2012 which also contains Draft Rules for PPP 2011. This legislation is applicable for procurement by the central government and does not apply to the states. The bill was tabled in Parliament and passed in the lower house of the Parliament in May 2012 (i.e., Lok Sabha).</p>  |
| Rules         | <p>The General Financial Rules 2005 are the rules followed for public procurement by government departments and ministries across the country. These rules do not have the status of legislation and violations do not attract much penalty. India currently has no clear rules for regulating PPP projects. Furthermore, India has approximately 35 different ministries at the central level alone and no central procurement mechanisms. In addition, there are approximately 26 states and 7 union territories that procure independently. The General Financial Rules (GFR), developed by the Ministry of Finance, establish the principles for general financial management and procedures for government procurement. The rules contained in chapter 6 concern the procurement of goods and services, while chapter 8 addresses contract management. All government purchases must strictly adhere to the principles outlined in the GFRs. The Manual on Policies and Procedures for Purchase of Goods contains guidelines for the purchase of goods. There is no central legislation governing procurement in India. Comprehensive rules and directives in this regard are contained in the GFR 2005 and Delegation of Financial Powers Rules (DFPR). A broader framework is also provided by the Contract Act, 1872, the Sale of Goods Act, 1930,[6] the Law on Arbitration[7] and Limitation[8] and the recent Right to Information Act, 2005.</p> |
| <b>KUWAIT</b> |  |
| Laws          | <p>The public tender law: law number 37 of 1964, modified by Laws No. 13 and 31 of 1970 and 1977</p> <p>The public tender law: law number 37 of 1964, modified by Laws No. 13 and 31 of 1970 and</p>   |



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|                     | 1977<br>The Kuwait Commercial Code  |
| Rules               | <p>The Public Tenders Law provides that any procurement made by the Kuwait Government with a value in excess of KD5,000 (approximately US\$16,500) must be conducted through the Central Tenders Committee and in accordance with its procedures in order to ensure competitive pricing. Article 5 of the Tenders Law provides that a tenderer for government contracts must:</p> <ol style="list-style-type: none"> <li>1. “Be a Kuwaiti merchant, individual or company, registered in the Register of Commerce in the Chamber of Commerce and Industry of Kuwait; The tenderer may be a foreigner if he has a Kuwaiti merchant acting as a partner or agent pursuant to a deed duly executed by a notary, provided the Central Trading Committee shall set down a specific regulation for the participation of the foreign company in the tenders of large works.</li> <li>2. Be registered in the Classification List of Contractors and Suppliers in conformity with the following Articles.”</li> </ol> <p>Two important exceptions to the application of the Public Tenders Law:</p> <ol style="list-style-type: none"> <li>1. The Public Tenders Law does not apply to the procurement of military items for the Ministry of Defense and Security Forces. “Military materials” is broadly defined by Kuwait law to include land, sea and air weapons, spare parts, military communications, detection equipment and related systems (“strategic military procurement”).</li> <li>2. Other Specialized Procurement. Kuwait government agencies may request permission of the Central Tenders Committee to conduct particular tenders outside the Public Tenders Law. However, such tenders are relatively rare.</li> </ol> |
| <b>PERU</b>         |   |
| Laws                | Law n° 28.269, amending Law n° 26.850 (Public Procurement Act).   |
| Rules               | <ul style="list-style-type: none"> <li>• Presidential decree n° 031-2002-PCM (electronic system of public procurement – SEACE);</li> <li>• Presidential decree n° 067-2003-PCM (Powers of the Council of Minister's President to set out Public Procurement Policy).</li> </ul>   |
| Guide-lines         | None identified   |
| <b>RUSSIA</b>       |   |
| Laws                | <p>Federal Law No. 44-FZ ‘On the Contract System in State and Municipal Procurement of Goods, Works and Services’ dated 5 April 2013</p> <p>Public Procurement for military equipment is regulated by Federal Law No. 275-FZ ‘On State Defence Procurement’, dated 29 December 2012, no provisions on offsets</p>   |
| Rules               | Usual principles and rules: transparency, openness, competition, stimulation of innovation, etc.  |
| Guide-lines         | Law entered into force in January 2014; no guidelines yet.  |
| <b>SOUTH AFRICA</b> |   |

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| Laws               | Constitution (section 217), Public Finance Management Act 1, 1999 (PFMA); Preferential Procurement Policy Framework Act 5, 2000 (PPPFA) and its regulations; Local Procurement Agreement, 2011.  |
| Rules              | Principles of fairness, equitability, etc.; Requirements for black economy (post apartheid affirmative measure); Focus on local content of the Agreement.  |
| <b>SOUTH KOREA</b> |  |
| Laws               | Act on Contracts to Which the State is a Party (Presidential Decree, Ministerial Rule of Strategy and Finance); Government Procurement Act (Presidential Decree, Ministerial Rule of Strategy and Finance); Defense Acquisition Program Act (Presidential Decree, Ministerial Rule of National Defense)  |
| Rules              | <ul style="list-style-type: none"> <li>- <b>The Government Procurement Act</b> regulates operation and management of government procurement, which is conducted by the Public Procurement Service. It is further regulated by enforcement decree and ordinances related to the procurement.</li> <li>- <b>The Act on Contracts to which the State is a Party</b> regulates contracts to which the government is a party. It is further regulated by the enforcement decree and ordinances related to contracts to which the government is a party. The 'Act on Local Government Contracts' applies to contracts with the local government, and public agencies are regulated by 'Act on the management of Public Institutions.' In those cases, the government engages in legal acts as a private economic entity. Thus, general principles of the civil law, such as the Principle of Party Autonomy, Principle of Good Faith, and Principle of Abuse of Rights are also applicable to government contracts.</li> <li>- Moreover, there are special laws which regulate each specific area.             <ul style="list-style-type: none"> <li>(1) <b>Special Provisions of the Enforcement Decree of the Act on Contracts to which the State is a Party for Specific Goods</b> determines special provisions regarding the enforcement decree of the act on contracts to which the state is a party when conducting international bids in order to implement multilateral or bilateral government procurement agreements such as the agreement prepared in Marrakech on April 15, 1994 which the government has established or acceded to.</li> <li>(2) <b>Defense Acquisition Program Act</b> addresses military procurement and delegated enforcement decree and the rules related to procurement. The procedure of contracting through competitive bidding is as follows: contract method decided → bidding notice → bidding → successful bidder decided → contract award → contract performance → completion and payment.</li> </ul> </li> </ul> |
| <b>TURKEY</b>      |  |
| Laws               | Procedures and principles to be applied to public procurement are established within Public Procurement Law 4734 (2002). The law sets forth rules of participation in public tenders, such as principles about threshold values, estimated costs, rules on qualification, ineligibility, tender notice periods, prior notice, subcontractors, cancelation of tender prior to the predetermined time for submission of tenders, prohibited acts or conduct; rules governing principles of procurement process such as procurement procedures and implementation, principles of open, restricted, negotiated, direct procurement procedures, contents of prequalification and tender documents and administrative specifications and such principles. Ineligibility to participate in procurement tenders is regulated under Article 11 of the law.  |

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| Rules                       | None identified   |
| Guide-lines                 | None identified   |
| <b>UNITED ARAB EMIRATES</b> |   |
| Laws                        | Public tender law: Financial Order No. 16 of 1975. For federal procurement only.  |
| Rules                       | <p>With some exceptions, only UAE nationals, foreign entities represented by a UAE agent, or foreign entities with UAE partners (i.e., a UAE entity with at least 51 per cent UAE ownership) may bid for public sector tenders for the supply of goods and public works projects that are governed by the Public Tenders Law. As a result, foreign entities wishing to perform public sector contracts are generally required to have some level of UAE national participation. Such participation typically takes the form of a registered commercial agency, a service agent of the foreign entity's branch office, a joint venture in which the foreign entity owns 49 percent or less of a UAE limited liability company. Three important exception to the public tender law:</p> <ol style="list-style-type: none"> <li>1. Purchases and contracts conducted by the federal defense forces – procurements for the federal defence forces are conducted pursuant to Decree 12 of 1986 of the Deputy Supreme Commander of the Armed Forces (the 'Armed Forces Procurement Regulations'.</li> <li>2. Procurement by the governments of the individual emirates. For example, Abu Dhabi has a procurement system, which generally tracks that of the Federal Public Tenders Law by requiring suppliers to have commercial agents or national companies that are registered with the Abu Dhabi municipality.</li> </ol> <p>The general requirement for UAE national participation is not uniformly observed by all government agencies in the context of certain direct sales to the public sector or private tenders in which the government solicits bids directly from relevant manufacturers, particularly in cases in which the goods or services are quite specialized or not widely available.</p> |
| Guide-lines                 | None identified   |

**Level 3 – Conclusion:**

Most of the countries have similar bid and tender processes, including RFPs, administrative processes, etc. But the existence of concrete legislation at federal and local levels varies greatly across countries. Increased enforcement initiatives against corruption are a common theme.

In addition, existing laws emphasize transparency, competition and accountability.

However, existence of concrete legislation at federal and local levels varies greatly across countries.

Some countries are regulated primarily on the national level (Australia, Brazil, South Africa, Turkey, Kuwait, Peru, Russia), some local (Canada, UAE), and some have weak or no national/sub-national laws (India).

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| <b>Australia</b> | Comprehensive, transparent rules, modeled to reflect international obligations and global best practices. |
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| <b>Brazil</b>       | Detailed federal procedures. Domestic preference for local production/Mercursor. Specific provisions for IT, Defense, and nationalized industries (telecom, oil, health). Recent focus on enforcement against corruption. Significant reform in law expected over next three years.  |
| <b>Canada</b>       | Detailed federal and provincial procedures. Procurement laws impacted by international trade agreements (NAFTA, EU CETA, etc.). Special rules for Defense contracts and offset agreements. Recent increase in debarment and enforcement proceedings against corruption. Recently signed EU CETA (2013) will require significant reform in procedures at the municipal and local levels.  |
| <b>India</b>        | National legislation proposed (2012), but to-date no comprehensive procurement law. Best practices defined primarily by industry (in manuals and procedures), and accountability/enforcement is weak. However, there are specific Defense procedures and related anti-corruption rules. Domestic/local sourcing preferences. Recent Supreme Court case invalidating major telecom licenses may spark reform and enactment of public procurement law. |
| <b>Kuwait</b>       | Public Tenders Law, with Central Tendering Committee that administers tendering processes for most public institutions. However, Public Tenders Law does not apply to Defense procurements. Foreign companies must pre-qualify before each new contract.   |
| <b>Peru</b>         | Regulated under Public Procurement law and by the High Council for Public Procurement. In addition, recent enactment of new public procurement law, and process reforms are in progress, including e-government procurement system and streamlining of procedures. However, corruption continues to be a significant problem.  |
| <b>Russia</b>       | Federal Public Procurement law governs state and local municipalities. Exceptions for Defence contracts. Preferences for domestic suppliers.   |
| <b>South Africa</b> | Public Procurement regulated under the Constitution, national regulations and municipal legislation. General requirements of fairness, transparency, and cost-effectiveness. Special rules for Defense. Preferences for local content. Recent initiatives against corruption ( <i>e.g.</i> , anti-corruption hotline) and proposals to establish centralized buying office to handle national, provincial and local procurements.                    |

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| <b>South Korea</b> | <p>Defense Acquisition Program Act and its delegated Enforcement Decree and Regulation require offsets to overseas purchase projects with expected costs over USD 10 million and the product meets the requirements set by each service of the armed forces. The minimum offset ratio for a project is determined by the number of bidders. For a project with multiple and competing bidders, the ratio is 50%. For a project with only one bidder, the ratio is 10%. The ratio may be increased or decreased on a case-by-case basis.</p> <p>The Defense Acquisition Program Administration remains as the only government agency that can authorize offset credits and controls offset packages. Korea's offset program is detailed in the Defense Acquisition Program Act and its delegated Enforcement Decree and Regulation. Further, specific procedures are described in detail in the Guideline.</p> <p>The administrator of DAPA will formulate a procurement plan by the guideline made by the Ministry of Defense.<sup>5</sup> In principle, offset MOA must be signed by before the conclusion of the main contract. The offset procedure is broadly divided into three phases: planning, negotiation, and implementation. In the planning phase, DAPA's Integrated Project Team (<b>IPT</b>) determines whether an acquisition program requires offset.<sup>6</sup> For contracts over USD100 million, the Offset Council determines the offset ratio before the Offset Request for Proposal (<b>RFP</b>).<sup>7</sup> Otherwise, the IPT determines the offset ratio. Next, in the negotiation phase, DAPA issues RFP and evaluates the bids.<sup>8</sup> Further, DAPA and bidders conclude the Memorandum of Understanding (MOU) and Memorandum of Agreement (MOA) through negotiations. Lastly, the implementation phase includes the implementation of the offset program to completion of the offset program.<sup>9</sup></p> |
| <b>Turkey</b>      | <p>Public law modeled after UNCITRAL. Procurement law is one of the most rapidly changing areas of law in Turkey. Specific reforms are expected with respect to mining, transportation and communications are expected over the next year.</p>  |
| <b>UAE</b>         | <p>Public procurement law, with separate laws for procurements by individual emirates. Bidding limited to UAE nationals, foreign entities represented by a UAE agent or foreign entities with a UAE partner (e.g., local joint venture). Separate regulations for Defense Contracts.</p>  |

<sup>5</sup> DAPA Presidential Decree. (§25 (1),(2))

<sup>6</sup> DAPA Guideline Article 9 (Notification of Programs with Offset Obligations)

<sup>7</sup> DAPA Guideline Article 10 (Deciding Offset Ratio)

<sup>8</sup> DAPA Guideline Article 14, Article 15

<sup>9</sup> [http://www.dapa.go.kr/mbshome/mbs/dapa\\_eng/subview.jsp?id=dapa\\_eng\\_03010000000](http://www.dapa.go.kr/mbshome/mbs/dapa_eng/subview.jsp?id=dapa_eng_03010000000)

## LEVEL 4: OFFSETS RULES AT NATIONAL LEVEL

### Level 4 – Summary

|                  | <b>OFFSETS RULES</b>   |
|------------------|--|
| <b>Australia</b> | <p>No offset policy as such in industry. But there is the e-Australian Industry Participation (AIP) Plans in Commonwealth Government Procurement, 2010: for procurement above A\$20 million. This aims at potential suppliers to detail actions and strategies, which will be implemented to provide full, fair and reasonable opportunity to Australian small and medium sized enterprises (SMEs) to supply goods and services to the project. This is done on a contractual basis. Defense industry has other guidelines. No required percentage. New requirements from December 2013 in term of employment: The Australian Jobs Act 2013 commenced on 27 December 2013. All major projects with a capital expenditure of A\$500 million or more are now required to meet new mandatory requirements under the Act.</p>  |
| <b>Brazil</b>    | <ul style="list-style-type: none"> <li>• Federal Law No. /93 (Public Procurement Act), article 24.</li> <li>• Federal Law No. 10.079/04 (public-private partnerships - PPPs)</li> <li>• Law 12.598/2012 (Defense Procurement), articles 3 and 4.</li> <li>• Normative Ordinance n. 764/2002 - Commercial, Industrial and Technological Offset Policy of the Ministry of Defense;</li> <li>• Brazilian Air Force (BAF): Portaria n° 1.395/GC4 (DCA 360-1/2005: Policy and Strategy for Commercial, Industrial and Technological Compensation);</li> <li>• Brazilian Air Force (BAF): Portaria n° 1.397/GC4 (ICA 360-1/2005: Precepts for the Negotiation of Commercial, Industrial and Technological Compensation Agreements).</li> </ul>   |
| <b>Canada</b>    | <ul style="list-style-type: none"> <li>• IRB Program provides the framework for ensuring long-term industrial and regional development benefits from the Government of Canada defense and security purchases. The Policy ensures that business activities equal to the value of the contract are generated in Canada from companies who win these contracts.</li> <li>• IRB obligation is a contractual commitment and part of the overall government procurement contract.</li> <li>• Canada currently has more than 60 defense and security procurements that are subject to the IRB Policy. Together, these IRB obligations represent in excess of C\$20 billion in current and future business activities with Canadian industries.</li> <li>• The Policy applies to the Government of Canada defense and security procurements that are exempt from international trade agreements to which Canada is a signatory, such as the WTO-AGP and NAFTA.</li> <li>• Moreover, the IRB Program does not apply in the following situations:             <ul style="list-style-type: none"> <li>○ Foreign aid by or on behalf of the CIDA;</li> <li>○ Procurements by the Canadian Commercial Corporation on behalf of entities not subject to this policy;</li> <li>○ Acquisition, modification and routine maintenance of real property;</li> <li>○ Security requirements by or on behalf of the Communications Security Establishment of the Department of National Defense;</li> <li>○ Canadian Security Intelligence Service;</li> <li>○ Royal Canadian Mounted Police for the purpose of pursuing criminal investigations;</li> <li>○ Cases of a pressing emergency.</li> </ul> </li> <li>• When applicable, the Policy is mandatory for projects greater than C\$100 million and discretionary for projects between C\$2 and 100 million.</li> <li>• Industry Canada takes a number of factors into account when deciding whether or not to apply the Policy to government procurements under 100 million CAD. Considerations include:             <ul style="list-style-type: none"> <li>○ Is the procurement strategic to Canadian industry?</li> <li>○ Are the potential bidding companies of interest to Canadian industry and are they capable of fulfilling an Industrial and Regional Benefits (IRB) obligation?</li> <li>○ Is the project a smaller part of a larger one?</li> </ul> </li> <li>• There are two types of IRB benefits: direct and indirect.             <ul style="list-style-type: none"> <li>○ Direct IRB benefits are transactions containing work directly related to the product or service that the government is procuring (example: providing parts or maintenance for the purchased Canadian equipment).</li> <li>○ Indirect IRB benefits are transactions containing work or investments that are not related to the Canadian purchase (example: investments in post-secondary institutions and non-profit research and development institutions).</li> </ul> </li> </ul> |

|               | <b>OFFSETS RULES</b>  |
|---------------|---|
|               | <ul style="list-style-type: none"> <li>• There are five eligibility criteria that an IRB contractor must demonstrate when they submit an IRB transaction to Industry Canada for review: causality, incrementally, Canadian Content Value (CCV), timing and eligible party.                             <ul style="list-style-type: none"> <li>○ Causality: IRB contractors must demonstrate that their decisions to place business activities with a Canadian company have a link to their IRB obligation. They need to prove to Industry Canada that the business activity would likely not have happened had it not been for the IRB requirement.</li> <li>○ Incrementally: Allows IRB contractors to use current suppliers on a particular business activity. If an IRB contractor has an established business relationship on a particular part or service and, because of an IRB obligation, they choose to increase this work, the increase is eligible for IRB credit. This ensures that the new work that has a link to the IRB obligation is counted but work that was occurring before the IRB obligation is not factored in.</li> <li>○ CCV: All proposed IRB transactions must be valued in terms of the CCV. CCV is measured in Canadian dollars and is the portion of the selling price of a product or service associated with the work actually performed in Canada. Only the Canadian labor and materials of a particular work package is counted toward an IRB contractor's obligation; all foreign overhead, labor and materials for any particular transaction is excluded from CCV.</li> <li>○ Timing: 30 percent of obligations will need to be identified at time of contract signing, 30 percent one year later, and the remaining 40 percent within three years.</li> <li>○ Eligible Party: Benefits must be completed by either the contractor himself or its parent corporations.</li> </ul> </li> </ul> |
| <b>Kuwait</b> | Kuwait offset program, dealing with military and civil procurements, under the responsibility of the National Offset Company.   |
| <b>India</b>  | DPP (2005) introduced Offset Policy; DPP (2006) fine-tuned Offset Policy; offset clause applicable to all procurement proposals where (1) cost is above Rs 300 Crores, and (2) the schemes are categorized as 'Buy (Global)' (involving outright purchase from foreign / Indian vendors) and "Buy and Make with Transfer of Technology" (involving purchase from foreign vendor followed by Licensed Production); RFP tells which one applies; DPP (2013): Increases in the number of possibilities for the discharge of Offset Obligations.  |
| <b>Peru</b>   | <ul style="list-style-type: none"> <li>• Law n° 28.269, amending Law n° 26.850 (Public Procurement Act);</li> <li>• Guidelines of August 2010 (defense acquisitions from foreign sources);</li> <li>• Directive No. 08-2010 MINDEF/SG/VRD</li> </ul>  |
| <b>Russia</b> | <p>Russian Federation lacks of detailed legislative framework with pre-approved transparent conditions and limitations for military contracts. There are no predefined offset rules on national level, however many contracts with foreign supplier features offset provisions, which are most likely negotiated with each contractor.</p> <p>There are some working documents such as "The main directions of the implementation of the offset mechanism in the Russian Federation" prepared by The Ministry of Economic Development in 2010. But they are not part of applicable law, and there is no information whether those plans will be implemented in the future.</p> <p>The main directions of activity of the Government of the Russian Federation for the period until 2018 (revised) (app. The Government of the Russian Federation May 14, 2015) in point 3 mentions:" encouraging the transfer and development of modern technologies at the expense of increased use of offset mechanisms";</p>   |

|                     | <b>OFFSETS RULES</b>   |
|---------------------|--|
| <b>South Africa</b> | <p>Civil offset: For procurements over US\$10 million, 30% of the procurement. Guidelines: National Industrial Participation Programme (NIPP). Authority: DTI's Industrial Participation Secretariat</p> <p>Defense offsets: Guidelines: Defense Industrial Participation; Responsible authority: ARMSCOR (Armament Corporation of South Africa SOC Ltd). Defence Industrial Participation is mandatory on all foreign defense purchases above US\$2 million.</p> <p>Defense purchases exceeding US\$2 million but less than US\$10 million: Require a Defense Industrial Participation obligation of up to 50%. Defense purchases exceeding US\$10 million: Require a Defense Industrial Participation obligation of at least 50% and a National Industrial Participation obligation of at least 30%.</p> <p>Usually: Industrial Participation of at least 100% is requested, split equally between Defense Industrial Participation and National Industrial Participation.</p> <p>Defense purchases exceeding US\$2 million but less than US\$10 million: Require a Defense Industrial Participation obligation of up to 50%.</p> <p>Defense purchases exceeding USD 10 million: Require a Defense Industrial Participation obligation of at least 50% and a National Industrial Participation obligation of at least 30%.<br/>Usually an Industrial Participation of at least 100% is requested, split equally between Defense Industrial Participation and National Industrial Participation.</p>  |
| <b>South Korea</b>  | <p>Defense Acquisition Program Act and its delegated Enforcement Decree and Regulation require offsets to overseas purchase projects with expected costs over USD 10 million and the product meets the requirements set by each service of the armed forces. The minimum offset ratio for a project is determined by the number of bidders. For a project with multiple and competing bidders, the ratio is 50%. For a project with only one bidder, the ratio is 10%. The ratio may be increased or decreased on a case-by-case basis.</p> <p>The Defense Acquisition Program Administration remains as the only government agency that can authorize offset credits and controls offset packages. Korea's offset program is detailed in the Defense Acquisition Program Act and its delegated Enforcement Decree and Regulation. Further, specific procedures are described in detail in the Guideline.</p> <p>The administrator of DAPA will formulate a procurement plan by the guideline made by the Ministry of Defense.<sup>10</sup> In principle, offset MOA must be signed by before the conclusion of the main contract. The offset procedure is broadly divided into three phases: planning, negotiation, and implementation. In the planning phase, DAPA's Integrated Project Team (<b>IPT</b>) determines whether an acquisition program requires offset.<sup>11</sup> For contracts over USD100 million, the Offset Council determines the offset ratio before the Offset Request for Proposal (<b>RFP</b>).<sup>12</sup> Otherwise, the IPT determines the offset ratio. Next, in the negotiation phase, DAPA issues RFP and evaluates the bids.<sup>13</sup> Further, DAPA and bidders conclude the Memorandum of Understanding (MOU) and Memorandum of Agreement (MOA) through negotiations. Lastly, the implementation phase includes the implementation of the offset program to completion of the offset program.<sup>14</sup></p> |
| <b>Turkey</b>       | <p>Law No: 3238 of 1985 established SSM and authorised it to coordinate export and offset trade issues relating to defense industry products. The first offset handbook was published in July 1991. Offset directives were subsequently published in 2000, 2003, and 2007. With the directive issued in April 2011 SSM (SSM-YN-022 Rev.:0 April 2011) is on its fifth policy revision.</p>   |

<sup>10</sup> DAPA Presidential Decree. (§25 (1),(2))

<sup>11</sup> DAPA Guideline Article 9 (Notification of Programs with Offset Obligations)

<sup>12</sup> DAPA Guideline Article 10 (Deciding Offset Ratio)

<sup>13</sup> DAPA Guideline Article 14, Article 15

<sup>14</sup> [http://www.dapa.go.kr/mbshome/mbs/dapa\\_eng/subview.jsp?id=dapa\\_eng\\_030100000000](http://www.dapa.go.kr/mbshome/mbs/dapa_eng/subview.jsp?id=dapa_eng_030100000000)



| <b>OFFSETS RULES</b> |  |
|----------------------|--|
| <b>UAE</b>           | UAE offset program under the responsibility of Tawazun, focus on defense acquisition side : defense contractors should partner with the local private sector in commercially venture |

**Level 4 – Conclusion:**

The offset rules at national level cover all types of legislation:

- Stronger laws: Canada, Turkey, South Africa and Brazil;
- Guidelines: Peru;
- Program that depends of the executive power (Kuwait and UAE) and the plan (Australia).

For instance, Australia, a very developed country that is not reliant on a high level of technology, has only a plan. By contrast, Kuwait and the UAE have programs under the control of the Executive power, reflecting a strong political will. Indeed, there is two objectives for Kuwait and the UAE:

- improve technology and,
- keep control of the economy in national hands. The best way to achieve these goals is to put it under the Executive Power.

## LEVEL 5: COMPARATIVE OFFSETS REQUIREMENTS

### **Level 5 – Summary:**

This level includes the following information per country:

1. Percentage of direct offset required
2. Percentage of indirect offset required
3. Threshold
4. Multipliers
5. Bank guarantees
6. Method of discharge
7. Penalties
8. Multipliers

|                  |   |
|------------------|---|
| <b>Australia</b> | <ol style="list-style-type: none"> <li>1. No offset standard policy and no percentage of offset requirements. The policy is named “Industrial Participation Policy”</li> <li>2. Direct mostly and indirect civil: contractors must participate to the Australian Industry Participation Plan Defense: contractors must participate to the Australian Industry Capacity Plan.</li> <li>3. Threshold: Civil: US\$450 million Defense: US\$21.4 million.</li> <li>4. Multipliers: no</li> <li>5. Bank guarantees: no</li> <li>6. Method of discharge are: make participate the local industry to the “Global supply chain “ Cooperate with local industries with the “ Strategic Industry capabilities (picks – Priorities industries capabilities)</li> <li>7. Penalties: Civil, no ,but principle of “Name and Shame” if no respect of the obligation Defense: black list</li> <li>8. Multipliers: Civil: Industry Ministry (through Australian Job Act); Defense: Defense Material Organization (DMO)</li> </ol>  |
| <b>Brazil</b>    | <ol style="list-style-type: none"> <li>1. Offset requirement is 100% of the contract value.</li> <li>2. Offset is mainly managed by SEPROD:             <ul style="list-style-type: none"> <li>– Air Force (several departments, mainly: SEFA, DCTA, IFI);</li> <li>– Army (several departments, mainly: CCOMGEX);</li> <li>– Navy (several departments, mainly: “CoRM – Diretoria de Coordenação do Orçamento da Marinha”).</li> </ul> </li> <li>3. Mostly direct but also indirect.</li> <li>4. Threshold US\$5 million.</li> <li>5. Multipliers: 1 to 10.</li> <li>6. Bank guarantees are allowed on a case-by-case basis under the following:             <ul style="list-style-type: none"> <li>– 5 year max validity period;</li> <li>– limited to companies within the same holding;</li> <li>– be used to the max extent of 50% of an obligation under a new contract.</li> </ul> </li> <li>7. Method of discharge are the following: Co-production; Production under license; Subcontracted production; Foreign Direct Investment (FDI); Training; Technology transfer ; Purchase of Brazilian products/services; Donations/leases equipment; Costs in development.</li> </ol> |

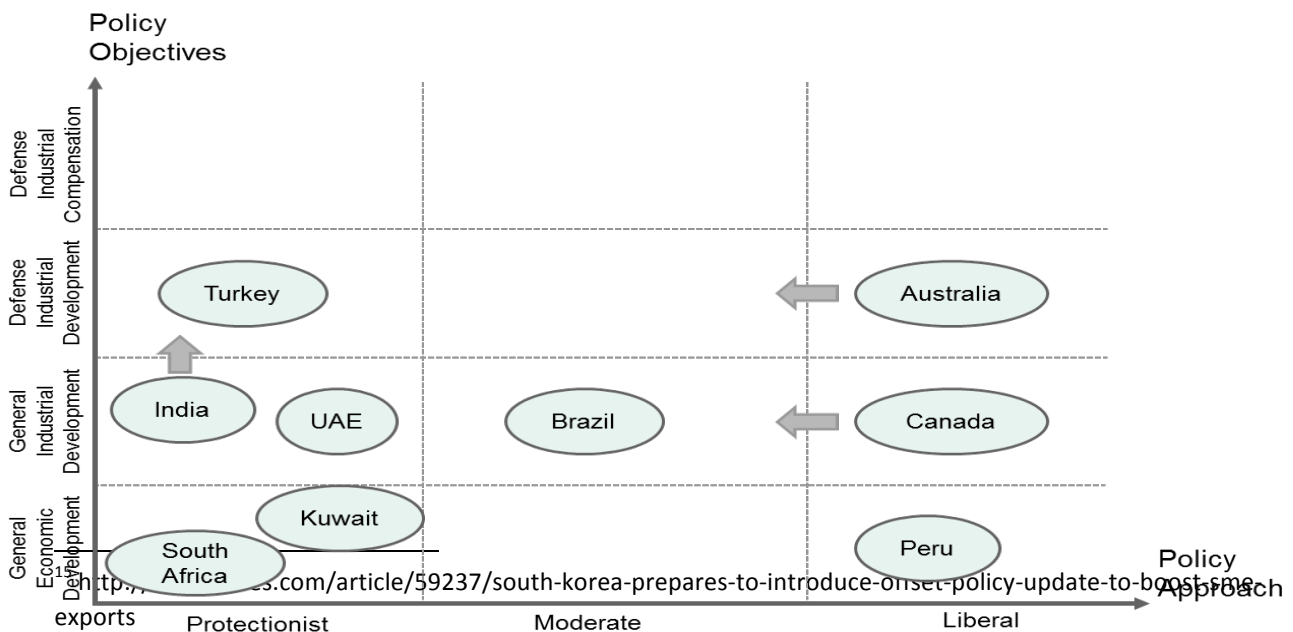
|               |  |
|---------------|--|
|               | <p>Transfers of credits (swaps) and pre-offsets are usually not acceptable but may be considered on a case-by-case basis.</p> <p>8. Penalties equal to 5% of unfulfilled offset obligation.</p>  |
| <b>Canada</b> | <ol style="list-style-type: none"> <li>1. Offset requirement is 100% of the contract value;</li> <li>2. Mostly direct, also indirect with 15% of transaction with local SME;</li> <li>3. IRB: C\$2 million (selected projects) C\$100 million for all Projects ITB: defense over C\$100 million;</li> <li>4. Multiplier: 5 to 10 for IRB not yet for ITB;</li> <li>5. Irrevocable LC covering penalties, amount for IRB - not yet published for ITB;</li> <li>6. Method of discharge are: Investment, T.T. +15% of transaction with SME 5% of IRB project with technologies and services associated with the EPTI (Enhanced priority technology list);</li> <li>7. Penalties are 10% of obligation amount.</li> </ol>  |
| <b>Kuwait</b> | <ol style="list-style-type: none"> <li>1. Offset requirements is 35% of the contract value;</li> <li>2. Mostly direct, also indirect;</li> <li>3. Threshold: Defense US\$10.4 million. Civil US\$35 million;</li> <li>4. Multiplier: 1 to 5,5;</li> <li>5. 60% of the contract value;</li> <li>6. Methods of discharge are: ToT, JV, Education, investment for export, Industrial cooperation;</li> <li>7. Penalties: cash of bank guarantee – black list.</li> </ol>  |
| <b>India</b>  | <ol style="list-style-type: none"> <li>1. 30% offsets in "Buy (Global)" contracts; can be higher in "Buy and Make with Transfer of Technology (ToT)" contracts. DOG (2012) states that Indian company or its joint venture participating in 'Buy (Global) contracts are exempted from offset obligations, provided the product in question has indigenous content of minimum 50% by value; If indigenous content is below 5%, offsets are mandatory on part which involves foreign component. Direct, Indirect, Foreign Direct Investment, DFI;</li> <li>2. Direct, Indirect, Foreign Direct Investment, DFI;</li> <li>3. Rs300 crore (equivalent to US\$65 million).</li> <li>4. Multiplier: a foreign company can claim credits up to three times of its actual offset investment. However, multipliers are restricted to two areas: Micro, Medium and Small Enterprises (MSME) and technology acquisition by DRDO;</li> <li>5. When the period for discharge exceeds the period of the main contract, vendor is required to furnish a performance bond in the form of a bank guarantee for the full value of the un-discharged offset obligation falling beyond the period of the main procurement contract. When a vendor fails to fulfill offset obligation and a penalty is assessed, the penalty may be paid by the vendor or recovered from the bank guarantee of the main procurement contract.</li> <li>6. Method of discharge: Within contract + 2; six ways for discharge governed by complex rules: <ol style="list-style-type: none"> <li>(1) Direct purchase and export orders;</li> <li>(2) FDI in ventures w/ eligible products or services,</li> <li>(3) Investment "In-Kind" transfer of ToT,</li> <li>(4) "In-Kind" provision of equipment;</li> <li>(5) ToT or provision of equipment to PSUs;</li> <li>(6) Technology acquisition by the Defense Research and Development</li> </ol> </li> </ol> |

|                     |  |
|---------------------|--|
|                     | <p>Organization.</p> <p>7. Minimum 5% of unfulfilled offset obligation; Maximum 20% of the total obligation during the period of the main procurement contract; no cap on penalty for failure to implement offset obligations during the period beyond the main procurement contract.</p>  |
| <b>Peru</b>         | <ol style="list-style-type: none"> <li>1. Offset requirements in Defense: 100% of the contract value</li> <li>2. Mostly direct, also indirect.</li> <li>3. UIT 5,600 (equivalent to US\$7 million).</li> <li>4. Multiplier: 0.5 to 5.0.</li> <li>5. Bank guarantees are allowed on a case-by-case basis.</li> <li>6. Direct offsets: mainly transfer of technology and investments. Indirect offsets: investment for the railway, hydroelectric and energy sectors, education, health and environment protection.</li> <li>7. By negotiation; with blacklisting when there are none.</li> </ol>  |
| <b>Russia</b>       | Data on offset requirement not available   |
| <b>South Africa</b> | <ol style="list-style-type: none"> <li>1. Offset requirements: Nip/ 30% (civil) Dip: 50% (defense).</li> <li>2. Mostly direct, also indirect</li> <li>3. Threshold: Nip: US\$10 million; Dip: US\$2 million</li> <li>4. Multiplier: 2 for Nip no for Dip.</li> <li>5. Bank Guarantees: yes to supply within 30 days for Nip; to be established for Dip.</li> <li>6. Method of discharge: Investment, J.V., Education, Job Creation, Maintenance Facility, T.T., Export, Rules of BBB (Black Empowerment).</li> <li>7. Penalties: 5% Nip, 100% Dip.</li> <li>8. Multiplayers: Armscor – Min. Def. for Dip; Dti (Dept of trade &amp; industry) for NIP.</li> </ol>   |
| <b>SOUTH KOREA</b>  | <ol style="list-style-type: none"> <li>1. <b>Percentage of direct offset required:</b> The offset ratio is, 50% for competitive contracts and 10% for where there is no competition.</li> <li>2. <b>Percentage of indirect offset required:</b> No distinction based on accessible Acts and their delegated decree and regulation.</li> <li>3. <b>Threshold:</b> USD10 million or more, although the policy states that it can also be applied to programs worth less than this threshold.</li> <li>4. <b>Multipliers:</b> Various valuation standards exist depending on areas and items. For example, up to two times the actual offset investment for development of SMEs.</li> <li>5. <b>Bank guarantees:</b> Offset performance bond apart from the main contract performance bond in a definite sum equal to 10 percent of the total Offset value within 30 days after the effective date of the offset MOA.</li> <li>6. <b>Method of discharge:</b> securing items related to defense science and technology; manufacturing and exporting parts of military equipment; securing items related to logistics support; upgrading existing equipment; exporting military supplies; securing overseas maintenance work; joint participation in major development programs; other items that contribute to the national interest with regard to Korea's defense capability; exports of recommended commercial items for indirect offset; and foreign direct investment in an entity to improve the competitiveness of the domestic defense industry.</li> <li>7. <b>Penalties:</b> Forfeiture of the performance bond.</li> <li>8. <b>Multiplayers:</b> Ministry of Defense; Public Procurement Office</li> </ol> <p><b>Summary</b></p> |

|               |   |
|---------------|---|
|               | Korea has continuously updated the offset policy to maximize effectiveness. <sup>15</sup> Two trends are notable. First, Korea has uses its multiplier scheme for development of SMEs. SMEs generally benefit from a 1.5x multiplier, 2x in certain cases. Second, Korea increased foreign participation by making it easier for foreign companies to discharge offsets.  |
| <b>Turkey</b> | <ol style="list-style-type: none"> <li>1. Offsets requirements: 70%</li> <li>2. Direct and indirect</li> <li>3. Threshold: US\$5 million (cumulative p/a)</li> <li>4. Multiplier: 1 to 8</li> <li>5. Pre-credit / 5 years</li> <li>6. Method of discharge: The discharge of obligations in the civil sector is not acceptable unless they are for the civil aviation and space sectors.</li> <li>7. 6%</li> </ol>   |
| <b>UAE</b>    | <ol style="list-style-type: none"> <li>1. 60%</li> <li>2. Hybrid: I(30) O(70)</li> <li>3. The threshold is US\$10 million. Cumulative defense procurements reaching US\$10 million in value within a 5-year period will also qualify for offsets.</li> <li>4. Multiplier: 1.0 to 3.0</li> <li>5. NTE 10 Years</li> <li>6. "Hybrid" discharge focus on "shareholder value" (profit) rather than revenues JV-focused – no credit for traditional direct offset purchases</li> <li>7. LD = 8.5% of contract</li> </ol> |

**Level 5 – Conclusion:**

- Discharge: 1 year to 10 years.
- Banking: 3 years to 10 years
- Transfer: Possible
- Penalties: 5 % to 20 %
- Multipliers: 1.0 to 10.0
- Organization: MoD / MoE / or mixed system (worldwide: 45% / 40% / 15%)



## LEVEL 6: OFFSETS AND CORRUPTION

### **Level 6 – Summary:**

This level, based on the analysis of Transparency International, identifies and examines officially declared cases of corruption for which countries have been indicted, and includes the following information per country:

- Classification under existing readings;
- List of cases of corruption linked to offset under active investigation

|                  |  |
|------------------|--|
| <b>Australia</b> | <p>According to Transparency International's "Government Defence Index" – Survey (2012), offsets have a relatively low risk of corruption (no associated corruption risk) in Australia. The country scores highest (4) in 'anti-corruption due diligence requirements for offsets' and "high standards of transparency for offset programmes", and second highest (3) in "same level of competition as the main contract".</p> <p>However, while the transparency is relatively high and Australia's Defense Material Organization has published specific transparency policies as well as guidelines for due-diligence measures on their webpage, there is no evidence that the performance of the offset contracts is controlled later on via audits.</p> <p>Also, Australia is one of the few countries where a case of corruption in offsets has happened and has been discussed in the media (even though this happened in the 1990s). Here, the offset agency has been bribed to receive a share of the offset obligation and offset transactions have been claimed incorrectly (see Platzgummer, P (2013): Arms Trade Offsets and Cases of Corruption: The Usage of Anti-Corruption Tools in Special Forms of Arms Acquisitions).</p> |
| <b>Brazil</b>    | <p>According to Transparency International's "Government Defense Index" – Survey (2012), offsets have a rather high risk of corruption in Brazil. Brazil scores highest (4) in 'same level of competition as the main contract', however, "high standards of transparency for offset programmes" and 'anti-corruption due diligence requirements for offsets' have below average scores (2 respectively 0). There is no sign of any transparency or due diligence requirements (with the exception of overall requirements in the procurement legislation Federal Law 8.666/1993). Audits are carried out (only in later stages) by the Comptroller General and the Federal Accounting Court.</p> <p>So far, there has not been any allegation of corruption in offsets in Brazil (that found its way into English speaking newspapers!).</p>  |
| <b>Canada</b>    | No data available  |
| <b>Kuwait</b>    | <p>According to Transparency International's "Government Defense Index" – Survey (2012), offsets have a relatively high risk of corruption in Kuwait. The country scores between 0 and 1 (out of 0 to 4) in "anti-corruption due diligence requirements for offsets", "high standards of transparency for offset programmes", and 'same level of competition as the main contract'.</p> <p>While the regulation per se defines very high standards, TI's country assessor claims that there are opportunities to escape regulation (when contracts are below the threshold for transparency regulation).</p> <p>Still, so far, there has not been any allegation of corruption in offsets in Kuwait (not, at least, that found its way into English speaking newspapers).</p>  |

|                     |  |
|---------------------|--|
| <b>India</b>        | On paper, India has very high standards for due-diligence and transparency measures. But, according to Transparency International's "Government Defense Index" – Survey (2012), the situation is different in practice. Due diligence requirements are imposed for almost all contracts, but there are major loopholes due to the level of secrecy in the negotiation of defense contracts. Lack of transparency is a result of the limited qualified technical staff available to monitor the transactions even though the transparency standards are very high in the regulation. While there is formally the same level of competition of offsets and the main contract, there is evidence that the level for offsets is less stringent (changing offset percentages within the tender process, waiving off the complete offset requirement). Recent corruption allegations (bribing government officials during the tender phase, high-ranking officials owned/worked for offset receiving companies).   |
| <b>Peru</b>         | No data on corruption in offsets respectively anti-corruption measures exist.  |
| <b>Russia</b>       | According to Transparency International's "Government Defence Anti-Corruption Index" there are no direct data on risk of corruption in offset contracts. This is probably due to lack of any regulations on that subject-matter. However Russian Federation is overall in high risk of corruption in the defence and security sector. Independent observers suggest that decisions on imports are usually made because of the personal or political interests of key decision-makers in the Ministry of Defence and at the highest levels of government. Reports show that there the level of transparency in procurement cycle in defence sector is very low.   |
| <b>South Africa</b> | <p>According to Transparency International's "Government Defense Index" – Survey (2012), offsets have a very high risk of corruption in the South Africa. The country scores 1 (of 4) in all three indicators: "anti-corruption due diligence requirements for offsets", "high standards of transparency for offset programmes", and "same level of competition as the main contract".</p> <p>However, the focus of the assessment is on the BAE/Saab Gripen case that has been highly discussed in the media. It is unclear, if DTI did or did not change any of the regulations regarding transparency or due-diligence.</p> <p>South Africa is the only country that could see allegations of corruption in all parts of the offset process and with all stakeholders involved in the process. However, not all allegations led to condemnations/ were correct (see Platzgummer, P (2013): Arms Trade Offsets and Cases of Corruption: The Usage of Anti-Corruption Tools in Special Forms of Arms Acquisitions, or Feinstein, Anrew (2011): The Shadow World, for a specific discussion on the corruption allegations in South Africa.</p> |

|                           |  |
|---------------------------|--|
| <p><b>SOUTH KOREA</b></p> | <p>According to Transparency Internationals “Government Defense Index” – Survey (2015), offsets have a high risk of corruption in South Korea. The country scored 0 (of 4) in “anti-corruption due diligence requirements for offsets” and scored 1 (of 4) in both “high standards of transparency for offset programmes”, and “same level of competition as the main contract”.</p> <p><b>Summary</b></p> <p>Korea’s Defense Acquisition Program Act contains no specific articles addressing corruption risk in the negotiation of offset contracts. However, it is understandable to a certain extent. Specific military procurements are confidential issues and in need of more discretion by the executive branch. And, subordinate decrees and ordinances in line with acts could give enough flexibility to the executive branch. Moreover, the Defense Acquisition Program Act has extensive safeguards to contain corruption since its enactment. The DAPA Executive Committee, in charge of major policy decisions, must include an external expert participation. Also, the Voluntary Clinic Audit System is available for project managers with a sophisticated audit and inspection during programs for legal assurance. Lastly, all defense industrial personnel must sign off on the Integrity Pact, which imposes criminal liability for noncompliance.</p> |
| <p><b>Turkey</b></p>      | <p>No data on corruption in offsets respectively anti-corruption measures exist.</p>   |
| <p><b>UAE</b></p>         | <p>According to Transparency Internationals “Government Defense Index” – Survey (2012), offsets have a medium risk of corruption in the UAE. The country scores 2 (of 4) in “anti-corruption due diligence requirements for offsets”, 3 (of 4) in “high standards of transparency for offset programmes”, and 0 (Of 4) “same level of competition as the main contract”.</p> <p>The UAE requires a very high level of transparency from the foreign supplier but does not publish any information on its own website. Also, there is no evidence of an anti-corruption programme.</p> <p>So far, there has not been any allegation of corruption in offsets in the UAE (that found its way into English speaking newspapers!).</p>   |

**Level 6 – Conclusion:**

Overall, it seems that the level of corruption in offsets is relatively closely linked to the overall level of corruption in that country. Such appears to be the case because specific anti-corruption regulations pertaining to offsets appear to be implemented following the implementation of more general anti-corruption efforts. Also, while an overall same level of competition of offsets in the main contract could theoretically be organized relatively quickly, a high level of transparency of offset programs would need specific regulations that would define which indicators to control. An understanding of what data companies would be willing to include in international public reports is an important point of consideration. Regarding anti-corruption due diligence requirements for offsets, the main problem seems to be that there is not a specific understanding as to what they would look like or how they would differ from overall due diligence requirements for procurement contracts.



## LEVEL 7: CULTURAL, REGIONAL AND POLITICAL ORGANIZATION

### **Level 7 – Summary:**

This level includes the following information per country:

- Languages(s) and ethnic composition;
- Actual Head of State
- Governance structure (central government, regional/ state government);
- Application of laws (importance of national v. regional, etc.).
- Repartition of competence
- Competences in international economic relations

|                  | <b>Cultural Organization</b>   | <b>Political organization</b>   |
|------------------|--|---|
| <b>Australia</b> | Australia does not have an official language but the national language is English.   | <ol style="list-style-type: none"> <li>1. Australia is a constitutional monarchy with a federal division of powers.</li> <li>2. Queen Elisabeth II and the Governor General of Australia Malcolm Turnbull.</li> <li>3. Australia has six states—New South Wales (NSW), Queensland (QLD), South Australia (SA), Tasmania (TAS), Victoria (VIC) and Western Australia (WA)—and two major mainland territories—the Australian Capital Territory (ACT) and the Northern Territory (NT).</li> <li>4. Each state and major mainland territory has its own parliament—unicameral in the Northern Territory, the ACT and Queensland—and bicameral in the other state</li> <li>5. Federal Government remains the competent authority for trade and commerce.</li> </ol>  |
| <b>Brazil</b>    | <p>The official language of Brazil is Portuguese.</p> <p>Population of Brazil is composed of 47.73% White, Brazilian of European origin, 43.13% Pardo, 7.61% Black 1.09% Asian 0.43% Amerindian.</p> | <ol style="list-style-type: none"> <li>1. Brazil is a federal presidential constitutional republic, based on representative democracy.</li> <li>2. President Dilma Rouseff</li> <li>3. Federal republic</li> <li>4. The Federation is composed of all the Federal District, 26 states and 5,564 municipalities.</li> <li>5. The federal government has three independent branches: executive, legislative, and judicial. Executive power is exercised by the executive branch, headed by the President who is the head of state and the head of government. Municipalities and States have autonomous administrations, collect their own taxes and receive a share of taxes collected by the Federation and state government.</li> <li>6. Federal Government remains the competent authority for trade and commerce.</li> </ol> |
| <b>Canada</b>    | Official languages:  | <ol style="list-style-type: none"> <li>1. Parliamentary Monarchy; Election of the House of</li> </ol>   |

|               | <b>Cultural Organization</b>  | <b>Political organization</b>  |
|---------------|---|--|
|               | <p>English, French.<br/>Majority of Canadians (32%), English (21%), French (15,8%), Aborigines (4%); Majority of Christian (67.3%).</p>   | <p>Common: 2011/06/02.<br/>2. Prime Minister - Stephen Harper (2011 - )<br/>3. Federation<br/>4. 10 provinces, 3 territories (power delegated by the Federal government). Municipalities (city), called local municipalities. Some provinces have regional municipalities that include local municipalities.<br/>5. For the Federal State (section 91 of the Constitution): trade, military, taxation, statistics, money, banking, citizenship; For Province (section 92): taxation for provincial purpose, health, property and civil rights, exploration, development, taxation and export to other provinces of non-renewable natural resources. In case of conflict, Commonwealth law prevails.<br/>6. Federal Government remains the competent authority for trade and commerce. However, in some area as public procurement, Provinces and municipality are consulted since impacted by the agreement. Ex: US firms allowed to bid in municipal public procurement. Provinces included in negotiation of trade agreement with EU. This might include mechanism for sharing liability and protection of investment.</p> |
| <b>Kuwait</b> | <p>The official language is Arabic. However, English is more frequently spoken because of the large foreign work force.<br/><br/>Population of Kuwait is composed of 35.6% Kuwaiti and 64.4% of various people, essentially stranger workers.</p> | <ol style="list-style-type: none"> <li>1. Kuwait is a constitutional monarchy with a parliamentary system of government.</li> <li>2. Emir Sheikh Saad Al Abdullah Al Salim Al Sabah</li> <li>3. Constitutional monarchy with a parliamentary system of government.</li> <li>4. Kuwait is divided into 6 governorates and the governorates are subdivided into district.</li> <li>5. The Emir is the Head of State and has the power to dissolve the parliament. The Kuwaiti parliament has the constitutional right to approve and disapprove an Emir's appointment.</li> <li>6. The Emir and his cabinet have to competent power to remain the economic international relations. Iran and the other Arab Gulf countries are the strongest economic partners.</li> </ol>   |
| <b>India</b>  | <p>Official languages: English, Hindi. 114 languages spoken in total. Majority of Hindu (80%), Muslims (13%), Christians (2,4%).</p>  | <ol style="list-style-type: none"> <li>1. Parliamentary Republic; Election of the Lower Chamber: 2014</li> <li>2. President – Pranab Mukherjee (2012 - ); Prime Minister – Narendra Modi (2014 -).</li> <li>3. Form of government: Hybrid</li> <li>4. 7 Union Territories that include 29 States. Local level: Municipalities and Panchayats.</li> <li>5. For the Union State (central): defense, armed forces, atomic energy, foreign affairs, war and peace, citizenship, foreign trade, inter-state trade and commerce, control of industries, regulation and development of mines, mineral and oil resources, and all other competencies not mentioned ; For the States: maintaining law and order,</li> </ol>   |

|                     | <b>Cultural Organization</b>  | <b>Political organization</b>   |
|---------------------|---|---|
|                     |   | <p>police forces, healthcare, transport, land policies, electricity in state, village administration, limited competencies. State law prevails in case of conflict</p> <p>6. N/A</p>  |
| <b>Peru</b>         | <p>The principal language spoken is Spanish. Quechua and Aymara, also official languages of Peru, are less spoken.</p>                          | <ol style="list-style-type: none"> <li>1. Peru is a Republic with a Presidential System.</li> <li>2. President Ollanta Humala</li> <li>3. Type of government: Peru is divided into 25 regions and the province of Lima.</li> <li>4. Each region has an elected government composed of a president and council that serve four years terms.</li> <li>5. The governments of the regions plan regional development, execute public investment projects, promote economic activities, and manage public property. The goal of devolving power to regional and municipal governments was among others to improve popular participation.</li> <li>6. The competent power remains to the Executive Branch. On April 12, 2016, a free trade have been signed with the United States. Peru's main exports are copper, gold, zinc, textiles and fish meal; its major trade partners are the United States, China, Brazil, and Chile.</li> </ol>   |
| <b>Russia</b>       | <p>Official Language: Russia, 27 co-official languages in other regions. Ethnic composition: Russian (81%), Tatar (3.7%), Ukrainian (1.4%),</p> | <ol style="list-style-type: none"> <li>1. Semi-presidential republic; Election in the Lower chamber: 2011.</li> <li>2. President - Vladimir Putin (2012 - ); Prime Minister Dmitri Medvedev ( 2011 - )</li> <li>3. Federation</li> <li>4. Russian Federation includes 83 "subjects of the Federation," with various degree in autonomy. These include 2 cities of Federal importance (Moscow and Saint-Petersburg). Crimea and Sebastopol are not counted. These subjects of the Federation are gathered in 9 federal districts. These districts are not a level of government but rather a sublevel of central administration.</li> <li>5. Competence of the Federal State: classical attribution, including: international policy and treaties, taxes, nuclear energy, defense, foreign economic relations. Shared competencies: civil and political rights, international and foreign economic relations, healthcare, environmental protection. The subjects of the Federation have full competencies in other matters. The Constitution and Federal Laws prevails over local laws.</li> <li>6. Possibility for subjects of the federation to implement their foreign economic relations provided that the Ministry of Foreign Affairs agrees with the project.</li> </ol> |
| <b>South Africa</b> | <p>11 official languages, including: Zulu, Xhosa, Afrikaans and English. Ethnic composition: Black African (72%),</p>                           | <ol style="list-style-type: none"> <li>1. Political regime: Parliamentary Republic, but President is both Head of state and head of government; Election of the Lower Chamber: 2014</li> <li>2. President: Zuma (2009)</li> <li>3. Form of government: constitutional democracy</li> <li>4. South Africa is composed of 9 Provinces. The next level is</li> </ol>   |

|                    | <b>Cultural Organization</b>   | <b>Political organization</b>   |
|--------------------|--|---|
|                    | White (8.9%), Colored (8.9%)   | <p>municipality (local government).</p> <p>5. Repartition of competences can be found in schedule 4 and 5 of the Constitution. The South African Republic presents an original model of political organization, with an overlap between all layers of governance (central state, provinces, local government). The principle is "co-government". There is a not separate competence between central state and provinces. It is rather participation of provinces in the central state and local government, creating relations based on negotiation and cooperation. There are still exclusive competencies for the central state: army, police, economy, international relations... There are shared competences (schedule 4 of the Constitution): among others, there are indigenous laws, health insurance, environment, provincial public enterprises, trade. Exclusive competence of provinces (schedule 5): provincial roads, local planning,... The provincial rules should be conform to national rules. Rules on public procurement apply to State and Provinces</p> <p>6. Competences in international economic relations: Trend of paradiplomacy by provinces since 2004, with increasing of agreements by provinces. Even though not properly binding as international agreements by the Central State, there is a trend toward broader local economic cooperation.</p> |
| <b>SOUTH KOREA</b> | Korean is the official national language   | <p>1. Constitutional, unitary, presidential representative democratic republic</p> <p>2. President: Park Geun-hye (25 February 2013); Prime Minister: Hwang Kyo-ahn (18 June 2015)</p> <p>3. Constitutional, unitary, presidential representative democratic republic</p> <p>4. The government is divided into three branches: legislative, executive and judicial. All of them operate at both the national and local levels. Local governments are semi-autonomous, and have their own executive and legislative bodies. Korea is divided into nine provinces, six metropolitan cities, one special city, and one special self-governing city. 5. The Central Government remains the competent authority for trade and commerce.</p>  |
| <b>Turkey</b>      | The official language of Turkey is the Turkish, spoken natively by approximately 85% of the population, composed of 70-75% Turks, 18% Kurds, 7-12% various people. | <p>1. Turkey is a democratic, secular, unitary, constitutional republic.</p> <p>2. President Abdullah Gul</p> <p>3. Turkey is a democratic, secular, unitary, constitutional republic.</p> <p>4. Turkey is subdivided into 81 provinces for administrative purposes only. Each provinces is divided into districts, for a total of 923 districts.</p> <p>5. The President of the Republic is the head of state and has a symbolic and ceremonial role. The real executive power is exercised by the Prime Minister, elected by the parliament</p>   |

|            | <b>Cultural Organization</b>  | <b>Political organization</b>   |
|------------|---|---|
|            |   | <p>through a vote of confidence in the government and is most often the head of the party having the most seats in parliament.</p> <p>6. The Prime Minister and their Ministers have the competent power to sign all the economic international agreements.</p>   |
| <b>UAE</b> | <p>Population of the Unites Arab Emirates are composed of 16.6% Emirati, 23% other Arabs, 42.3% South Asian, 12.1% other Asian, 6.0% other expatriates.</p> | <ol style="list-style-type: none"> <li>1. The United Arab Emirates is a federation of absolute monarchies</li> <li>2. President Khalifa bin Zayed al Nahyan</li> <li>3. Federation</li> <li>4. The United Arab Emirates (UAE) is a federation of seven hereditary emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al-Qaiwain, Fujairah, and Ras Al-Khaimah).</li> <li>5. All responsibilities not granted to the national government are reserved to the emirates.</li> <li>6. The UAE's liberal climate towards foreign cooperation, investment and modernization has prompted extensive diplomatic and commercial relations with other countries. Thus each emirates has power to manage its own economic policy</li> </ol> |

**Level 7 – Synthesis: Cultural, Regional and Political Organization**

|         |  |
|---------|--|
| Point 2 | <ol style="list-style-type: none"> <li>1. There are a number (limited) of titles for heads of state, mainly including Monarchs (Emir, Queen, Viceroy/Governor), Presidents and Prime Ministers. In different country different meanings behind terms.</li> <li>2. Titles are not necessarily indicative of political power.</li> </ol> <p>Impact on an Offset framework:</p> <p>How involved is that person in the executive and what enforcement authority. Who is able to impose penalties? How accountable and ethical is the executive? How reliable is the system? How much is reliability depends upon the individual person and how much reliability is due to the system itself?</p> |
| Point 3 | <ol style="list-style-type: none"> <li>1. Federations, Federal Republics, Republics, Constitutional Republics are cited.</li> <li>2. There are countries that are clearly a single state (Turkey), and countries that are presented as a federation of autonomous states (UAE).</li> <li>3. There are countries where the gravity toward one pole or the other is less clearly defined (India, South Africa).</li> </ol>   |

|                |   |
|----------------|---|
|                | <p>Impact on an offset framework:</p> <p>Very different political organizations (Turkey v. Brazil) can have good offset results because their governance system is clear (roles, responsibilities). Government authorities have the power and organization to implement. But in that in many government systems there are roadblocks, it might be easier to put into place a more flexible lighter framework (ex. in a first step a model agreement rather than a binding agreement).</p>   |
| <p>Point 4</p> | <p>1. Each country is divided into regional units and local units.</p> <p>2. The names used to describe the sub- units appear to be indicative of the way power is exercised in the country. For Australia, Brazil and India, the term “state“ is used; Peru uses the term “regions”; for Canada and South Africa, the term used is “province”; Turkey also uses the term “province”, but qualifies that they are established only for administrative purposes; Kuwait uses the term “governorates”; UAE uses the term “Hereditary Emirates”; and Russia uses the term “subjects of the Federation.”</p> <p>Impact on an Offset framework:</p> <p>The regional subdivision is a good indicator of the country's complexity in designing a simple enough model law.</p>  |
| <p>Point 5</p> | <p>1. There are countries with clearly defined/separated roles within Federal Government as well as between Federal and Regional Government: Australia, Brazil, Canada, Peru (except possibly judiciary), Turkey. UAE.</p> <p>2. There are countries with unclearly defined/separated roles within Federal Government and/or between Federal and Regional: Kuwait (current gridlock between Emir and parliament on reforms), India (power tending toward the center but regional / local power as well; Russia; South Africa</p> <p>Impact on an Offset framework:</p> <p>In a number of countries with areas of unregulated overlap, it is important that any proposed offset model or framework be rigorous enough to bring order while also preserving flexibility. Moreover, it must be simple enough to be implemented in countries with complex political organization.</p> |
| <p>Point 6</p> | <p>The federal authority is mainly responsible for international economic relations, with the UAE being the exception</p> <p>Impact on an Offset framework: The federal authority can generally negotiate. On the other hand, the framework must be simple enough to be adhered to by the regional authorities. Authority to negotiate is important but local needs in more complex environments must be taken into consideration in defining a framework. Local pushback should be expected.</p>   |

**Level 7 – Conclusion:**

Names of regimes are not necessarily indicative of the way power is exercised. Example: Australia and Kuwait are both constitutional monarchies; for Australia, Queen Elizabeth II (who is the monarch

for fifteen countries, notably of the United Kingdom) has a non-governing role with the Governor General, an Australian national and Member of the Australian Parliament actually governs; by contrast, in Kuwait, the Emir is actively involved in governing.

There are widely differing regime types among the surveyed countries, including federations, parliamentary monarchies, constitutional monarchies, constitutional republic, and hybrid models.

This situation proves that offset requirements have nothing to do with the country's political regime.

## LEVEL 8: COMPARISON BETWEEN UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT (2011) AND NATIONAL PUBLIC PROCUREMENT LAWS

### **Level 8 – Summary:**

A comparison has been established between level 2 of every countries and the UNCITRAL model law on public procurement \*

\*Official records of the General Assembly, Sixty-Sixth Session, Supplement No. 17 (A/66/17), annex I from the United Nations Organization (UNO).

|                     | Chapter I – National Law Basis  |
|---------------------|---|
| <b>Australia</b>    | Commonwealth Procurement Rules (CPR) - July 2012  |
| <b>Brazil</b>       | Law 8.666/93 (Public Procurement Act). Each Brazilian State have also their own legislation on public procurement   |
| <b>Canada</b>       | Manual (PWGSC) 1 - Public Procurement 1.1-1.3   |
| <b>Kuwait</b>       | Law 37, 1964  |
| <b>India</b>        | Chapter 6 of the General Financial Rules (GFR) 2005. A broader framework is also provided by the Contract Act, 1872, the Sale of Goods Act, 1930, the Law on Arbitration and Limitation and the Right to Information Act, 2005.<br><br>Each Indian State have also their own rules, guidelines or legislation on procurement. |
| <b>Peru</b>         | Law 30.225 of July 11, 2014 (not in force)  |
| <b>Russia</b>       | Law 94-FZ (2005) and Law 44-FZ (2013). These two laws operate simultaneously until 2017, which is the end of a transition period. Then, from 2017, Law 44-FZ will become the only law regulating public procurement.  |
| <b>South Africa</b> | There are no prescribed legal procedures, only a few common principles (Section 217 of the Constitution; State Tender Board Act, 1968; Public Finance Management Act 1999 (Section 51 (1)(a)). Each entity has its own internal policy and procedures.  |
| <b>SOUTH KOREA</b>  | The Government Procurement Act; the State Contracts Act   |
| <b>Turkey</b>       | Law 4734 and 4735 (Ch. 1)   |
| <b>UAE</b>          | Federal Order No. 16 as well as State Laws in Abu Dhabi (Law No. 6 of 2008) and Dubai (Law No. 6 of 1997).  |



Synthesis Chapter I

**UNCITRAL 2011 model law on public procurement** *“recommends that all States use the Model Law in assessing their legal regimes for public procurement and give favourable consideration to the Model Law when they enact or revise their laws”*. It stipulates, *“Model Law will significantly assist all States, in particular developing countries and countries with economies in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist, and will lead to the development of harmonious international economic relations and increased economic development”*.

For the moment, all of the ten countries reviewed have enacted procurement laws, except South Africa. Three of the ten countries (Brazil, Canada and Turkey) include well-defined laws in accordance with the harmonized standards of the 2011 model law. Four of them (Australia, India, Peru and Russia) perform most of the chapters of the 2011 model law, but fail to fulfill some of them. Two countries (UAE and Kuwait) fulfill only partially and insufficiently the harmonized standards.

|                     | Chapter II – Methods of Procurement   |
|---------------------|---|
| <b>Australia</b>    | CPR 9. Procurement method   |
| <b>Brazil</b>       | Law 8.666/93, Art 22-26   |
| <b>Canada</b>       | PWGSC 3 Chapter 3 - Procurement Strategy  |
| <b>Kuwait</b>       | Some elements in Articles. Article 15 discusses announcement in official Gazette. Did not identify selection criteria for different procurement methods |
| <b>India</b>        | GFR 2005, Rules 145-156   |
| <b>Peru</b>         | Art 21-27   |
| <b>Russia</b>       | Art. 10 (94-FZ)   |
| <b>South Africa</b> | There are no prescribed legal procedures  |
| <b>SOUTH KOREA</b>  | the Government Contracts Act Article 7; Presidential Decree on State Contracts Act Chapter 3  |
| <b>Turkey</b>       | Arts. 18-23   |
| <b>UAE</b>          | Federal Law provides for public, closed, negotiation and direct order contracts. (Specific provisions to be identified.)                                |

Synthesis Chapter II

**Methods of procurements**” of UNCITRAL 2011 model law on public procurement states that: *“The procuring entity may conduct procurement by means of: (a) Open tendering; (b) Restricted tendering; (c) Request for quotations; (d) Request for proposals without negotiation; (e) Two-stage tendering; (f) Request for proposals with dialogue; (g) Request for proposals with consecutive negotiations; (h)*

*Competitive negotiations; (i) Electronic reverse auction; and (j) Single-source procurement”* (article 27 of UNICTRAL 2011 model law).

Except South Africa (where there are no prescribed legal procedures) and Kuwait (where there is no clearly selection criteria for procurement methods distinction), the other eight countries reviewed have well defined the methods of public procurement according to UNCITRAL 2011 model law requirements.

|                     | Chapter III – Open Tendering                          |   |   |
|---------------------|---|---|---|
|                     | Section 1<br>Solicitation                             | Section 2<br>Presentation of tenders  | Section 3<br>Evaluation of tenders  |
| <b>Australia</b>    | See chapter 2   | CPR 10.17 Potential suppliers must be required to lodge submissions in accordance with a common deadline. | Specific guidelines not identified in document  |
| <b>Brazil</b>       | See chapter 2   | Law 8.666/93, Art 27-37   | Law 8.666/93, Art 38-53   |
| <b>Canada</b>       | See chapter 2   | PWGSC 4.85 Closing Procedures   | PWGSC 4.40 Evaluation Process and Method of Selection                                 |
| <b>Kuwait</b>       | See chapter 2   | Art. 22-26  | Art 32-41   |
| <b>India</b>        | See chapter 2   | GFR 2005, Rule 150  | GFR 2005, Rules 137, 150, 160-161   |
| <b>Peru</b>         | See chapter 2   | Art 12  | Pending of an implementation decree   |
| <b>Russia</b>       | See chapter 2   | Arts. 20-26 (94-FZ)   | Arts. 27-28 (94-FZ)   |
| <b>South Africa</b> | See chapter 2   | There are no prescribed legal procedures  | There are no prescribed legal procedures  |
| <b>Korea</b>        | Presidential Decree on State Contracts Act Chapter IV | Presidential Decree on State Contracts Act Article 39   | Presidential Decree on State Contracts Act Article 41, 42                             |
| <b>Turkey</b>       | See chapter 2   | Arts. 30-35   | Arts. 36-47   |
| <b>UAE</b>          | See chapter 2   | Federal and Emirates laws include procedures. (Specific provisions to be identified.)                     | Federal and Emirates laws include procedures. (Specific provisions to be identified.) |

### Synthesis Chapter III

**Open tendering**” of UNCITRAL 2011 model law on public procurement provides for several mechanisms and requirements on: “Section 1 – Solicitation”, “Section 2 – Presentation of tenderers” and “Section 3 – Evaluation of tenders”.

Except South Africa (where there are no prescribed legal procedures), Australia and Peru (where specific guidelines or implementation could not be totally identified), the other seven countries reviewed fulfil the harmonized standards set out in “Chapter III - Open tendering” of UNCITRAL 2011 model law.

|                     | Chapter IV – Procedures for Restricted Tendering   |
|---------------------|--|
| <b>Australia</b>    | CPR 9. Procurement method  |
| <b>Brazil</b>       | Law 8.666/93, Art 22-26  |
| <b>Canada</b>       | Bids open to all principle. Restriction to one requires justification in line with established rules |
| <b>Kuwait</b>       | Little criteria identified for choosing to restrict a tender   |
| <b>India</b>        | GFR 2005, Rules 151-152  |
| <b>Peru</b>         | Pending of an implementation decree  |
| <b>Russia</b>       | Art. 30 - Art. 56 of Federal Law 44  |
| <b>South Africa</b> | There are no prescribed legal procedures   |
| <b>SOUTH KOREA</b>  | Presidential Decree of the State Contracts Act, Chapter III  |
| <b>Turkey</b>       | Art 20   |
| <b>UAE</b>          | Federal and Emirates laws include procedures. (Specific provisions to be identified.)                |

#### Synthesis Chapter IV

Procedures for restricted tendering, requests for quotations and requests for proposals without negotiation” of UNCITRAL 2011 model law provides different requirements on these subjects.

Except South Africa (where there are no prescribed legal procedures), Kuwait and Peru (where selection criteria are no clearly identified) the other eight countries reviewed fulfil the harmonized standards set out in “Chapter IV” of UNCITRAL 2011 model law.

|                  | Chapter V – Procedures for Two- Stage Tendering |
|------------------|---|
| <b>Australia</b> | Specific guidelines not identified in document  |

|                     |  |
|---------------------|--|
| <b>Brazil</b>       | Law 8.666/93, Art 22-26. Law 12.462/2011 (Special Regime for Public Procurements - "RDC"), Art 12 and 26 |
| <b>Canada</b>       | PWGSC 3.25 b ii A  |
| <b>Kuwait</b>       | Not information identified   |
| <b>India</b>        | GFR 2005, Rule 137   |
| <b>Peru</b>         | Pending of an implementation decree  |
| <b>Russia</b>       | Art. 57 (44-FZ)  |
| <b>South Africa</b> | There are no prescribed legal procedures   |
| <b>SOUTH KOREA</b>  | Presidential Decree of the State Contracts Act, Article 18   |
| <b>Turkey</b>       | Art 21 (Negotiated Tenders)  |
| <b>UAE</b>          | Federal and Emirates laws include procedures. (Specific provisions to be identified.)                    |

#### Synthesis Chapter V

**Procedures for two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single-source procurement”** of UNCITRAL 2011 model law states how such procedures shall be regulated.

Only Brazil, Canada, India, Russia and Turkey show satisfactory fulfilment of the harmonized standards mentioned in this Chapter V.

|                     | Chapter VI – Electronic Reverse Auctions   |
|---------------------|--|
| <b>Australia</b>    | References to Austrade and CPR 9. Procurement method   |
| <b>Brazil</b>       | Law 10.520/2010  |
| <b>Canada</b>       | PWGSC 4.75.20  |
| <b>Kuwait</b>       | No information identified  |
| <b>India</b>        | No information identified  |
| <b>Peru</b>         | Art 48   |
| <b>Russia</b>       | Ch. 3.1, Arts. 41.1-41.12 (Electronic Auctions) (94-FZ); Art. 59-71: Electronic auctions (44-FZ) |
| <b>South Africa</b> | There are no prescribed legal procedures   |
| <b>Turkey</b>       | Arts. 68 (sub-article 5)   |
| <b>SOUTH KOREA</b>  | Presidential Decree of the State Contracts Act Article 10 <sup>③</sup>                           |

|            |  |
|------------|--|
| <b>UAE</b> | No Reverse Auction or Competition Tenders at Federal Level, but Abu Dhabi law provides for Auctions, and Dubai law provides for Competitions |
|------------|--|

### Synthesis Chapter VI

**Electronic reverse auctions** of UNCITRAL 2011 model law provides rules on the following issues: *“Electronic reverse auction as a phase preceding the award of the procurement contract”* (art. 54); *“Registration for the electronic reverse auction and the timing of the holding of the auction”* (art. 55); *“Requirements during the electronic reverse auction”* (art. 56) and *“Requirements after the electronic reverse auction”* (art. 57) Only Australia, Brazil, Canada, Peru, Russia and Turkey show some satisfactory fulfilment of these harmonized standards.

|                     | Chapter VII – Framework Agreement Procedures  |
|---------------------|---|
| <b>Australia</b>    | Specific guidelines not identified in document  |
| <b>Brazil</b>       | Law 8.666/93, Art 24 (items V, XVII, XIX)   |
| <b>Canada</b>       | Public Works and Government Services Canada PWGSC 3.45 Supply Arrangements  |
| <b>Kuwait</b>       | No information identified   |
| <b>India</b>        | No information identified   |
| <b>Peru</b>         | Art 31  |
| <b>Russia</b>       | No framework agreement procedures   |
| <b>South Africa</b> | There are no prescribed legal procedures  |
| <b>SOUTH KOREA</b>  | Government Procurement Act Article 5; Presidential Decree of the Government Procurement Service Act Article 7-2 <sup>16</sup> |
| <b>Turkey</b>       | Arts. 68 (sub-article 2)  |
| <b>UAE</b>          | Two-part tenders and negotiated tenders are available for complex procurements. Further information being compiled.           |

### Synthesis Chapter VII

<sup>16</sup> Article 7-2 of the Enforcement Decree of the Government Procurement Act: Where the Administrator of the Public Procurement Service deems it necessary to satisfy the diverse demand of end users when he/she purchases commodities in demand commonly required by each end user pursuant to Article 5-1 of the Act, he/she may enter into a contract for supply with two or more persons as parties to a contract so that each end user may select commodities in demand equal or similar to one another in quality, performance, efficiency, etc.

**Framework agreement procedures**” of UNCITRAL 2011 model law provides for several mechanisms and requirements for both *closed* and *open, single-stage and two-stage* framework agreements. Only Brazil, Canada, Peru and Turkey show some fulfilment of this Chapter.

|                     | Chapter VIII – Challenge Proceedings  |
|---------------------|---|
| <b>Australia</b>    | To be managed as much as possible within the administration   |
| <b>Brazil</b>       | Law 8.666/93, Art 109   |
| <b>Canada</b>       | Canadian International Trade Tribunal (CITT)<br><br>Canadian Competition Bureau<br><br>Public procurement rules are enforced by the courts in Canada  |
| <b>Kuwait</b>       | Independent instance/ rules for challenging decisions not identified  |
| <b>India</b>        | No information identified   |
| <b>Peru</b>         | Art 41-45   |
| <b>Russia</b>       | Ch. 8, Arts. 57-62 (94-FZ);   |
| <b>South Africa</b> | Judicial Review is commonly allowed   |
| <b>SOUTH KOREA</b>  | Complaints about international bidding can be filed in accordance with Article 28 of the Act on Contracts to which the State is a Party. If there is complaint against the review results, it can be filed with the State Contract Disputes Conciliation Committee according to Article 29. The complaint for the breach of the act as proscribed by Article 28 of the Act on Contracts to which the State is a Party should be made to the principal of a central executive agency within 15 days after the breach has occurred or within 10 days after knowing that such breach occurred. |
| <b>Turkey</b>       | Arts. 54-57   |
| <b>UAE</b>          | Federal and Emirates laws include procedures. (Specific provisions to be identified.)   |

Synthesis Chapter VIII **Challenging proceedings**” of UNCITRAL 2011 model law regulates the following issues: *“Right to challenge and appeal”* (art. 64); *“Effect of a challenge”* (art. 65); *“Application for reconsideration before the procuring entity”* (art. 66); *“Application for review before an independent body”* (art. 67); *“Rights of participants in challenge proceedings”* (art. 68); and *“Confidentiality in challenge proceedings”* (art. 69). Only Brazil, Canada, Peru and South Africa show satisfactory fulfilment of this Chapter.

**Level 8 – Conclusion:**

Compliance with UNCITRAL 2011 Model Law on public procurement:

1. Fully compliant: Brazil, Canada, Turkey.

2. Partially compliant: Australia, India, Peru, Russia.
3. Insufficiently compliant: UAE, Kuwait.
4. Non-compliant: South Africa.

All of the ten countries reviewed are members of the UN and therefore recognize the UNCITRAL 2011 Model Law on public procurement, which provides for rigorous transparency mechanisms and requirements to promote competition and objectivity. Three of the ten countries (Brazil, Canada and Turkey) include well-defined laws in accordance with the harmonized standards of the Model Law. Four of them (Australia, India, Peru and Russia) perform most of the chapters of the Model Law, but fail to fulfill some of them. Two countries (UAE and Kuwait) fulfill only partially and insufficiently the harmonized standards. South Africa has not yet prescribed legal procedures on public procurement.

Though this was not influenced directly by UNCITRAL Model Law, it is a similar enactment to that of UNCITRAL Model law. Whereas the Model Law applies to all procurement, Korea's legal framework address specific industries separately. For example, the pre-qualifications procedure is only being applied in construction contracts. The Korean Act itself lacks specific details and reserve such details to enforcement decrees and ordinances. This procurement regime allows flexibility for the government.

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## CHAPTER 2: ANALYSIS BY COUNTRIES

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### Summary

An analysis has been made in order to **identify** the **different major partnership contracts**, determining the different legal frameworks (BOT, FBO, offsets, etc.) and sectors (mining, water, infrastructures, etc.) in the following countries:

- Australia
- Brazil
- Canada
- India
- Kuwait
- Peru
- Russia
- South Africa
- Turkey
- United Arab Emirates

The text pinpoints the techniques used to create these major contracts, as well as the inter-normativity phenomena at work, notably in international calls for tender. Although apparently a simple process, such constitutional democracy a foundation is fundamental as the majority of government procurement contracts are shrouded in secrecy.



## AUSTRALIA

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Australia does not have a standard offset or industrial participation policy. Rather than wait for opportunities to be offered the government will actively seek to leverage its buying power to create opportunities for Australian (and New Zealand) firms in international programs.



For civil projects, the Australian Jobs Act, 2013 requires Australian Industry Participation Plans for projects valued at more than A\$500 million. The policy actually offers a series of questions that have to be answered in a Request for Tender (RfT). Even without an enforceable offset policy the government requires contractors to sign up to various contractual obligations either through an Australian Industry Capability (AIC) plan as part of the tender response, or separately through a Global Supply chain deed

The government identifies areas of industrial capability which it regards as critical. If those areas relate to the product or technology under purchase they will be included in the RfT.

Australia's revised Defence Industrial Policy, entitled "A Policy for a Smarter and More Agile Defence Industry Base", which is neither a law nor a regulation, provides foreign suppliers with additional information on governmental objectives, as well as how suppliers are expected to work with the Australian defense industry.

The Defence Industrial Policy requires a relatively large amount of very specific activities within the tender phase and the procurement contract. For instance, the "Australian Industry Capability Programmes" (AIC), which impact upon the tender evaluations. The Policy also actively explores opportunities of Australian firms in international programs (for example, via the "Global Supply Chain Programme" (GSP)). The Defence Material Organization (DMO) has produced a web-based toolkit with additional information for all stakeholders and is also publicly discloses details of AIC plans.

Especially during recent years, Australia's offset approach has shifted from a rather liberal to a much more rigid manner of handling offsets. AIC plans must be included for all contracts valued at more than A\$20 million and neither banking nor multipliers are applicable. Also, companies need to have comprehensive evidence of their activities and failures in order to fulfill obligations; failure to do so will lead to a blacklisting of companies and exclusion from tenders.

Conclusion:

1. Event/Challenge/Accomplishment

Memorandum of Discussion 1973. Australia signed the first modern offset agreement with the USA.

2. Significance in drafting the model law

Provides an example of an agreement that is simple and good

## BRASIL

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Brazil is a Latin American country with 200 million inhabitants and a GDP of US\$2246 billion. The official language is Portuguese. It is a federal presidential constitutional republic based on representative democracy. The Federation is composed of 27 federative states and 5,564 municipalities. The federal government has three independent branches: executive, legislative and judicial..

The current President and head of the Executive is Dilma Rousseff (of the Workers' Party). States and municipalities enact their own laws, have autonomous administrations, collect their own taxes and receive a share of taxes collected by both federal and state governments. The federal government is the competent authority for trade and commerce. Brazilian federal government total spending is US\$406.5 million , including: US\$31.44 million (1.40% of GDP) on defense, R\$30.76 million on energy, and R\$21.98 million on transport.

Brazil is a member of the International Monetary Fund since 1945 and a World Customs Organization member since 1981. It is also a member of the WTO since 1995 but a non-signatory of the GPA. Brazil is not a member of the OECD. Brazilian laws on public procurement show closely track the UNCITRAL Model Law on public procurement. Brazil is member of the Mercosur trade regional bloc.<sup>17</sup> Although not explicitly speaking to government procurements, Mercosur Member States agreed on a Protocol on Government Procurement.<sup>18</sup> Further, acting on behalf of its members, Mercosur signed bilateral (or bioregional) trade agreements with the other South American countries, as well as with Mexico, Israel, India, Egypt (not in force), Palestine (not in force), and the Southern African Customs Union/SACU (not in force). Similarly, such agreements do not include specific provisions on Government Procurement.

Brazil's system includes well-defined, robust laws and practice on public procurement. However it does not yet include a general legal framework on offsets. Civil offsets are used – even though they are not always called as such – in major national projects, such as high-speed rail transportation, hydroelectric plants and hydrocarbon offshore. In the defense sector, each branch of the armed forces<sup>19</sup> has its own organization and internal rules on offsets. Mandatory above US\$5 million, they can include indirect offsets (mostly restricted to the defense sector), multipliers, penalties and to some extent bank guarantees.

**Relevant legislation on offsets:** Federal Constitution, articles 37 and 175; Federal Law No. 8.666/93 (Public Procurement Act); Federal Law No. 8.987/95 (Public Procurement for Public Service Concessions); Federal Law No. 10.079/04 (public-private partnerships - PPPs); Federal Law No. 12.462/2011 (Special Regime for Public Procurements – "RDC"); Law 12.598/2012 (Defense Procurement); Order 764/MD – MoD Policy Directive on Offsets, Dec 27th 2002 (regulating offsets in the defense area); Order nº 1.395/GC4 – Commercial, Industrial and Technological Cooperation

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<sup>17</sup> Created by the Treaty of Asunción, signed on March 26, 1991, Mercosur members include Argentina, Brazil, Paraguay, Uruguay, and Venezuela.

<sup>18</sup> Decision CMC 40/03, of December 15 and 16, 2003.

<sup>19</sup> Air Force, Navy and Army.

(Offset) Policy and Strategy for the Air Force Command; Policy and Strategy for Offset Agreements updated Dec 13th, 2005 (Air Force Regulation DCA 360-1); Order nº 1.397/GC4 – Guidelines for the Negotiation of Commercial, Industrial and Technological Cooperation (Offset) Agreements, Dec 13th, 2005 (Air Force Regulation ICA 360-1); and National Strategy of Defense (Decree nr. 6.703, 18 Dec 2008 describing how Brazil views its defense objectives and to the concept of defense-related social benefits).

A 100% obligation is required for Defense purchases greater than R\$5 million. For Defense purchases, offsets are mostly direct but part of the obligation can be fulfilled through indirect offsets. Multipliers are possible from 1 to 10. For Defense purchases, Bank guarantees are allowed on a case-by-case basis and under certain conditions: (a) to be signed by both parties; (b) five-year maximum validity period; (c) transfer is limited to companies within the same holding; (d) credits can be used to the maximum extent of 50% of an obligation under a new contract. Transfers of credits (swaps) and pre-offsets are usually not acceptable but may be considered on a case-by-case basis as well.

Direct offsets in the defense sector are fulfilled mainly through the following categories: co-production; production under license; subcontracted production; foreign direct investment (FDI); training; transfer of technology; purchase of Brazilian products/services; donations/leases equipment; costs in development. Offset penalties for Defense encompass 5% of unfulfilled offset obligations; blacklisting.

According to Transparency International's "Government Defense Index" – Survey (2012), offsets have a rather high risk of corruption in Brazil. Brazil scores highest (4) in "same level of competition as the main contract", however, "high standards of transparency for offset programmes" and "anti-corruption due diligence requirements for offsets" have below average scores (2 and 0, respectively). There is no sign of any transparency or due diligence requirements (with the exception of overall requirements in the procurement legislation Federal Law 8.666/1993). Audits are carried out (only in later stages) by the Comptroller General and the Federal Accounting Court.

#### Conclusion:

##### 1. Event/Challenge/Accomplishment

Brazil leveraged offset (Embraer was licensed to produce Aermacchi airplanes) to develop its industry leading aeronautical company Embraer.

However it can be difficult to find the right contact because there are many different offset actors in place.

##### 2. Significance in drafting the model law

Having very clear and realistic (even if ambitious) industrial priorities and using offset as a means to accelerate progress is key to an offset program's success.

## CANADA

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### I. Overview of Canadian Government Procurement Law



- The Government of Canada is one of the largest public buyers of goods and services in Canada, purchasing approximately C\$16.05 billion worth every year on behalf of federal departments and agencies (**federal level**).
- Public Works and Government Services Canada (**PWGSC**) is the government's main purchaser of goods and services (including both **civil and defense sectors**).
- PWGSC procurement activities are principally carried out pursuant to the following legal framework: the *Department of Public Works and Government Services Act*; the *Financial Administration Act*; the *Defence Production Act*; the *Federal Accountability Act*; and the *Government Contracts Regulations*.
- Subsequent purchasing (**provincial and territorial level**) is done by the 10 provincial governments and the three territorial governments, as well as by what is also known as the MASH sectors (municipalities, academic institutions, schools and hospitals).
- Each provincial, municipal, and institutional purchaser has unique procurement policies and/or bylaws.
- The Canadian government procurement process begins when a department or agency sends a requisition to PWGSC. PWGSC subsequently publishes its procurement opportunities on a website called MERX ([www.MERX.com](http://www.MERX.com)).  
In keeping with the *Government Contracts Regulations*, PWGSC procurement is done by means of a competitive procurement process whenever possible, or a non-competitive procurement process (only used in special circumstances). Through the competitive procurement process, PWGSC buys goods and services using the following 2 methods of supply: contracts, and standing offers and supply arrangements.
- Contracts valued at over C\$25,000 (threshold) must follow the specific PWGSC procurement process (definition of requirement, validation of requirement, governmental approval, creation of an official Statement of Requirement (SOR), selection of procurement strategy, bid solicitation and source selection, negotiation and award of contract, final delivery of product).
- For requirements below C\$25,000, contracting officers may request quotations from suppliers directly. These requirements are considered by PWGSC as low dollar value procurement. In this case, contracting officers will determine the most appropriate procurement strategy for each requirement to obtain best value and ensure the timeliness and cost-effectiveness of each contract. They may use various methods of supply to identify and select a supplier on either a competitive or non-competitive basis.
- Standing offers and supply arrangements are two types of non-binding agreements between the federal government and potential suppliers of specified goods or services. These agreements outline the terms and conditions that will apply to future requirements to be ordered on an as and when required basis.
- The non-competitive procurement process, on the other hand, is only used in special circumstances:

- The need is one of pressing emergency in which delay would be injurious to the public interest;
  - The estimated expenditure does not exceed:
    - C\$25,000 for goods and services (contracting officers are still expected to solicit bids below this value whenever it is cost effective to do so);
    - C\$100,000 for architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work;
    - C\$100,000 for the Canadian International Development Agency (CIDA) service contracts related to international development assistance programs or projects;
  - Only one person is capable of performing the work, such as when a supplier owns a copyright or a license;
  - The nature of the work is such that it would not be in the public interest to solicit bids.
- When PWGSC decides, based on one or more of the above exceptions, to sole source a contract that would otherwise require a competitive process, it posts an advance contract award notice (ACAN) on MERX.
  - An ACAN is a public notice published for a minimum of 15 calendar days, indicating to the supplier community that a department or agency intends to award a contract for goods, services or construction to a pre-qualified supplier believed to be the only one capable of performing the work, that way enabling other suppliers during the publishing period to signal their interest in bidding by submitting a statement of capabilities. If no other supplier submits a statement of capabilities that meets the requirements set out in the ACAN, the contracting officer may then proceed with awarding the contract to the pre-qualified supplier.
  - Existing alongside the framework of Canadian statutes, regulations and policies that implement Canada's trade obligations are trade agreements. Indeed, Canada is a signatory to international and domestic agreements that promote trade opportunities with the Canadian government for both foreign and domestic suppliers.
  - Canada is a signatory to two international trade treaties aimed at reducing trade barriers between the signatories: the *North American Free Trade Agreement* (NAFTA) and the *World Trade Organization Agreement on Government Procurement* (WTO-AGP).
  - The procurement provisions of all trade agreements are similarly structured in that if a proposed contract meets certain criteria it is covered by the agreement; if it does not meet all the stated criteria then it is not covered. A proposed contract can be, and often is, covered by more than one agreement.
  - The *North American Free Trade Agreement* sets out Canada's commitment to reduce trade barriers between Canada, the United States of America and Mexico.
  - The use of measures to improve socioeconomic development (offsets) for procurements covered by NAFTA is prohibited.
  - A procurement is subject to NAFTA: if its value is equal to or greater than the relevant threshold; if the type of requirement is covered; if the entity for which the procurement is being done is covered, and if there is no specific exception applicable or invoked.
  - The *World Trade Organization Agreement on Government Procurement* (WTO-AGP) is, as discussed, an agreement, which aims to secure greater international competition for government procurement. It provides procurement procedures which Canada abided to.

- The use of measures to improve socioeconomic development (offsets) for procurements covered by WTO-AGP is generally prohibited.
- A procurement is covered by the WTO-AGP: if its value is equal to or greater than the relevant threshold; if the type of requirement is covered; if the entity for which the procurement is being done is covered, and if there is no specific exception applicable or invoked.

### **The Industrial and Regional Benefits (IRB) Program**

- The IRB Program provides the framework for ensuring long-term industrial and regional development benefits from Government of Canada **defense and security purchases**. The Policy ensures that business activities equal to the value of the contract are generated in Canada from companies who win these contracts.
- The IRB obligation is a contractual commitment and part of the overall government procurement contract.
- Canada currently has more than 60 **defense and security procurements** that are subject to the IRB Policy. Together, these IRB obligations represent in excess of C\$20 billion in current and future business activities with Canadian industries.
- The Policy applies to Government of Canada **defense and security procurements** that are exempt from international trade agreements to which Canada is a signatory, such as the WTO-AGP and NAFTA.
- Moreover, the IRB Program does not apply in the following situations:
  - Foreign aid by or on behalf of the CIDA;
  - Procurements by the Canadian Commercial Corporation on behalf of entities not subject to this policy;
  - Acquisition, modification and routine maintenance of real property;
  - Security requirements by or on behalf of the Communications Security Establishment of the Department of National Defence; the Canadian Security Intelligence Service; and the Royal Canadian Mounted Police for the purpose of pursuing criminal investigations, and
  - In cases of a pressing emergency.
- When applicable, the Policy is mandatory for projects greater than C\$100 million and discretionary for projects between C\$2 and C\$100 million.
- Industry Canada takes a number of factors into account when deciding whether or not to apply the Policy to government procurements under C\$100 million. Considerations include:
  - Is the procurement strategic to Canadian industry?
  - Are the potential bidding companies of interest to Canadian industry and are they capable of fulfilling an Industrial and Regional Benefits (IRB) obligation?
  - Is the project a smaller part of a larger one?
- There are two types of IRB benefits: direct and indirect.
- Direct IRB benefits are transactions containing work directly related to the product or service that the government is procuring.
  - Example: providing parts or maintenance for the purchased Canadian equipment.
- Indirect IRB benefits are transactions containing work or investments that are not related to the Canadian purchase.
  - Example: investments in post-secondary institutions and non-profit research and development institutions

- There are five eligibility criteria that an IRB contractor must demonstrate when they submit an IRB transaction to Industry Canada for review: causality, incrementality, Canadian Content Value (CCV), timing and eligible party.
  - Causality: IRB contractors must demonstrate that their decisions to place business activities with a Canadian company have a link to their IRB obligation. They need to prove to Industry Canada that the business activity would likely not have happened had it not been for the IRB requirement.
  - Incrementality: Allows IRB contractors to use current suppliers on a particular business activity. If an IRB contractor has an established business relationship on a particular part or service and, because of an IRB obligation, they choose to increase this work, the increase is eligible for IRB credit. This ensures that the new work that has a link to the IRB obligation is counted but work that was occurring before the IRB obligation is not factored in.
  - CCV: All proposed IRB transactions must be valued in terms of the CCV. CCV is measured in Canadian dollars and is the portion of the selling price of a product or service associated with the work actually performed in Canada. Only the Canadian labor and materials of a particular work package is counted toward an IRB contractor's obligation; all foreign overhead, labor and materials for any particular transaction is excluded from CCV.
  - Timing: 30 percent of obligations will need to be identified at time of contract signing, 30 percent one year later, and the remaining 40 percent within three years.
  - Eligible Party: Benefits must be completed by either the contractor himself or its parent corporations.

### **The Canadian Content Policy**

- The Canadian Content Policy is a Cabinet-mandated policy. The Policy encourages industrial development in Canada by limiting, in specific circumstances, competition for government procurement opportunities to suppliers of Canadian goods and services.
- The Canadian Content Policy is not an offset policy so to speak; it limits procurement opportunities for foreigners thus providing Canadian enterprises a substantial advantage.
- The Policy applies to competitive procurements with an estimated value of C\$25,000 or more, except for the following:
  - Government procurements subject to the international trade agreements;
  - Procurements made in furtherance of aid to developing countries, but does apply to purchases made by the Canadian International Development Agency (CIDA) on its own account;
  - Procurements made by PWGSC Acquisitions offices located outside Canada;
  - Cabinet-mandated sourcing, including sourcing related to industrial and regional benefits, shipbuilding, ship repair, refit and mid-life modernization.
- When applicable, eligible bidders will be considered as those supplying Canadian goods and/or services.
- One ought to note that only goods wholly manufactured or originating in Canada are considered to be Canadian.
- Nonetheless, a product containing imported components may also be considered Canadian for the purpose of this policy when it has undergone sufficient change in Canada, in a manner that satisfies the definition specified under the NAFTA Rules of Origin.

- Moreover, a service provided by an individual based in Canada is considered a Canadian service.
- Thus, when a requirement is covered by the Canadian Content Policy, the bidder must certify the Canadian content by submitting a certification that the good or service offered meets the definition of Canadian goods and/or services.
- For requirements consisting of more than one service, a minimum of 80 percent of the total bid price must be provided by individuals based in Canada.
- For requirements consisting of a mix of goods and services, 80 percent of the total bid price must consist of Canadian goods and Canadian services.

#### Conclusion

##### 1. Event/Challenge/Accomplishment

Requirements for fulfilling IRB obligations are very clear and straightforward, but meeting them (for example a company that wishes to trade offset credits must be no further than a tier 1 supplier to the prime contractor. This requirement can in some cases be difficult to fulfill)

##### 2. Significance in drafting the model law

Along with clear rules, there should be some flexibility (possibility to propose indirect offset).



## KUWAIT

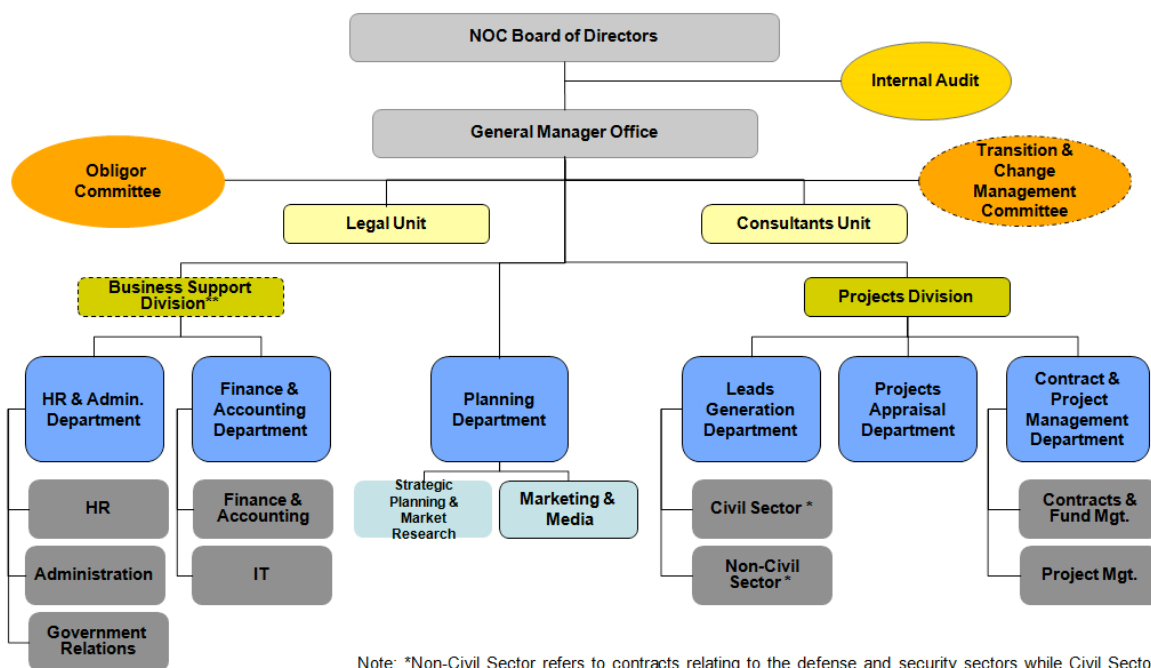
Kuwait's offset program has been in force since 1992, dealing with both military and civil procurements.



The Council of Ministers decision No. 863 of 2005 transferred responsibility for implementing the offset policy to the National Offset Company (NOC), which signed a management contract to manage the Kuwait Offset Programme on behalf of the Ministry of Finance. The NOC started operating on 2nd September 2006, and officially announce the launch of its operations on 1st November 2007, with the new guidelines (No. 9-2007) entering into force on 9th September 2007.

The NOC's Board of Directors comprises the Chairman, Vice-Chairman, and three other members. The General Manager's office oversees the Consultants Unit, the Legal Unit, and both the Obligor Committee and the temporary Transition & Change Management Committee.

### Functional Organization Structure



Note: \*Non-Civil Sector refers to contracts relating to the defense and security sectors while Civil Sector refers to the contracts relating to sectors other than defense and security sectors (i.e. education, healthcare, water & electricity etc.)

\*\*Position to be filled based on NOC's business growth and associated human resource growth.

The Obligor Committee reviews all projects concept papers and business plans submitted for approval. The final approval of Business Plans lies within the mandate of the NOC Board of Directors.

The NOC assists obligors by accelerating the process of issuing licenses and government approvals for offset projects. It identifies potential third party offset performers, and promotes financial services and the use of offset funds.

A Planning Department addresses strategic planning (business plans and follow-up), market intelligence, and marketing activities.

Foreign contractors that are short-listed after the bidding process are required to sign MoA with the NOC and present offset project proposals prior to signing the Supply Contract.

The Kuwait Foreign Investment Bureau (KFIB) together with other concerned ministries and government agencies cooperate in the development of offset programs.

Acceptable third parties may be brought in to fulfill obligations on behalf of the obligor, but the obligor will always remain responsible for fulfillment of the obligation.

**Relationship:**

- The prime contractor needs to be actively engaged with the NOC throughout the process.
- The NOC intends to preserve the continuity of long-term partnerships between Kuwaiti and foreign investors. The foreign partner will be responsible for management in the joint venture and is required to employ and train local manpower, appoint an external auditor, and submit monthly reports highlighting work progress.

**Process and Procedures:**

- Foreign companies may satisfy their offset obligations by proposing direct and indirect projects and by selecting a local partner, which may or may not be involved in the project. Kuwaiti companies may also submit projects for consideration by the NOC.
- The contractor shall present a business plan with five-year projections. This should include estimates of manpower requirements, financial statements, details of training programs, and particulars of any market research that the contractor has carried out. The business plan should be finalized within four months of signing the MoA.
- The Concept Paper Stage comprises a short document (3 or 4 pages) to be prepared prior to signature on the Supply Contract.
- The Memorandum of Agreement is signed by the contractor and the NOC prior to or at the same time as the Supply Contract.
- The Business Plan Preparation Stage provides offset project details. The Business Plan should be finalized within four months of signing the Supply Contract, though an extension is negotiable. Contractors should provide implementation details covering 5 years. Evaluation of the Business Plan should take about two months.
- There is a six-month grace period for project execution. Extensions of up to one year may be negotiable.
- Evaluated by NOC within 2 months from the date of receipt; may require additional information.

**Steps in the Process:**

- The prime contractor submits a concept paper which the NOC approves, rejects, or amends.
- Once approved, the contractor submits a feasibility study.

**Conclusion**

1. Event/Challenge/Accomplishment

The Kuwait offset authority (National Offset Company (NOC)) has been stopped. Current obligations are managed by the Direct Investment Promotion Authority in coordination with the relevant bodies to fulfill commitments of the existing offset projects.

2. Significance in drafting the model law

It is important to define what happens if the offset program is suspended or stopped

## INDIA

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India's defense offset policy is the responsibility of the Ministry of Defence (MoD). There have been several amendments to the offset regulations since they were first published in 2005. Here is how the policy has evolved:



The offset clauses in the Defence Procurement Procedure policy document published 2005 (DPP 2005), established broad guidelines for implementing offsets in defence acquisitions. They became effective 1st July 2005. DPP 2006 was established to provide comprehensive policy guidelines for all capital acquisitions for the Armed Forces, and introduced a number of important new definitions.

Further modifications to policy were settled in April 2007 by the Defence Offset Facilitating Agency (DOFA). The government would allow dual-use technology within the defense sector. Acceptable software applications qualified for offset credits from April 2007.

The government introduced the banking of offset credits with publication of the Defence Procurement Procedure 2008 (DPP 2008) policy document on 1st August 2008. A 2009 amendment to the DPP 2008 became effective on 1<sup>st</sup> November 2009.

In March 2010 the Department of Telecommunications introduced specific requirements for the supply of both hardware and software

Having effect from 1<sup>st</sup> January 2011, DPP 2011, a document of 291 pages, expanded the scope for offset fulfillment to include most aspects of civil aerospace, marking the first official intrusion into the civil sector.

Internal security and training now also qualify for offset projects, and a wide range of weapons and counterterrorism services are included in the list of eligible product under "internal security". There are measures to promote indigenization of the private shipbuilding industry for defense contracts.

Amendments to DPP 2011 were announced on 2nd April 2012. They cover technology transfers, multipliers, banking periods, and penalty provisions. Details are provided below. The provisions detailed below are in force for offset contracts established from 1st August, 2012 under revised guidelines known as Appendix D. For offset guidelines for earlier contracts please refer to our previous issues.

These provisions apply to all Capital Acquisitions categorized as "Buy (Global)" (i.e., outright purchase from foreign/Indian vendor) or "Buy and Make with transfer of technology" (i.e., purchase from a foreign vendor followed by Licensed Production where the estimated cost of the acquisition proposal is 300 crore or more (1 crore is Rp10 million).).

Appendix D permits the discharge of offset obligations by foreign OEMs by:

1. Permitting investment in "kind" in Indian industry;
2. Allowing the Defence Research and Development Organization (DRDO) to acquire a select list of high technologies; and
3. Increasing the number of Indian Offset Partners (IOPs).

The offset terms will form a part of the RFP and subsequently of the main contract. A separate offset contract will be executed simultaneously with the main contract.

### **Objectives**

The key objective is the development of the Indian defense industry. Secondary objectives are to foster the development of internationally competitive enterprises, augment capacity for Research, Design and Development related to defense products and services, and encourage development of sectors such as civil aerospace and internal security.

### **Civil Offsets**

#### For Telecommunication Contracts:

The Department of Telecommunications has declared it mandatory for equipment vendors to transfer technology to Indian manufacturers within three years of selling equipment to any operator. This is applicable for both hardware and software.

The condition will be strictly enforced. If there is non-compliance there will be financial penalties and criminal proceedings would also be started against the vendor. Particulars of the penalties have not been announced.

The Department of Trade is implementing the policy and has said that it has asked service providers to ensure that their networks are entirely operated and maintained by Indian engineers, with minimal or nil dependence on foreign engineers.

### **Countertrade Policy Implemented by State Trading Corporations (STCs) for Civil Sector Procurements**

Countertrade is not mandatory and depends upon the decision of the purchasing committee of the relevant ministry. The government instructs the STC to implement and monitor the countertrade requirement. The STC is referred to as a nodal agency and it is the commercial arm of the government.

The quota percentages are usually applied haphazardly. In some cases they may amount to just 30 percent of import content value, in other cases 70 percent.

Counterpurchase obligors usually have to provide bank or corporate guarantees covering 3 percent of the counterpurchase value.

The STCs use the expression "offset" and "countertrade", but apply to them the same meaning. While countertrade has historically been used to encourage trade in both soft and hard commodities under bilateral trade agreements, and for selective government acquisitions in the civil sector, bilateral countertrade agreements are encouraged, though mainly for exchanges of agricultural and food stocks.

The principal nodal agency designated for implementing countertrade agreements is the State Trading Corporation of India Ltd. There are also MMTC and PEC, which are designated by the Ministry of Commerce to monitor countertrade performance whenever it chooses to do so. At present only the State Trading Corporation of India Ltd is active.

Transactions are routed through major government owned corporations (also known as nodal agencies). The Indian Oil Corporation handles petroleum crude; the Minerals and Metal Trading

Corporation deals in minerals and metals; the Steel Authority of India handles steel; NAFED handles palm oil; and the Council for Leather Exports specializes in leather products. These nodal agencies allocate countertrade opportunities to Indian exporters and importers.

## Conclusion

### 1. Event/Challenge/Accomplishment

First civil offset agreement in India with Boeing. It incorporates many important facts. Also, in India, actors do not like making decisions.

### 2. Significance in drafting the model law

Model law should take into account both defense and civil offsets

## PERU

Peru is a Latin American country with 30 million inhabitants. The principal language spoken is Spanish. Quechua and Aymara, also official languages, are less frequently spoken. Peru's economy is one of the most dynamic in its region. Its GDP has gone from US\$26 billion in 1990 to US\$202 billion in 2013, with an inflation rate in 2013 of only 2.9% (down from 3.7% in 2012), the lowest in the region. It is a Republic with a presidential system. The current president is Ollanta Humala. Peru is divided into 25 regions and the province of Lima. Each region has an elected government composed of a president and council that serve four-year terms. The governments of the regions plan regional development, execute public investment projects, promote economic activities, and manage public property. The competent power remains to the Executive Branch. On April 12, 2016, Peru's main exports were reported as copper, gold, zinc, textiles and fish meal; its major trade partners are the United States, China, Brazil, and Chile.



Peru's total government spending is 10.8% of GDP or US\$23 billion including US\$2.83 billion spent on Defense, or 1.4% of GDP. It spends annually US\$0.6464 billion on energy and US\$3 billion (PEN-Peruvian money currency) on transport infrastructure.

Peru has been a WTO member since 1 January 1995 and a member of GATT since 7 October 1951. Peru is a GPA (Observer). It has been a member of the International Monetary Fund since 1945 and a World Customs Organization member since 1971. Peru is cited in the IBRD Guidelines and its draft law on public procurement shows a strong adhesion to the UNCITRAL Model Law on public procurement. Peru is involved in GATS Article XIII negotiation; Peru is not a member of the OECD.

Andean Community Decision 439 of June 11, 1998 – Principles and Rules for Services Liberalization (articles 3 and 10) was signed in Lima Peru on June 11, 1998. Peru has signed trade deals with the USA, Canada, Singapore, China, Korea, Mexico, Japan, the EU, the European Free Trade Association, Chile, Thailand, Costa Rica, Panama, Venezuela, concluded negotiations with Guatemala, and begun trade talks with Honduras and El Salvador, Turkey and the Trans-Pacific Partnership. Peru also has signed a trade pact with Chile, Colombia, and Mexico, called the Pacific Alliance, that rivals Mercosur.<sup>20</sup>

Offsets are regulated by the Law n° 28.269, amending Law n° 26.850 (Public Procurement Act), Presidential decree n° 031-2002-PCM (electronic system of public procurement – SEACE); Presidential decree n° 067-2003-PCM (Powers of the Council of Minister's President to set out Public Procurement Policy) and Guidelines of August 2010 (defense acquisitions from foreign sources) as well as Directive No. 08-2010 MINDEF/SG/VRD. A 100% obligation is required for Defense purchases greater than US\$7 million. For Defense purchases offsets are mostly direct but part of the obligation can be fulfilled through indirect offsets. Multipliers are possible from 0.5 to 5.0 For Defense purchases, Bank guarantees are allowed on a case-by-case basis.

Direct offsets are fulfilled mainly through transfer of technology and investments. Indirect offsets can be fulfilled through investment for the railway, hydroelectric and energy sectors, education, health and environment protection. Offset penalties for Defense are defined by negotiation; with blacklisting when there are none. There is no data on corruption in offsets but respectively anti-corruption measures exist.

<sup>20</sup> Source [www.indexmundi.com](http://www.indexmundi.com) Peru.

The Law 30.225 of July 11, 2014 (not yet in force) is highly aligned with the UNCITRAL Model Law on public procurement.

## Conclusion

### 1. Event/Challenge/Accomplishment

Peru's offset policy is flexible and allows the use of indirect offset projects to fulfill part of obligations. Peru is also very clear on the infrastructure projects required to increase country productivity (transportation infrastructure and in particular roads). Having a flexible offset policy (including the possibility to propose indirect offset) as well as very clear and realistic country industrial development priorities favors program success.

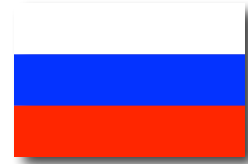


## RUSSIA

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### General data

The Russian Federation has a population of 143.7 million. Most of them are of Russian ethnicity (81%). The most numerous minorities are Tatar (3.7%) and Ukrainian (1.4%). As a multi-ethnic state (5 religious groups and over 60 different ethnic groups), Russian is the official language across the Federation but there are other 27 co-official languages.



Russia is a Federal state that includes 83 "subjects of the Federation," with various degrees of autonomy. These include two cities of Federal importance (Moscow and Saint-Petersburg). Crimea and Sebastopol are not counted. These subjects of the Federation are gathered in 9 federal districts. These districts are not a level of government but rather a sublevel of central administration. Each subject is divided into administrative districts called "raions." Lower levels are cities and towns.

A federal state, competences are classically distributed between the central and provincial authorities. The federal state has competence over international policy and treaties, taxes, nuclear energy, defense, foreign economic relations. The federal state shares various competencies with the subject of the federation, such as civil and political rights, international and foreign economic relations, healthcare, environmental protection. The subjects of the Federation have full competencies in all other matters. The Constitution leaves the possibility for subjects of the federation to implement their foreign economic relations, provided that the Ministry of Foreign Affairs agrees with the project.

The Russian Federation is a semi-presidential republic. The current head of state is V.V. Putin elected in 2012, Prime minister is D.A. Medvedev, and the last parliamentary elections were held in 2011.

### Russia in international trade

Russia is a member of the WTO since August 2012 and has signed 73 bilateral investment treaties and 4 multilateral investment agreements (including Eurasian Investment Agreement and an Agreement on partnership and cooperation with the EU). Russia is a member of the Commonwealth of Independent States.

Government procurements remain an important sector of Russian economy and policy, more particularly to stimulate the development of SME. This explains that Russia is only an observer in the GPA committee. Moreover, it seems that investment agreement treaties of the Russian Federation do not deal with government procurements.

### 1. Government Procurement in the Russian Federation: Data and Legal Framework

As mentioned earlier, government procurement remains an important part of public policy and development. The Russian Federation infrastructure needs are substantial but the recent economic crisis has led the government to modify its plans for procurement in infrastructure and to favor private participation in project finance.

Procurement is regulated by the Federal law "On the Federal Contract System in the Sphere of Public Procurement" (entered into force in 2014), and a special regime is provided for military procurement

(Federal Law N275, 2012, "On Defence government procurement"). The principles of procurement are transparency, openness, competition, and stimulation of innovation...

The previous regulation (Federal law No. 94, 2005) was not efficient enough and, in spite of the many amendments, the Prosecutor General's Office found more than 74,000 procurement law violations for 2013. In 2010, an assessment of Russian procurement legal framework has identified regulatory gaps were identified in several key benchmark indicators. Moreover, the numerous amendments and complex enforcement mechanism gave the impression that the legal framework is not stable and unpredictable.

The new regulations aims at modernizing the process for creating and monitoring orders for public goods and services and introducing transparency, professionalism, and unity of the contract system in the field of procurements. It creates a unified information system to access procurement information, provides antidumping measures, mandatory planning of procurement, and possible audit by the Account Chamber. The Federation's accession to the WTO is often mentioned as an additional reason for procurement regulation reform.

A common initiative of the EBRD and UNCITRAL is currently going on, aiming at enhancing procurement process in Russia. A first assessment has been made in 2010 (on the previous regulation) against the UNCITRAL Model Law on public procurement. Recent information on this initiative and assessment of the new law has not been carried out or published yet. CoP Compensatory measures in international government procurement.

## **2. Compensatory measures in the Russian Federation**

The Russian Federation does not have offset rules or any compensatory measure requirement for government procurement. The new procurement regulation introduces in its article 14 a "buy Russian" and localization obligation for foreign companies. The Russian Government can establish conditions for access of goods and services originating in foreign countries to public procurement in order to stimulate local economic development. The implementation decree has been adopted in March 2013 (Decree of the Ministry of Economy No 155, 25.03.2014, on the conditions related to the admissions of goods, services and works for public contracts). The decree includes a wide range of goods, such as light industry (including textile), vehicles, transportation equipment, pharmaceutical goods. *The requirement of localization is effective if the goods of foreign origin constitutes more than 50% of the total goods in the procurement (to be verified).*

Nevertheless, in spite of the lack of clear policy, principles, and limit in the conduct of offset deals, in 2010, the Ministry of Economic Development elaborated a document called "Introducing basic principles of an offset mechanism in Russian Federation", which were later validated. Similarly, few amendments were prepared to allow offset requirements in the procurement process (the new law does not contain such requirement however). More recently, in March 2015, the government adopted a work plan for 2015 that include the adoption of a report on how to spread the practice of offset deals and to determinate which sphere are more valuable for offset deals.

The lack of offset policy and legislation makes it difficult to analyze the level of corruption in such deals.

It is important to note that this legislation still leaves the possibility to the government to require compensatory measures, as was the case in the contract of "Mistral" warship where technology transfer and ship building in Russia were key elements of the contract.

## Conclusion

### 1. Event/Challenge/Accomplishment

The Mistral ship example: Russia contracted with France for 2 Mistral ships. In the same contract it was agreed that 2 additional ships would be delivered and were to be produced 80% in Russia. France has stopped the main contract in the context of the US embargo on Russia and has repaid Russia 1 Billion €. Question: What happens to the offset contract? Significance in drafting the model law

Model law should have provisions to cover what happens to the offset contract if the main contract is stopped. A good offset model law should allow to create all types of local economic benefits allowing. It should be easily verifiable

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## SOUTH AFRICA

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South Africa has not yet ratified the WTO-AGP and its law on public procurement doesn't follow the UNCITRAL Model Law. However, it has a good regulatory practice regarding offsets. Three main programs manage the offset: the DIP program for the defense sector, the NIP for commercial and non-defense government sales, and Supplier Development and Localisation (SD&L) program for Energy. Offset is mandatory when the value of the acquisition is above US\$10m. There is a complex mix of non-discretionary requirements that obligors must accept, including the Black Economic Empowerment (BEE) requirement..



The Armaments Corporation of South Africa (ARMSCOR) manages Defense Industrial Participation (DIP) programs on the defense side, and the Department of Trade and Industry (DTI) manages National Industrial Participation (NIP) programs in the commercial or non-defense sectors, except for Energy, where offsets are managed by ESKOM through the SD&L program.

The National Industrial Participation Program (NIPP) is applicable to commercial sales to government and seeks to leverage economic benefits and support the development of industry by effectively utilizing government procurement. The Industrial Participation (IP) program is mandatory when the value of the acquisition is above the threshold.

There is no legislation or Act of Parliament regulating the program other than a Cabinet directive issued in 1997.

There is a complex mix of non-discretionary requirements that obligors have to accept. These comprise the NIP and DIP programs, as well as the Black Economic Empowerment (BEE) requirement and the Competitive Supplier Development Program (CSDP). The Competitive Supplier Development Program (CSDP) is a Department of Public Enterprises initiative intended to capture local supplier benefits on expenditures in the civil and commercial sectors' infrastructure program. A state-owned utility, Transnet, has signed up to the scheme, replacing the NIP requirements with this program. However, CSDP is not yet applicable to other government agencies such as those responsible for South African Airways, Metrorail, PetroSA, or the police, which are still subject to the NIP program.

ESKOM has signed the SD&L program which has been designed for big investment. It stopped CSDP which has been applied in only a very small number of projects.

The present NIPP process is conducted post-tender and offset requirements are negotiated after a tender has been awarded. The NIPP will be strengthened to make it a pre-tender process in relation to strategic tenders, with domestic production and supplier development requirements built up-front.

The CSDP is about added national value, not just about localizing aspects of the products. There are no clearly prescribed obligations, as it is different for each state-owned enterprise, nor is there a clear accounting methodology. One objective is to increase capacity, capability and competitiveness of the local supply base. Another aim is to contribute to economic growth, skills development, employment creation, and broad-based BEE.

SD&L (applicable only to ESKOM), which is based on an imposed percentage of local content (only South African value added is taken into account), varies from one call for bids to another and from

one package to another within the one call for bids, and on complex social criteria including training for the unemployed.

SD&L accounts for 20% of the total bid points and bidders must demonstrate at least a 60% score for their bids to be evaluated. In other words, if a foreign company fails to propose more than 12% SD&L, it is disqualified. This means that bid quality and price account for only 70% of the total points. Unlike its predecessors, SD&L is an offset program which is fully integrated into the purchasing process, meaning that it radically changes the sales approach. In addition, it can result in bids being disqualified.

There is no mechanism in place at this time to allow obligors who have performed on the NIP side to migrate to the CSDP or SD&L programs. Nor is there any formal policy in place yet for transferring properly earned credits. Changes would have to be made to the current Preferential Procurement Policy Framework Act to achieve the following objectives:

- Align discretionary points with broad-based black economic-empowerment (BBEEE) codes and local procurement;
- Eliminate "import fronting", whereby small BEE firms are used to supply fully imported goods and services;
- The designation of "fleets" and other "critical industries" for domestic production;
- Allow price matching by domestic producers.

**Black Economic Empowerment (BEE):**

Black Economic Empowerment (BEE) is a significant requirement and obligors must treat it seriously. The intention is to leverage procurements to benefit black and colored South Africans.

Between 2010 and 2011, the BEE requirement in the DIP program was established at 25.1 percent of the value of the offset obligation. After those two years, the black shareholding rose to 35.1 percent. Two years later, the level rose again to 50.1 percent. These requirements do not apply to earlier defense contracts. State-owned enterprises such as Denel are recognized as BEEs for the purposes of DIP.

The DTI has issued so-called BEE Codes of Good Practice, which became effective in February 2007. Armscor, too, has a dedicated BEE division that supports inquiries for this type of activity.

Contractors have to fulfill seven categories of activities. The vendor will be rated on BEE implementation at 10 to 20 percent as part of the tender score. In theory, imported products are exempt, but some contractors say that that is not their experience. The government is expected to require that ten out of 100 points in any government tender should be attributed to the BEE score for larger procurements, and for smaller procurements of up to ZAR 20m the figure will be 20 points. The law proposing this is in process.

The BEE policy adopts a scorecard approach developed mainly by the DTI, but the scorecard is valid for only 12 months. Obligor must get their BEE scorecards approved.

**NIP Policy:**

On September 1, 1996, South Africa introduced an offset policy known as NIPP (National Industrial Participation Program). It had just become a member of the WTO and the international community had given the go-ahead on the grounds that the country had to catch up economically after long years of apartheid. NIPP is an indirect offset program which consists in creating economic benefit in South Africa to the value of 30% of the imported amount of all government procurement contracts signed with foreign companies. This program only applies to contracts worth more than US\$10m and has no influence on the decision to buy. It comes into force once the main contract has been signed. It is managed by the DTI (Department of Trade & Industry), and is completely independent of the SOE. Indirect NIP refers to activities where the offset is carried out in industries not related to that of the procurement.

**Conclusion:**

1. Event/Challenge/ Accomplishment

BEE is included in the offset policy - the need to develop Black Economic Empowerment.

Difficulties have been encountered when policies have changed and new policies are introduced. Contracts put in place under one regime are no longer recognized under a new regime. Significance in drafting the model law

The model law must take into consideration offset obligations that take into account approaches such as "affirmative action", "positive discrimination", "employment equity" that favor members of groups that have suffered discrimination.

In case of a change of policy, the rules of the former regime must remain applicable under the new regime.



## SOUTH KOREA

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Korea is one of the only four OECD member countries in Asia. It has a strong economy and low unemployment rate. Korea's population has been steadily increasing. It has increased from 50.22 million people in 2013 to 50.50 million people in 2016. The population is highly educated and well equipped, with the world's fastest broadband and strong digital economy. It is mostly homogenous society with a growing number of foreigners from China and other Asian countries. The South Korean society places high importance on hierarchy, respect, loyalty, and courtesy.

Over the last five decades, Korean economy has experienced substantial growth. It grew from about \$8 billion 1970 to \$1.38 trillion in 2015 that is 11<sup>th</sup> in the world. It has been increasing by approximately 3% annually for the past decade. The leading industries are electronics, shipbuilding, automotive, petrochemicals, metal and machinery products. The public procurement amount was KRW 11, 428 million in 2015. It's percentage of the GDP is among the highest in the world. Korea is a member of over 70 international organizations. Notable memberships include UNICTRAL Model Laws, GATS, IBRD, IMF, WTO, GPA, OECD, and WCO. Majority of Korea's FTA agreements prohibit offsets by express prohibition or by a clause incorporating the WTO's GPA.

**The Public Procurement Service (PPS)** is the procurement agency of Korea. PPS' mission is "to provide the best value service to its clients, save national budget spending and contribute to economic development by procuring and managing resources for public administration." It is under the Ministry of Strategy and Finance, the primary ministry for central procurement. **The Act on Contracts to Which the State is a Party** ("State Contract Act") is the chief legal authority for procurement by central government entities. It applies to "contracts to which the State is a party, including government procurement contracts entered into through international tendering procedures and contracts signed between the State as a party and a national of the Republic of Korea as the counter-party (including contracts that become sources of revenue)." A similar authority exists for local government entities called Local Government Contract Act. The State Contract Act was influenced by the WTO GPA, as they were enacted in response to the WTO GPA membership. In addition, there are numerous legal authorities involved in public procurement, including:

- Act on the Management of Public Institutions
- Framework Act on the Construction Industry
- Construction technology Promotion Act
- Electrical Construction Business Act
- Small and Medium Enterprises Promotion Act
- Act on Facilitation of Purchase of Small and Medium Enterprises-Manufactured Products and Support for Development of Their Markets
- Framework Act on Small and Medium Enterprises
- Industrial Standardization Act
- Quality Control and Safety Management of Industrial Product Act
- Qualification Control and Safety Management of Industrial Products Act
- Government Organization Act
- Framework Act on Low-Carbon Green Growth
- Special Act on the Preferential Purchases of Products Manufactured by Persons with Several Disabilities
- Act on Support for Female-owned Businesses
- Income Tax Act

- Value-added Tax Act
- Special Enterprise Promotion Act

Korean offset program is limited to military contracts, adhering to its international obligations and the WTO GPA, as Korea did not open Ministry of National Defense (MND) fully in WTO GPA. Notes to Annex 1 provides as follows:

“The Defense Logistics Agency shall be considered as part of the Ministry of National Defense. Subject to the decision of the Korean Government under the provisions of paragraph 1, Article XXIII, for MND purchases, this Agreement will generally apply to the following FSC categories only, and for services and construction services listed in Annex 4 and Annex 5, it will apply only to those areas which are not related to national security and defense.”

Defense offsets are given emphasis as Korea faces stable hostility from North Korea. Korean military is the 7<sup>th</sup> largest in the world and heavily depends on exports for defense acquisition. The importance of foreign weapon procurement contracts in the Republic of Korea is reflected in its policy. The policy requires offset programs for foreign defense acquisition greater than USD 10 million. For competitive bidding contracts, the offset ratio is 50% value of the amount in the defense acquisition contract, whereas, for single bid projects, the offset ratio is 10%.

The Defense Acquisition Program Administration is the primary government agency in defense procurement. It was formed in January 2006 to raise the transparency and effectiveness in tasks formerly handled by the Defense Ministry. The five core functions of DAPA are (1) acquisition planning, (2) defense industry promotion and export cooperation, (3) analysis, testing, and evaluation, (4) national security improvement project management, and (5) military supplies and contract management. Tasks are divided into DAPA's four bureaus, three departments, and two agencies including the Agency for Defense Development (ADD) and the Defense Technology Quality Board (DTaQ). Since its introduction, DAPA has improved the efficiency of program management through the introduction of the Integrated Project Teams (IPT). Once the acquisition plan and defense industry promotions are set forth by the DAPA headquarters, its management is passed down to the Integrated Project Teams (IPTs) of Program Management Agency. IPTs manage all processes from the determination of requirements to project completion. Through this improvement of the procurement process, DAPA has reduced the time required for acquisition and ultimately cut the project costs. DAPA handles military procurement under the framework set by The Defense Acquisition Program Act. Under the Act, DAPA must prioritize domestic purchases.

Korea's law is very flexible and malleable. It gives considerable discretion to the Offset Council. The Offset Council was introduced to reduce corruption. The Offset Council's handles tasks related to offset ratio, separation of the main contract and offset MOA, banking, and integration of offset programs approval, and offset requirements. The legal framework permits the Offset Council to deviate, in exceptional cases, from the set values.

Since its introduction, Korea's offset programs have played a major role in Korea's defense market. To illustrate, South Korea's defense exports reached USD 1 billion in 2008. In 2013 and 2014, they reached UDS 3.4 billion and 3.6 billion, respectively. In recent years, DAPA has supported SMEs through policies and schemes aimed at industrial growth and competition in the defense sector. In



2014, DAPA introduced a clause that included a provision of a multiplier of up to 1.5 times for facilitation of exports from Korean SMEs. In 2015, DAPA has increased the multiplier to 2 times for some cases and introduced a defense offset portal between foreign equipment manufacturers and SMEs.

Overall, Korea has a flexible and rapidly developing military offset market.

## TURKEY

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Turkey is a free-market country with strong industry and service sectors and a population of 80.6 million. The official language of Turkey is the Turkish Turkic language spoken natively by approximately 85% of the population, which is composed of 70-75% Turks, 18% Kurds, 7-12% various people. The current president of Turkey Recep Tayyip Erdoğan and the current prime minister is Ahmet Davutoğlu. Turkey is a democratic, secular, unitary, constitutional republic. It is subdivided into 81 provinces for administrative purposes only. Each province is divided into districts, for a total of 923 districts. The President of the Republic is the head of state and has a symbolic and ceremonial role. The real executive power is exercised by the Prime Minister, who is elected by the parliament through a vote of confidence in the government and who is most often the head of the party having the most seats in parliament. The Prime Minister and their Ministers have the competent power to sign all the economic international agreements.

Turkey's GDP in 2013 was US\$820.21 billion. Spending on government procurement amounted to US\$126 billion with 2.31% of GDP or approximately US\$19 billion, dedicated to Defense spending, US\$2.13 billion to energy and \$0,6 billion on transport annually. Turkey has been a WTO-GPA observer since June 4th, 1996. Turkey is also involved in the GATS Article XIII negotiation, adheres to OECD principles and IBRD guidelines.

Turkey has a number of free trade agreements. Many of them include provisions about public procurement but none include strictly concrete commitments for Turkey to realize. Agreements include Turkey-EFTA (Free Trade), Turkey-Israel (Free Trade), Turkey-Romania (Free Trade), Turkey-Bulgaria (Free Trade), Turkey-Macedonia (Free Trade) Turkey-GRECO (Against Corruption); Turkey-Croatia (Free Trade), Turkey-Tunisia (Free Trade), Turkey-Palestinian Authority (Free Trade).

Procedures and principles to be applied to public procurement in Turkey are established within Public Procurement Law 4734 (2002). The law sets forth rules of participation in public tenders, such as principles about threshold values, estimated costs, rules on qualification, ineligibility, tender notice periods, prior notice, subcontractors, cancelation of tender prior to the predetermined time for submission of tenders, prohibited acts or conduct; rules governing principles of procurement process such as procurement procedures and implementation, principles of open, restricted, negotiated, direct procurement procedures, contents of prequalification and tender documents and administrative specifications and such principles. Ineligibility to participate in procurement tenders is regulated under Article 11 of the law.

Turkey has a favorable environment for offsets. The Law 3238 relating to offsets in defense contracts was established in 1995 (and also established the SSM Turkey's Defense offset authority). It has undergone 5 rounds of revisions, most recently in 2007. The rules include a 70% offset requirement (not as strict as others), using standard multipliers (1 to 8), with opportunities for both direct and indirect compliance. In addition, potential penalties are lower than other regimes at 6. To date Turkey has been successful with its offset program for Defense contracts, and is looking to extend its offset policy to other contracts, including energy, transport and health. (Note that, as an "Observer" in the GPA, there may be implications with respect to the offset prohibition for non-defense contracts.)

Turkey's public procurement is governed by the Law 4734 and 4735. This has a high degree of conformity with the UNCITRAL Model Law on public procurement.

Conclusion:

1. Event/Challenge/ Accomplishment

Turkey has put un-officially civil offset into place. Sectors that are targeted include health/medicine, energy, communications, and transport.

2. Significance in drafting the model law

Civil offset must be taken in consideration in drafting the model law

## UAE



### UAE's extensive defense procurement

- UAE is top 5 largest **defense importer** in the world (2014)<sup>1</sup>
- UAE to be in top 3 countries globally with **defense obligations accrued** (2012-2022)<sup>2</sup>
- National priority for UAE to build **domestic defense industry**

As of June 2012, the UAE manages offsets through its Tawazun Economic Council (TEC).

The focus of the offset program remains firmly on the matter of defense acquisition. The TEC also has significant interests in many non-offset commercial projects.

### Policy guidelines updated in November 2015

Before (2010/2011 edition)

After (2015/2016 edition)

|                           |  |  |
|---------------------------|--|--|
| <b>Objectives</b>         | <ul style="list-style-type: none"> <li>• Build industrial base for UAE</li> <li>• Create knowledge jobs for UAE nationals</li> <li>• Provide opportunities for SMEs</li> <li>• Generate exports</li> </ul>   | No change  |
| <b>Focus areas</b>        | 4 system & 4 component types   | Updated sector & capability list   |
| <b>Min. threshold</b>     | \$10M over 5 years   | No change  |
| <b>Offset %</b>           | 60%  | No change  |
| <b>Milestones</b>         | 7 years (5, 10, 10, 15, 15, 20, 25%)   | No change  |
| <b>Liquidated damages</b> | 8.5% of shortfall amount fulfills 50% of obligation; remaining goes into default account   | Added condition: In case of failure to initiate a project, 100% of outstanding obligations are added to default account  |
| <b>Crediting method</b>   | JV (Max 30% Input, Min 70% Output) <ol style="list-style-type: none"> <li>Inputs: Cash + Non-cash contribution                             <ul style="list-style-type: none"> <li>• Multiplier: Table &amp; formula</li> </ul> </li> <li>Output: Profit + UAE National comp                             <ul style="list-style-type: none"> <li>• Multiplier table: range 2 to 5</li> </ul> </li> </ol> | <ol style="list-style-type: none"> <li>1. No change to JV model</li> <li>2. Formally introduced Work Packages</li> <li>3. Input multiplier = 2 (fixed)</li> <li>4. Updated output multiplier formula</li> <li>5. Introduced clause for additional methods</li> </ol> |

### Role of Tawazun Economic Program

Drive economic value from UAE's extensive defense procurement by five objectives:

- Design industrial development sector focus and program guidelines
- Agree with foreign defense contractors to invest/participate in UAE industry
- Evaluate and approve projects
- Facilitate foreign DC partnerships with local companies, provide other support
- Monitor success of industrial participation

#### **Six key objectives of The Tawazun Economic Program**

- Build critical national defense industry
- Create knowledge based economy
- Create business opportunities for UAE private sector
- Generate high value exports
- Diversify UAE's economy by growing the country's Industrial base
- Produce employment and investment opportunities for UAE Nationals in high-tech fields

**Established in 1992, the program has launched over 60 initiatives in a variety of sectors**

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The guidelines require defense contractors to customize their programs by selecting credit-generating components from both input and output activities in specified percentages. Credits for output activities are awarded only when projects are profitable.

The contract award process is linked to the signing of an offset agreement. Defense contractors must develop an offset fulfillment plan while negotiating the procurement contract with the UAE Armed Forces. Approval prior to the Purchase Contract is mandatory. A bank guarantee in support of the offset penalty provisions is to be established within 30 days of the contract.

Contracts are subject to Swiss federal law.

#### **Objectives:**

The objective is to enable industries with know-how, technology transfer, training of nationals, and investment. The objectives are output and profitability, and ensuring that projects are sustainable. Export sales are a particular target.

The focus is about 80 percent on defense and defense-related projects, and 20 percent on high-tech, dual use technologies suited to the UAE's requirements.

In particular, obligors should assist with developing the industrial and defense infrastructure, help develop the private sector with new business ventures, and provide management skills with regard to the UAE defense industry.

Long-term commercial viability and causality are important features of the policy.

**Threshold:**

The threshold is US\$10 million.

Cumulative defense procurements reaching US\$10 million in value within a 5-year period will also qualify for offsets.

**Quota:**

Sixty percent of purchase contract value.

**Input and Output based Requirements:**

No more than 30 percent of the obligation can be satisfied through input-based projects. The minimum level of output-based projects is 70 percent.

Input contributions may include equity contributions, apprenticeships, knowledge improvement programs, and contribution of specialist equipment.

Output credits are calculated on net profits generated by projects, export potential, and employment for UAE citizens (see Multipliers).

**Fulfillment Period and Milestones:**

Contractors must fulfill their offset obligations within 7 years.

A grace period has been introduced to allow defense contractors to establish their joint ventures in terms of infrastructure, construction, training, etc., with regard to the input part of their program. The grace period is for negotiation, but up to 3 years is available, depending on the complexity and size of the project. This allows input-based activities to be generated in the grace period and realized as offset credits at the start of the 7 years program period.

Milestones are annual. The percentages of the obligation to be achieved at each annual milestone are: 5 percent, 10 percent, 10 percent, 15 percent, 15 percent, 20 percent, and 25 percent respectively for each year.

**Pre-Offsets:**

Pre-offset activity is encouraged. Defense contractors may transfer their offset credits to another contractor or use them for future obligations.

**Multipliers:**

Inputs qualify for multipliers of 1 to 2.

Outputs qualify for 2 to 5. A complex formula is used to allocate output-based multipliers according to the profitability, export activity, and the employment level of UAE citizens in the partnership.

**Penalties:**

Liquidated damages of 8.5 percent will be assessed for under-performance. They will be charged on the unfulfilled portion of the obligation, calculated at each annual milestone.

Fifty percent of the penalty payment at each milestone will be cashed under the bank guarantee and the other 50 percent will be rolled over to a default account. The rollover may then be refunded,

depending on the overall performance of the next milestone or at the end of the program. At the end of each milestone, the TEC will release back to the contractor all penalties paid at interim milestones if they have caught up with the shortfalls.

The TEC reserves the right to withhold payments under the purchase contract and to publicize the names of companies that are non-compliant.

**Banking:**

Offset credits may be banked for 10 years. They are transferable and may be swapped or traded

**Conclusion:**

1. Event/Challenge/ Accomplishment

Offset credits are generated by joint venture company results and as there are currently many companies with obligations pursuing joint ventures, there is concern that the economy lacks the capacity to allow the success of each venture within the required timing.

2. Significance in drafting the model law

Integrate sufficient flexibility into the model law to accommodate successful fulfillment of different forms of obligation fulfillment projects such as launch of JV's. Offset credit allocation needs to be based not only on the result of an investment but also on the initial investment.



Transportation and Manufacturing in Myanmar

Photo credits: Christian SYLVAIN