

**THE CONTRIBUTION OF PUBLIC PROCUREMENT TO COHERENCE
OF THE MULTI-LAYERED GOVERNANCE IN IMPLEMENTING LABOR
STANDARDS**

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ABSTRACT: I. Introduction; II. Multilayered governance as conceptual framework: II.1 The analytical and normative dimensions of the doctrine of the multilayered governance; II.2 The application of the multilayered governance in the field of public procurement; II.3 International Instruments regulating public procurement and the possible horizontal collisions between different international regimes; III. Procedural Guarantees for the Inclusion of Labour Rights in National Procurement Practices; IV. Comparative study of the international instruments regulating procurement towards different ultimate objectives: convergence in the tender assessment process: IV.1 Admissibility of the Inclusion of Labour Rights under WTO Procurement Law; IV.2 Labour Considerations under the UNCITRAL Model Public Procurement Law; IV.3 The World Bank Procurement Guidelines and the inclusion of Labour Policies; V. Conclusion; VI. List of references.

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I. INTRODUCTION

The enforcement of labour right in public contract is probably one of the most significant examples of the tensions between liberalization concerns and legitimate policy objectives in public procurement, raising at the same time more systemic questions on the fragmentation of national and international procurement regulation. The study of the inclusion of labour rights clauses in public contracts underlines the importance of striking a balance between different procurement objectives at various levels of the national and international procurement governance. The difficulties in combining conflicting policy objectives - from the value for money to the efficiency and integrity in the procurement process, from transparency to other legitimate political and social priorities, like environmental, industrial or social considerations - represents an important challenge not only at domestic level but also in the major international instrument regulating the field of government procurement.

This paper aims at providing a contribution in the harmonization efforts of international procurement practices for the identification of the key common methods for the enforcement of labour rights in public contracts. For this reason, the analysis is centred on the different methods of implementation of labour rights, which do not undermine the principle of non-discrimination and the objective of value for money of the whole procurement process. With this purpose, the analysis of the paper starts with the analysis of the doctrine of the multilayered governance and it will proceed with its application on the field of government procurement. In this perspective, the possible areas of conflicts and overlaps between the major principles and policy objectives behind the various procurement regulations will be investigated. In the different government procurement systems, in fact, the importance allocated to the different regulatory objectives significantly changes, with different balance between economic efficiency and liberalization of the procurement markets and the promotion of social policies.

This paper is built around the study three abstract models of procurement regulations identified in the literature, and three major international instruments of procurement regulation - each one representing a different abstract model of procurement regulation - will be analysed. The paper is essentially based on my PhD research structured as a comparative study of the relevant

provisions included in the WTO Government Procurement Agreement, the World Bank Guidelines and the UNCITRAL Model Law thereby contributing to the discussion on the international regulatory challenges to strike a balance between legitimate national policies and the international liberalization of public procurement².

II. MULTILAYERED GOVERNANCE AS CONCEPTUAL FRAMEWORK FOR THE ANALYSIS

The doctrine of multilevel governance of Prof Thomas Cottier offers the theoretical background of the research, with a multidimensional perspective³. On one hand, it reflects the reality of interdependence in the different levels of governance of international economic law; on the other hand, it aims at achieving greater coherence among the distribution of regulatory powers between these layers of governance. The multilayered governance's theory, focusing on shared constitutional principles and procedural guarantees, constitutes, at the same time, an analytical and normative framework for a comparative analysis of public procurement systems. The adoption of this doctrine to the field of public procurement allows us to concentrate the study of the procurement fragmentation on the main regulation principles and procedural guarantee shared by the major international instruments regulating public procurement, contributing to their progressive harmonization in the different levels of the procurement governance. In this way, the research aims at illustrating that the political and legal problems of multilevel regulation of the social use of public procurement may be resolved more efficaciously with a closer attention to common structures and appropriate procedural guarantees, in order to strike a balance between conflicting values and principles,

² This paper is based on the preliminary result of my PhD research, presented during the 5th Public Procurement Research Students Conference of the Procurement Research Group of Nottingham the 12th-13th September 2011 and to the 1st Conference of the Postgraduate and Early Professionals/Academics of the Society of International Economic Law (PEPA/SIEL) in Hamburg, 27 and 28 January 2012

³ Thomas Cottier, "Multilayered Governance, Pluralism and Moral Conflict," *Indiana Journal of Global Legal Studies* 16, no. 2 (2009).

according to the analysis that will be conducted in the following chapters.

The adoption of this theoretical paradigm in the study of public procurement is an innovative approach with a great normative potential. The fragmentation of national, regional and international regimes of procurement regulation is strictly linked with the phenomenon of the “global revolution” of public procurement⁴. In the last twenty years, in fact, an increasing number of states have radically changed the national procurement regulations. At the same time, international instrument regulating public procurement toward market liberalization have grown, together with the growing importance of formal and informal international coordination of public procurement practices. These developments at different levels of the regulatory framework of government procurement’s regulations raise a number of unresolved questions on the relation between the domestic and international regulations of public procurement, a field traditionally belonging to domestic affairs.

The fragmentation of the instruments regulating public procurement is not necessarily based on the assumption that the different national and international levels of public procurement regulation are in conflict with each other. Domestic and international regulations of procurement, even if based on different regulatory scopes, can also mutually support and compensate each other. However, there is a wide margin of uncertainty on which extend the objectives inspiring the different domestic and international procurement regulations are conflicting, resulting in contradictory rules on the award of public contracts. Moreover, to properly understand the different perspectives on procurement regulation and the shift in the procurement governance it is crucial the choice of an appropriate theoretical framework, particularly in order to strike a balance between competing policy objectives and values. The analysis of the different perspectives on procurement regulation in the framework of the doctrine of multilayered governance is the purpose of this chapter.

⁴ Thomas Cottier, "Trade and Human Right: A Relationship to Discover," *Journal of International Economic Law* 5 (2002).

II.1 The analytical and normative dimensions of the doctrine of the multilayered governance

The doctrine of the multilayered governance represents an analytical and a normative approach to the problem of the constitutionalisation of international economic law, combining the attention of Jackson on the allocation of regulatory powers⁵ with the focus of Petersmann on constitutional normative values⁶. The ultimate scope of the analytical description of the reality of multilevel governance consists, in fact, in the formulation of a possible coherent architecture of multilayered governance, in the framework of the controversial debate on the constitutionalisation of international law.

Every constitutional system is, in fact, composed by a different set of rules and regulations on different levels of integration, deriving from different sources of law but linked by common structures and principles⁷. To illustrate the idea of the complex structural organization of the multilevel governance, Prof Cottier suggested the image of a five-storey house, taking as example the case of Switzerland⁸. These layers, represented by local, sub-national (cantonal or sub-federal), national, and possibly regional, and global rules, are complementary and interact with each other, with a system of vertical checks and balances that assure the coherence between the layers. "*The crucial point is to conceive international, regional and domestic levels as a single and ideally coherent regulatory architecture of multilayered governance*"⁹.

A crucial aspect of the doctrine of the multilayered governance is represented by the core set of common constitutional principles

⁵ John Jackson, "The Wto 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited," *The European Journal of International Law* 4, no. 1 (2001).

⁶ Ernst-Ulrich Petersmann, "Human Rights, Markets and Economic Welfare: Constitutional Functions of Emerging Un Human Rights Constitution," in *International Trade and Human Rights: Foundations and Conceptual Issues*, ed. Frederick Abbott, Christine Breining-Kaufmann, and Thomas Cottier, *Studies in International Economics* (Ann Arbor: University of Michigan Press, 2006).

⁷ Thomas Cottier, "The Prospect of 21st Century Constitutionalism," *Max Planck yearbook of United Nations Law* 7 (2003). 306

⁸ Ibid.

⁹ Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* 81 (1997).

and regulatory structures, presented in all the different levels of governance and ensuring the overall coherence in the layers¹⁰. These common constitutional principles represent not only the common moral ground of all the layers of governance but they also consists in the principal mechanisms of vertical check and balance and the key pillars of the multilevel structure: they represent the major restriction to domestic legislative powers, being enforced, at the same time, at regional and international level. The respect of human rights and the rule of law, together with the principles of good faith and equal competitions should be the constant normative benchmarks for the improvement of fairness and coherence of the allocation of regulatory powers and for the development of the regulations in each level of governance¹¹.

However, the sources of conflict and legal disagreement are, in fact, not just an abstract disagreement on principles: common values are universally embraced in their abstract terms but they are highly disputed in their concrete implementation¹². The evaluation of conflicting values should be based on rational decisions and it has to produce justifiable solutions to normative problems, obtained with the recourse to clear and fair legal

¹⁰ Thomas Cottier, "Cosmopolitan Values in International Economic Law: Myths and Realities," in *Universality: From Theory to Practice. An Intercultural and Interdisciplinary Dabate About Facts, Possibilities, Lies and Myths*, ed. Beatrix Sitter Liver (Fribourg: Academic Press Fribourg 2009).

¹¹ Thomas Cottier et al., "Introduction: Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundations," in *The Prospect of International Trade Regulation. From Fragmentation to Coherence*, ed. Thomas Cottier and Panagiotis Delimatsis (Cambridge: Cambridge University Press, 2011), 35.

¹² A significant example - particularly relevant for the social use of public procurement - is represented by the factual interpretation of the concept of distributive justice in international law. The idea of distributive justice, in fact, is a basic concept inspiring many constitutional systems, but particularly controversial in the concretization at legislative and judicial level, especially when balanced with other social and economic values. Robert Norzick, "Distributive Justice," *Philosophy & Public Affairs* 3, no. 1 (1973).

procedures¹³. For this reason, the final realization of an appropriate compensation between conflicting values is strictly influenced by the procedures adopted. The function of appropriately balancing conflicting values thanks to stable and transparent procedures becomes nowadays of a crucial importance: striking a balance between economic interests and socio-environmental concerns is probably one of the major challenge experienced at the moment in international law, struggling with the legal systematization of the concept of sustainable development¹⁴. For these reason, the focus on procedural guarantees is a distinctive characterization of the doctrine of multilayered governance and a crucial aspect in this research. *“The prospects of multilayered governance therefore strongly depend upon the level of shared procedural avenues established at, and among, different layers of governance”*¹⁵.

II.2 The application of the multilayered governance in the field of public procurement and the three abstract models of procurement systems

The use of public procurement for social purposes is an interesting starting point to assess the theory of the multilayered governance: it represents the case of a concrete application of conflicting values in a complex legal field structured in different levels of governance, fragmented in both horizontal and vertical way. In particular, the social use of public procurement represents a case of possible conflict between two sets of normative principles, not only a more abstract tension between the principle of non-discrimination and the protection of human rights in the broad framework of international economic law, but also a specific divergence between the objective of “value for money” and the achievement of social policies with public contracts, including the protection of labour rights. Moreover, it also represents the possible case of conflict between the models of procurement regulation built around the diverging principles.

¹³ Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

¹⁴ Cottier, "Multilayered Governance, Pluralism and Moral Conflict," 663-66.

¹⁵ *Ibid.*, 24.

And in order to strike a balance between the need of the realization of social objectives and the need of a fair liberalization of the procurement markets, it would be useful to start the analysis and the subsequent harmonization effort from the study of the shared common procurement objectives. The study of the goals as basic aspect of the public procurement rules hasn't been particularly explored in the academic literature, and the efforts of systematization have produced contrasting classifications until now¹⁶. Apart from the overarching principle of best value for money, it is possible to identify three main "*most readily identifiable policy objectives*" between the various procurement goals: economic efficiency, promotion of social and political objectives and trade liberalization objectives¹⁷. Procurement regulations, in fact, have been evolved in different context with different cultural and legal backgrounds but around a limited number of sets of principles, at the basis of the motivations and specific procedural contents in the various procurement regulations. The purpose of this analysis moves from the study of the principal procurement objectives, to have a better understanding of the nature of the different procurement systems in order to verify the possible convergences between them.

On the base of these three sets of objectives is, in fact, possible to construct three different models of abstract procurement regulations: an economic, a social and an international model. These models do not exist in pure isolation in the real procurement dynamics; they represent academic abstractions serving the purpose of identify the major policies pursued and the procedural guarantees set in the different public procurement systems, conforming to each specific set of principles. Due to the complex nature of any public procurement activity, it is particularly difficult that a domestic procurement regulation is oriented to the realization simply of one unique objective. Public procurement is essentially a complex activity that necessarily requires a multidimensional approach: it is primarily an economic relationship in which the identity of the purchaser is constituted by an entire government, operating through an articulated

¹⁶ Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law," *Public Procurement Law Review* 11 (2002).

¹⁷ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford: Oxford University Press, 2005), 59.

bureaucratic apparatus and bound by international commitments¹⁸. For these reason, every domestic procurement system is naturally the result of different influences and elements belonging to different abstract models, but evolving and adapting to the specific national context. However, a closer analysis of the motivations behind the different procurement regulations represents an important starting point for the study of the implications of these differences in the regulations.

Around of the principle of efficiency, it is possible to construct an economic model of procurement regulation, interpreted as an instrument to achieve the objective of economic welfare, based around the idea of the “*Pareto-efficient allocation of society's scarce resources*” in the market¹⁹. Apart from the strict economic approach, it is also possible to orient procurement regulation to the support or the achievement of “non-economic” objectives. These types of industrial and social policies pursued in public procurement are generally referred as “secondary” policy, in addition to the primary objective of best value for money in the mere acquisition of good and services²⁰. These procurement practices make are at the base of a social model of procurement, using the importance of the government influence on the markets, as dominant buyer for most goods and services, extending the concept of value for money also to the political priority of the maximization of the welfare in the society can be subjected to different distinction²¹. Moreover, around the principle of non-discrimination, various international agreements regulating

¹⁸ Ibid., 5-6.

¹⁹ Federico Trionfetti, "Discriminatory Public Procurement and International Trade," *The World Economy* 23, no. 1 (2000).

²⁰ The term of secondary policy is mainly used in the EU context while according to US terminology it is more frequent to refer to them as “collateral” policies. However, a strong component of the procurement literature adopted the definition of “horizontal” for social and environmental policies in public procurement, in an alternative parallel position to the objectives of efficiency and value for money. Sue Arrowsmith, "A Taxonomy of Horizontal Policies in Public Procurement," in *Social and Environmental Policies in Ec Procurement Law*, ed. Sue Arrowsmith and Peter Kunzlik (Cambridge: Cambridge University Press, 2009), Sue Arrowsmith, "Horizontal Policies in Public Procurement: A Taxonomy," *Journal of Public Procurement* 10, no. 2 (2010).

²¹ Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, 205.

public procurement have been concluded²². In these international models of procurement regulation, the principle of non-discrimination is generally supported by transparent procedural regulations in the award of the public contracts and rules against corruption and patronage, representing important barriers highly distortive for the international trade in public procurement²³.

II.3 International Instruments regulating public procurement and the possible horizontal collisions between different international regimes

Clashes between different ethical rationales and diverging policy objectives, resulting in conflicting norms²⁴ can be mirrored in the horizontal fragmentation of different legal regimes widely observed in the field of public procurement, essentially linked to the growth in the international instruments of procurement regulations²⁵.

In the last twenty years, international and regional agreements regulating procurement toward the principles of free trade have progressively required governments to liberalize their procurement markets on a non-discriminatory basis, taking clear commitments on procurement market access. The major instrument for the procurement liberalization on international basis is the Government Procurement Agreement (GPA), one of the plurilateral agreements in the WTO framework, perfectly respondent to the international model of procurement regulation. In the GPA, in fact, public procurement is interpreted and disciplined as a non-tariff barrier to free trade, focusing on the elimination of discriminatory and protectionist practices, enhancing transparency and fostering international competition in

²² Sue Arrowsmith and Arwel Davies, *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998).

²³ Transparency International. "Handbook for Curbing Corruption in Public Procurement." ed Kenneth Kostyo. (Place Published: Transparency International, 2006),

http://www.transparency.org/global_priorities/public_contracting.

²⁴ Panagiotis Delimatsis, "The Fragmentation of International Trade Law," *Journal of World Trade* 45, no. 1 (2011): 97.

²⁵ Arrowsmith and Davies, *Public Procurement: Global Revolution*. Sue Arrowsmith and Martin Tybus, *Public Procurement: The Continuing Revolution* (London: Kluwer Law International, 2002).

procurement²⁶. Moreover, a number of procurement agreements oriented to free trade liberalization have been largely adopted at regional level²⁷, first and most significantly with the European Union²⁸ but also in the APEC Forum²⁹, in the NAFTA Chapter 10³⁰, and the COMESA procurement directives³¹. In addition to the international and regional level of trade instruments regulating procurement, a large number of bilateral agreements have been also concluded; increasing the level of complexity in the network of the market access obligations included in international procurement regulations³².

However, the increased number of preferential trade agreements (PTAs) does not seem to produce serious risks of conflicts between the specific content of these different sets of procurement norms. The specific government procurement obligations included in these bilateral and preferential trade agreements broadly cover the same legal principles of non-

²⁶ Bernard Hoekman and Petros Mavroidis, "Basic Elements of the Agreement on Government Procurement," in *Law and Policy in Public Purchasing: The Wto Agreement on Government Procurement*, ed. Bernard Hoekman and Petros Mavroidis (Ann Arbor: University of Michigan Press, 1997).

²⁷ Sue Arrowsmith, John Linarelli, and Don Wallace, *Regulating Public Procurement: National and International Perspective* (The Hague: Kluwer Law International, 2000), 219-29.

²⁸ Major general works on the EU procurement system: Christopher Bovis, *Ec Public Procurement Law* (Cheltenham: Edward Elgar, 2008). Peter Trepte, *Public Procurement in the Eu: A Practitioner's Guide* (Oxford: Oxford University Press, 2007).

²⁹ Sue Arrowsmith, "Public Procurement within the the Asia-Pacific Economic Cooperation Forum," *Public Procurement Law Review* 5 (1996).

³⁰ Stephen Greenwold, "The Government Procurement Chapter of the North American Free Trade Agreement," *Public Procurement Law Review* 3 (1994).

³¹ Stephen R Karangiz and Isaac Ndahir, "Public Procurement Reforms and Development in the Eastern and Southern Africa Region," in *International Public Procurement: A Guide to Best Practice*, ed. Roberto Hernández Garcia (London: Globe Law and Business, 2009).

³² Stephen Woolcock, "The Interaction between Levels of Rule-Making in Public Procurement," in *Trade and Investment Rule-Making. The Role of Regional and Bilateral Agreements*, ed. Stephen Woolcock (Tokyo: United Nations University Press, 2006).

discrimination included in the GPA³³. In the large majority of the cases, the provisions in PTAs are precisely based on the text of the 1994 WTO Government Procurement Agreement or on the negotiating offers of the main GPA's parties³⁴. Preferential agreements with specific procurement commitments appear to be parallel and complement to the multilateral discipline, also preparing for a possible future accession to the GPA the countries that haven't ratified it yet. For this reason, the fragmentation induced with the development of PTAs consists mainly in a fragmentation of membership and possible jurisdiction of the different regimes, and not a fragmentation of concrete specific norms.

However, the characterization of the horizontal fragmentation as collision between different legal systems based on diverse ethical and political rationales it is also clearly visible in the analysis of the various international instruments regulating procurement, based on different objectives. Together with the international and regional agreements regulating the liberalization of public procurement, there are also other international instruments regulating procurement but aimed at addressing different concerns, with non-trade objectives. If, as exposed before, it is possible to construct three different abstract models of procurement regulations on the analysis of the major objectives of the regulation, it is also possible to verify the presence of these three models of procurement regulation at the international level.

The UNCITRAL Model Law on Procurement of Goods, Construction and Services represents an international instrument, designed as

³³ In the PTAs notified to the WTO Secretariat since 2000 to now, only 28% of them include specific detailed provisions on government procurement. 37% of the registered PTAs have no mention to government procurement and the 35% include only basic provisions on public procurement, referring in a broad sense to procurement liberalization as a general objective of the agreement. See Robert Anderson et al., "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to the Gpa Accession?," in *The Wto Regime on Government Procurement: Challenges and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011).

³⁴ In the case of RTAs signed by the EU or the US with countries not GPA's parties it is common practices to base the text of the agreement on the respective negotiating offer of EU and US in the WTO forum.

a voluntary model of law, with the clear purpose of establishing good practices of public procurement regulations and of guiding national governments - particularly developing countries - in the reform of their procurement regulations³⁵. Although it emphasise the important of the maximization of competition and efficiency in procurement, the UNCITRAL Model Law is assimilable to a social model of regulation: it recognises the use of procurement as a instrument to achieve secondary policies, allowing certain flexibilities in particular in the case of industrial policies. It is an international instrument based on the realization of domestic objectives, but external to the procurement process. The UNCITRAL Model Law not exclusively focuses on the promotion of trade thought the elimination of discriminatory practices but it aims at providing guidance to government in order to achieve the typical internal procurement objectives of the value for money, efficiency, integrity and equal treatment of the suppliers³⁶.

Moreover, there is also another type of international instruments regulating public procurement with objectives diverging from trade liberalisation: the procurement guidelines of international aid institution, first of all the World Bank. Most of the international aid institutions, in fact, have strict procurement regulations aiming at assuring the effective spending in the aid-funded procurement process³⁷. The primary objective on these procurement regulations consists in the effectiveness of the aid, supported by mechanisms to supervise and monitor the entire procurement process; for this reason, the procurement regulations of multilateral development banks can be interpreted as responding to the economic model of procurement regulation, even if with significant differences from the abstract model.

For all the reasons previously examined, the main source of divergence and fragmentation in the international framework of procurement regulation seems to be associated to the

³⁵ Robert Hunja, "The Uncitral Model Law on Procurement of Goods, Contruction and Services and Its Impact on Procurement Reform," in *Public Procurement: Global Revolution*, ed. Sue Arrowsmith and Arwel Davies (London: Kluwer Law International, 1998).

³⁶ Arrowsmith, Linarelli, and Wallace, *Regulating Public Procurement: National and International Perspective*, 253-57.

³⁷ Chee Khoon Chan, "The World Bank Development Agency, Credit Union, or Institutional Dinosaur?," *International Journal of Political Economy* 37, no. 1 (2008).

divergences in the objectives of the various models of regulations, resulting in contrasting procedural regulations. These international procurement instruments are particularly influential at national level in completely different way. If the GPA represents a strong regulatory system relying on the WTO Dispute settlement body for its implementation, the international financial institution guidelines have a central role in the procurement of goods and services involving granted funds, at the same time, been widely used as a base for the reform of the national procurement systems, together with the UNCITRAL model law. Moreover, the different international organizations driving the development of these different procurement regimes rely on differentiated memberships of comparable force, only partially overlapping. However, the study of the objectives and the deriving regulations of the major international instruments – respectively the GPA, the UNCITRAL Model Law and the World Bank procurement guidelines - will be further articulated, and the differences in these regulatory models will be highlighted, using the inclusion of labour rights protection in public procurement as specific case study of the research.

III. PROCEDURAL GUARANTEES FOR THE INCLUSION OF LABOUR RIGHTS IN NATIONAL PROCUREMENT PRACTICES

The methodological and theoretical apparatus of the research finds its case study in the use of public procurement for the enforcement of labour policies, without compromising the achievement of the primary objective of value for money in the procurement process. From a procedural perspective, every stage of entire procurement process, also the execution phase³⁸, offers

³⁸ In contradiction with all the methods previously analysed, it is also possible to enforce the respect of labour policies through procurement policies specifically relating to the execution phase of the contract. Contract performance conditions do not consist per se in non-discriminatory practices, setting parameters of compliance that have to be applied to all potential contractors, and they do not undermine “value for money” considerations. As openly supported in the European regulation of public procurement (Recital 33 of Directive 2004/18/EC) and in the official interpretation of the EU directives, interesting example of conformance with the core ILO conventions in the execution of a contract are frequently provided by the European countries, like in the case of the governmental regulation of timber procurement in Sweden ,

different procedural solutions for the inclusion of social and labour standards with relevant consequences on the degree of competition in the procurement market³⁹.

Set-asides can be considered one of the most traditional uses of social procurement, assuring rapid and visible and economic benefits to the targeted groups, guaranteeing the immediate allocation of the public contracts. They have been widely used not only in US⁴⁰ but also in Canada, Malaysia, South Africa and Australia⁴¹. However, this method of enforcement of social rights implies major limitations⁴²: the level of competition for the contracts is drastically reduced to uncompetitive favoured groups, with extra costs for the governments and losses in the efficiency of the whole procurement process⁴³.

Technical specifications, in particular with the use of functional requirement⁴⁴, represent another interesting opportunity for the contracting authority to include a reference to social and labour

the UK public transport for London or in France for the municipality of the city of Paris.

³⁹ Arrowsmith, Linarelli, and Wallace, *Regulating Public Procurement: National and International Perspective*.

⁴⁰ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (New York: Oxford University Press, 2007).pp. 167-175

⁴¹ With the same rationale of restoring an equality status in the employment context between minority groups, set-asides were adopted in Canada to favour business controlled by Aboriginal people, in Malaysia in order to stimulate the growth of Malaysian Bumiputera companies, as well as in South Africa and in the Australian state of Queensland. Christopher McCrudden and Stuart G. Gross, "Wto Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study," *European Journal of International Law* 17 (2006).

⁴² Arrowsmith, "A Taxonomy of Horizontal Policies in Public Procurement."pp. 137-138

⁴³ Ron B. Watermeyer, "Tools and Techniques to Facilitate the Alignment of Public and Donor Procurement Systems to Promote Sustainable Development Objectives," *Public Sector Procurement Law Review*, no. 1 (2004).

⁴⁴ The needs of the contracting authority can be translated into three main types of specification: design, performance and functional specifications. Arrowsmith, Linarelli, and Wallace, *Regulating Public Procurement: National and International Perspective*.p. 407

considerations in public contracts. The inclusion at the specification stage is an interesting procedural solution: providing competitors with the freedom to offer innovative solutions meeting the minimum criteria in the specifications, the use of functional specification maximises competition and minimizes distortive effects on the procurement market. However, if compared to environmental criteria, it seems difficult to clearly link labour requirement to the ultimate performance or the use of the goods and services to procure⁴⁵, involving also high risks of intransparency in the whole procurement process.

Exclusion criteria offer another opportunity to effectively block the involvement in the procurement process of candidates in violation of not only of important national social legislations and international labour standards, like the main ILO Conventions. They limit the margin of discretion and ambiguity in the procurement process⁴⁶, efficiently penalising past violations of labour rights⁴⁷. A recent and promising example of the inclusion of ILO Core Conventions as minimum standards for exclusion criteria is given in the "Recommendations for the Federal Procurement Offices" that the Swiss Federal Procurement Commission⁴⁸.

Another common mechanism to implement labour policies in public contracts is the inclusion of social considerations (other than price) in the criteria for awarding the contract, including the evaluation of more general social objectives not strictly related to

⁴⁵ However, if, on one side, it is possible to easily translate environmental concerns into measurable requirements, there are, on the other side, no logical reasons to distinguish them from social and labour concerns.

⁴⁶ Arrowsmith, "A Taxonomy of Horizontal Policies in Public Procurement." pag. 140.

⁴⁷ However, the reference to convictions under labour law are sometimes misleading in the case of countries with poor enforcement of employment laws, where the reliance on legal process may not be sufficient to identify suppliers with poor standards.

⁴⁸ Released on November 2011, available at www.bbl.admin.ch/bkb. If the contract is performed in Switzerland the bidders have to guarantee conformance with the applicable Swiss health and labour regulations. In the Swiss guidelines, different minimum labour standards are set depending on the place of performance of the procurement contract: in the case of a contract performed abroad, it is mandatory the compliance with at least the eight ILO Core Conventions in the main components of the bidders' supply chain.

the subject matter of the contract⁴⁹, for example fighting long-term unemployment. It is possible to allocate preferences in the contextual evaluation of the qualities of the bids, as a fixed price and percentages preference⁵⁰ or in the form of additional award criteria only in the case of equality of the most advantageous tenders. This approach has been adopted in the pilot project on long-term unemployment of the 2002 Public Procurement Policy in Northern Ireland⁵¹ and in the case of the 2007 Spanish procurement regulation⁵². These recent examples in the design of award criteria design more transparent and reliable award methods, limiting the margin of discretion for the contracting authorities as well increasing transparency in the awarding phase of the procurement process⁵³.

⁴⁹ Arrowsmith, "A Taxonomy of Horizontal Policies in Public Procurement."p. 143

⁵⁰ The implementation of the Preferential Procurement Policy Framework Act 5 of 2000 in South Africa represents the most famous case of percentage preferences allocated on the base of the extent of the benefit for disadvantaged and discriminated groups on the basis of race, gender, ethnicity and disability. Ron B. Watermeyer, "The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects," *Public Procurement Law Review*, no. 5 (2000). Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics," *Public Contract Law Journal* Summer 2008, no. 37 (2008). John D. Taylor and Kishore Raga, "Preferential Procurement: A Case Study of South Africa " (paper presented at the 4th International Public Procurement Conference , August 26-28, 2010, Seoul, South Korea, 2010).

⁵¹ For selected contracts in the construction and services sectors, the Pilot Project required contractors to submit a Social Policy statement and Employment Plan, outlining proposals for recruiting and employing people from the target groups in Northern Ireland. Andrew Errige, "Public Procurement, Public Value and the Northern Ireland Unemployment Pilot Project " *Public Administration* 85, no. 4 (2007).

⁵² The discipline of the additional award criteria is set in the Sixth Additional Provision of the Law on Public Sector Contracts 30/2007 under the heading "Contracting with firms that have disabled or socially excluded people among their employees and with non-profit-making organisations". Teresa Medina Arnaiz, "Social Considerations in Spanish Public Procurement Law," *Public Procurement Law Review* 2 (2011), *ibid.*

⁵³ Arrowsmith, "A Taxonomy of Horizontal Policies in Public Procurement."p.145

IV. COMPARATIVE STUDY OF THE INTERNATIONAL INSTRUMENTS REGULATING PROCUREMENT TOWARDS DIFFERENT ULTIMATE OBJECTIVE: CONVERGENCE IN THE TENDER ASSESSMENT PROCESS

As proved before, the different international instruments regulating public procurement can be interpreted as responding to the three main abstract models of procurement systems, on the base of the study of the primary objectives of the regulation. In the theoretical framework exposed before, the scope of this research consists in proving a convergence, between these different international instruments, in the procedural solutions offered for the inclusion of labour clauses in procurement contracts. If it is possible to interpret the various international norms in a way to allow the inclusion of labour clauses in the conduct of the procurement process, and if it possible to observe a convergence between the procedural solutions that allow the inclusion of social purposes, it will be confirmed the existence of a procurement method satisfying at the same time the major objectives included in the various international agreement. The procurement method that is at the same time compatible with the provision of the GPA, and not in violation of the UNCITRAL Model Law or with the World Bank Guidelines, it is the method that guarantees the implementation of labour policies in public contracts and assures the achievement of the efficiency in the procurement process.

From the analysis it has to be felt apart, the 1949 ILO Convention on Labour Clause on Public Contract (together with Recommendation n. 84); the only international agreement that specifically and comprehensively deals with the enforcement of labour rights in public contracts. ILO Convention n. 94 aims, in fact, at assuring that the workers involved in a public contract enjoy at least the minimum standards in term of wages and labour conditions normally established by the same type of work at local level⁵⁴. Even if it highly influential, unfortunately the ratification and the implementation of the Convention n.94 have

⁵⁴ International Labour Organization, "International Labour Conference," in *General Survey concerning the Labour Clauses (Public Contracts) Conventions, 1949 (No. 94) and Recommendation (No. 84)*, ed. International Labour Office (Geneva: 97th Session 2008).

not been particularly extensive and consistent until now and these international instrument does not represent an influential instrument of regulation.

IV. 1 Admissibility of the Inclusion of Labour Rights under WTO Procurement Law

The conformity with the WTO Procurement law – with the GPA 1994 and as well as with the Revised Text of the GPA - of procurement policies aiming at enforcing social objectives is highly disputed in the academic literature. The WTO Procurement regulation allows, in fact, the use of social procurement practices only if in compliance with the principle of national treatment and MFN, as well as with the rules on transparent award procedures or if they can be justified under the GPA Article XXIII exceptions.

Procurement practices implementing social and labour objectives often imply discrimination, *de jure* or *de facto*, against non-nationals, very likely to result in violation of Art.III:1, requiring foreign suppliers to be treated no less favourable than to domestic products, services and suppliers⁵⁵. However, procurement policies limited to the compliance with legal requirement, in particular international legal standards (like in the reference to international standards in technical specification at Art. VI.2.b), as in the case of the ILO Core Labour Rights, are rarely in violation of the National Treatment principle⁵⁶.

The inclusion of production and workforce measures in technical specification, qualification conditions and award criteria is at the core of the debate concerning the admissibility of discriminatory practices based on “non-product related” processes and

⁵⁵ Sue Arrowsmith, *Government Procurement in the Wto* (The Hague: Kluwer Law International, 2003),pp. 325 - 357

⁵⁶ The approach used in the ILO Convention n. 94 “*Labour Clauses in Public Procurement*” is a clear application of the national treatment principle. Article 2(l) of the Convention provides, in fact, the inclusion of favourable working conditions to be “*not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on*” by collective machinery or other recognised negotiation method, arbitration award or national legislation”. International Labour Organization, "International Labour Conference."

production methods (non-PPM) in the GPA context⁵⁷. In the interpretation of the GPA, there is a considerable uncertainty concerning the extent of government authorities' contracting power to influence or exclude suppliers that do not meet specific labour conditions⁵⁸. The Revised Text of the GPA only partially clarifies the situation, including an explicit permission to use technical specification only aimed at the protection of the environment and no specific mention of other secondary objectives, such as promotion of human rights or core labour rights⁵⁹.

With respect of the inclusion of labour right enforcement measures, the options offered by the GPA in the regulation of the award criteria are interesting for going beyond strictly commercial criteria. Article XIII(4) allows the award of public contracts to lowest or "most advantageous" tender, with the possibility to also include the consideration of social benefits in performing the contract⁶⁰.

Nevertheless, discriminatory policies based on social considerations may be justified under the exceptions in GPA Article XXIII. Derogations to national treatment and rules on award

⁵⁷ It must be kept in mind that it is not possible to easily extend in the procurement context, the Appellate Body's approach, due to the fact that the issue of "likeness" is excluded from the context of the GPA. GPA prohibits discrimination of "products" and not of "like products". Arrowsmith, *Government Procurement in the Wto*.

⁵⁸ McCrudden and Gross, "Wto Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study." McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change*.pp. 474-491

⁵⁹ Article X:6 of the Revised text should be read together with the definition of the term "technical specifications" in Article I(t), which includes specifications not only in relation to the product itself, but also to the processes and methods of its production – aspects that often are the target of environmental regulations. Moreover, GPA 2006, Article IV.3 allows price preferences and offsets even if time limited and subject to specific detailed rules. Arie Reich, "The New Text of the Agreement on Government Procurement," *Journal of International Economic Law* 12, no. 4 (2009).

⁶⁰ Christopher McCrudden, "International Economic Law and Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Law Under the Wto Government Procurement Agreement," *Journal of International Economic Law* 3 (1999).

procedures expressively apply to measures necessary to protect public morals or human, animal or plant life or health or produced by handicapped persons, prison labour or philanthropic institutions. Moreover, an extensive interpretation of the concept of "public morals and order" would easily cover exceptions based on human and labour rights justifications. However, it seems to be particularly controversial the legitimacy of procurement policies with clear extra-territorial effects⁶¹.

IV.2 Labour Considerations under the UNCITRAL Model Public Procurement Law

The 1994 Model Public Procurement Law of the United Nations Commission on International Trade Law (UNCITRAL) as particularly influential non-binding instrument, is designed to serve as a guide to foster good governance and efficiency in public procurement, directed at increasing the economic efficiency and transparency⁶².

The Model Law, simultaneously discouraging any form of discrimination in public contracts, provides for the possibility to use procurement as an instrument of industrial policy. Other social policies, including the protection of human and labour right, are not extensively recognized in the Model and, according to an extensive interpretation, can be regulated on the basis of the similar mechanisms used for industrial policies⁶³. Instead of including labour consideration in the technical specifications, the provisions of the Model Law suggest a preference in the possibility to take into account social concerns in the evaluation of bids, identifying two possible solutions⁶⁴.

⁶¹ Arrowsmith social policies under the GPA

⁶² John Linarelli, "The Wto Agreement on Government Procurement and the Uncitral Model Procurement Law: A View from Outside the Region," *Asian Journal of WTO & International Health Law and Policy* 1 (2006).

⁶³ Sue Arrowsmith, "Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard," *The International and Comparative Law Quarterly* 53, no. 1 (2004).pp.42 - 44

⁶⁴ Article 16 of the UNCITRAL Model Law regulates the drafting of technical specifications in a way to not constitute an obstacle or a restriction to the participation of firms, based on nationality. For this reason, it would be preferable the inclusion of social concerns in the evaluation of bids, forcing the competing firms to include the calculation

First, an efficient opportunity to enforce labour right could be represented by including their violation between the exclusion situations: Article 6(1)(iv) allows contracting authority to exclude competitors on the base of non payment of tax and other social contributions, putting it on the same level as to non-compliance with other social criteria. Second, Article 34(4)(c) includes the possibility of specified industrial preferences in the evaluation for the contract award, in the identification of the “lowest evaluated tender”⁶⁵. The two provisions seems to suggest the possibility to include the consideration of some basic labour rights in the evaluation of bids, both in the step of the exclusion situation both as award criteria, and, at the same time, promote efficiency and transparency in the procurement process⁶⁶.

IV. 3 The World Bank Procurement Guidelines and the inclusion of Labour Policies

The procurement guidelines of international financial institutions, at international and regional level, have a decisive influence in the processes of reform and harmonization of national public procurement systems, largely introducing labour and social

of social costs of the bids. Arrowsmith, Linarelli, and Wallace, *Regulating Public Procurement: National and International Perspective*.pp. 254 - 255

⁶⁵ The Model Law expressly considers the possibility to allocate preferences also on the basis of “*the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills*”.

⁶⁶ Article 34(4)(d) provides for additional guarantees in the application of preferences in the award of the contract, stating that “*If authorized by the procurement regulations, in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings*”. Article 22 of the Enforcement of the Model Law provides additional safeguards.

standards in their operations⁶⁷. In particular, the World Bank Procurement Guidelines and the Consultants Guidelines offer wide policy space, including different provisions directly addressing the possibility to include social concerns in the different procurement methods, like for example in the Country Procurement Assessment Reports (CPARs)⁶⁸.

One of the four major objectives of the World Bank procurement Guidelines consists, in fact, in the “*encouraging the development of domestic contracting and manufacturing industries in the Borrowing country*”⁶⁹ (Article 1.2). The inclusion of the protection of a national industry as a procurement objective represents, in fact, the main difference of the World Bank regulation, especially compared to the non-protectionist approach of the WTO, and it drastically changes the extent in which social policies are pursued in procurement projects financed by the Bank⁷⁰.

⁶⁷ Franz Ebert and Anne Posthuma, "Aligning Private Sector Investment and Labour Standards? The Case of Policies of Development Finance Institutions," in *Key lessons from the Crisis and Way Forward*, ed. International Labour Office (Geneva: 2011).

⁶⁸ In the case of Ghana in 2003, a CPAR specifically referred to ILO Convention n.94, suggesting that “procuring entities must ensure that clauses on labour standards (fair wages, health and safety measures and social security) are incorporated in works contracts and enforced by contract managers” World Bank: Ghana, CPAR – 2003, Main report, doc. No. 29055, Vol. 2, June 2003, p. 32. More on the CPAR Christopher L. Pallas and Jonathan Wood, "The World Bank's Use of Country Systems for Procurement: A Good Idea Gone Bad?," *Development Policy Review* 27, no. 2 (2009).

⁶⁹ The other principles on the base of the WB Procurement Guidelines are with the need for economy and efficiency, the guarantee of equal opportunities to all eligible bidders and of transparency in the procurement process. *Guidelines Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by The World Bank Borrowers*, January 2011, Available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

⁷⁰ Marta De Castro Meireles, "The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects" (PhD Thesis, University of Nottingham, 2006).pp. 221-226

In the World Bank Guidelines, if there is no clear indication on the possibility to draft technical specifications based on certain production methods, specifications based on international standards are allowed according to section 2.19, opening the door for an inclusive interpretation of ILO core Labour Standards.

Specifically concerning the exclusion criteria, the Procurement Guidelines reaffirm the importance of opening up the procurement markets regardless of the nationality of the competitors, providing for two possible exceptions. First, in Section 1.8, the Guidelines include some flexibility in the inclusion of concerns external to the procurement process, e.g. in the case of violation of human rights⁷¹. Second, the rules in Section 1.16 concerning the exclusion of contractors engaged in corruption even without a criminal conviction raise the question of the admissibility of imposing the same sanctions for the violation of core labour standards⁷².

On the other hand, the option of incorporating labour concerns in the evaluation of the financial and technical capacity of the contractors to perform the contract seems to be excluded from the interpretation of the Guidelines at the qualification stage. Moreover, also in the case of award criteria, there is no clear guidance about the evaluation of the proposals on the base on social criteria, eventually stated in the bidding documents. The World Bank Procurement Manual states that *“factors other than price to be used for determining the lowest evaluated bid shall, to the extent practicable, be expressed in monetary terms, or given a relative weight in the evaluation provisions in the bidding*

⁷¹ It would be possible to exclude firms since *“(i) as a matter of law or official regulation, the Borrower’s country prohibits commercial relations with that country... (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Borrower’s country prohibits any import of goods from, or payments to, a particular country, person, or entity”*. Firms from countries where are registered poor human rights records can be excluded from public contract, in case of a general trade restriction imposed at national level on their country of origin. In this case, it is also controversial the conformity of the Burma/Massachusetts case with the World Bank Guidelines. Ibid.pag. 248

⁷² Arrowsmith, "Horizontal Policies in Public Procurement: A Taxonomy."pag. 156

documents”(Section 19.3), therefore drastically restricting the options for the inclusion of social factors in the evaluation⁷³.

CONCLUSIONS

In the context of the fragmentation of the public procurement regulations, the priority of this research is to conduct, a comparative analysis between the major international instruments of procurement regulation in order to observe a convergence in the procedural regulations allowing the inclusion of social and labour policies.

Based on the assumption that there is no an optimal or appropriate procurement system, international agreements regulating public procurement towards market liberalisation, instruments regulating procurement towards industrial and social objectives and procurement guidelines of international development institutions and agreements based on efficiency and non-trade concerns can be interpreted as reflections of the three abstract models of procurement regulations. And these models of procurement regulation are built around the policy objectives and principles that can be achieved in the procurement process.

The focus on shared procurement principles and objectives is offered by the doctrine of multilayered governance and it will be a constant in the following analysis. Thanks to the analysis of the different procurement policy objectives, it will be possible to understand the rationales behind the various international procurement regulations, in order to comprehend the differences in the procedural guarantees provided by the different systems and to identify convergences and divergences, with the purpose of achieving a greater coherence in the international system of procurement norms.

From the comparative analysis of the key international instruments, it emerges a common preference for the inclusion of social and labour considerations in the tender assessment

⁷³ Bank-Financed Procurement Manual, Procurement Policy and Services Group, Operations Policy and Country Services, Edited January 29, 2003, available at <http://siteresources.worldbank.org/PROCUREMENT/Resources/pm7-3-01.pdf>

process. The social model of procurement regulation, embodied in the UNCITRAL Model Law, seems to offer the same procedural solution shared by the GPA International model and the World Bank guidelines oriented to the efficiency of the procurement process. For these reasons, exclusion situations and award criteria seem to be the procedural guarantees that better ensure an effective enforcement of labour rights, assuring at the same time effectiveness and compliance with international obligations.

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