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INTERNATIONAL SOFT LAW PRINCIPLES ON PUBLIC ACQUISITION CONTRACTS

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1. INTRODUCTION

Addressing the issue of principles in international soft law relating to public contracts implies accepting the polysemic meaning of « principles ». Set asides the discussion about the public contracts notion, here understood as public purchasing contracts[2] including both public procurement contracts and PPPs, this chapter must deal with a vocabulary that is extremely fluctuating, since the various terminology (« standards », « guidelines », « codes of conduct », « declarations of principles », « guiding principles ») and the substance of these « principles » evolve, and vary in space and time. Moreover, this plasticity is reinforced when the said « principles » are forged both at the international and domestic levels, alternatively or in parallel, either in public and/or private arenas. Ultimately, emblematic of the consecration of flexible law, some of these principles may precede, follow in, or even become hard law.

The recognition of soft law has been debated in international law, which some French Academics, like Prosper Weil[3], have seen threatened by its construction[4]. However, the autonomy of soft law has been more easily accepted in the field of international economic law[5]. It was precisely in this field that the technique of flexible law appeared and flourished.

[2] As a suggested translation for the French expression "Commande publique".

[3] P. WEIL, *Vers une normativité relative en droit international?*, Revue Générale de Droit International Public, 1982. In English: « Towards Relative Normativity in International Law? », American Journal of International Law (AJIL) 1983. « It is the second most cited article in AJIL's history », in K. KNOP, Introduction to the Symposium on Prosper Weil, « Towards Relative Normativity in International Law? » (March 2, 2020). 114 AJIL UNBOUND 67, 2020, Available at SSRN: https://ssrn.com/abstract=3547717.

[4] « By relative normativity in international law, Weil meant first the phenomenon of blurring the threshold between legal and non-legal norms, particularly by attributing a certain normative force to the acts of international organizations », K. KNOP. Op.cit.

[5] P-M DUPUY ET YANN KERBRAT, *Droit international public*, 13 éd, Dalloz. p.756.

Identified 45 years ago in a famous article by René-Jean Dupuis[6], it has today invaded all areas of law, both international and domestic.

Crossing the notion of principles with that of flexible law presents an obvious danger: that of redoubling uncertainty, since principles certainly produce norms, but the content of the principles is itself sometimes elusive, while flexible law without binding character may be difficult to grasp. However, and because these few lines cannot exhaust these questions, which come under the theory of international law[7], the subject of public purchasing contracts makes it possible to attempt to discover the principles in formation, when they are born of the synthesis of sometimes distant legal systems and before they are then transcribed into the binding obligations of hard law.

The programmatic, consensual, evolving, multidisciplinary character of international soft law, at a time when the boundaries between private and public law, between domestic, regional, and international levels, and even between legal systems, are becoming blurred, has proved to be particularly well adapted to the topic of transnational commercial relations[8]. The UN and some of its subsidiary bodies, but also universal institutions with a specialized vocation (e.g. FAO, ILO, WHO) as well as several regional organizations (OECD, EU, Council of Europe) were simultaneously seized from the 1960s onwards with all or part of the same problems, notably concerning economic development, trade, and, today, sustainable development including environmental protection. In turn, at the end of the

[6] R.-J. DUPUIS, *Droit déclaratoire et droit programmatoire : de la coutume sauvage à la soft law, in l'élaboration du Droit International Public*, colloque SFDI 1975.

[7] A. CASSESE, J. WEILER, *Change and Stability in International Law-Making*, 1986, pp. 66–101; OULEMI ELIAS AND CHIN LIM, *General principles of law', 'soft' law and the identification of international law*, Published online by Cambridge University Press, 2009.

[8] « Le droit transnational n'est donc ni du droit interne de l'Etat, ni du droit international, ni même du droit international privé ; c'est un droit mixte, un droit des confins qui se construit au moins en partie dans la zone de contact ou d'intersection de ces différentes branches du droit ». M. KAMTO, « *Les contrats d'Etat, une contribution au débat* », Rev. Arb., 2003, n°3, p. 743

70s' (1rts GPA) and even more in the 1990s (2nd GPA), the WTO became interested in questions of access to public procurement markets in promoting world trade. It is therefore not surprising that the field of public procurement, whose transnational dimension has been particularly accentuated in recent years, has also given rise to the emergence of standards and concepts of soft law in the field of international economic law. But this is not a linear process. Indeed, it must be emphasized from the outset that public procurement contracts and PPPs are today governed by standards of different legal force, public procurement contracts being now essentially subject to hard law or codified principles under international instruments (GPA, Trade agreements, EU Directives), while PPPs are still characterized by an abundance of soft law instruments[9], even if a turning point can already be detected with the European Directive on Concessions enacted in 2014.

One angle of research could be the interactions between EU Principles and International principles governing public acquisition contracts, but other chapters of this book are already thoroughly addressing this question. Hence, our perspective will focus on the supranational level, being understood as the supra-European level where soft law public purchasing principles have flourished in the recent decades. Forasmuch as the creation of principles in the context of flexible law is a privileged terrain for tackling the growing importance of international sources in the regulation of public purchasing contracts, it is not without raising questions about the scope, the function, and true nature of these principles. We will explore these questions through an overview of the international sources of soft procurement law instrument (2), enlightening their converging scopes and converging gaps (3), and potential explicit and implicit hierarchies (4), asking if soft law procurement « principles » are mainly driven by policies and objectives (5). Last, we will argue that we may be witnessing the slow but progressive construction of a *Lex mercatoria publica* based on both soft law principles and customary rules forged by international recognition (6).

[9] For example: European Bank for Reconstruction and Development, Core Principles for a Modern Concessions Law – selection and justification of principles prepared by the EBRD Legal Transition Team, 2005.

2. INTERNATIONAL SOURCES OF SOFT PROCUREMENT LAW INSTRUMENTS

International soft law principles are not only identified by their non-binding effect, something they share with domestic soft law instruments, but moreover by their origins. The diversity of their sources, which combines global, regional, domestic levels, may be understood as their main element of characterization. When considering international sources of the public contracts soft law category, one should notice the diversity of such sources, either public, private or mixed.

2.1. International Public sources

While the Statute of the International Court of Justice[10], in its Art. 38, identifies five sources of international public law:- (a) Conventions and Treaties between States; (b) International custom; (c) the « General principles of law recognized by civilized nations »; and, as subsidiary means for the determination of rules of international law: (d) Judicial decisions and the writings of « the most highly qualified publicists », international public soft law principles governing public purchasing contracts should pertain to the 3rd category. When it comes to the role of the supranational level in formulating these principles, it is interesting to discover a trend for specialization among international bodies operating in the area of public contracts, either working at the global level where the big 3 operate, or at the regional level with the EU as the most prominent example.

[10] Statute of the ICJ, 1945, https://www.icj-cij.org/en/statute.

Considering the global level, UNCITRAL[11] is a source that can be described as « primary » for the principles of international soft law in the field of public purchasing contracts[12]. This status could be recognized not only because of the anteriority of its intervention and the legitimacy of its action as a United Nations body specialized in International economic law topics, but also because of the medium in which its principles are formulated. UNCITRAL has been working on the issue of public purchasing contracts since the 80s' with the preparation of a first Model law on public procurement contracts adopted in 1993, then revised and updated with a new version published in 2011[13]. As a complement, the same UNCITRAL's Working Group turned to elaborate a Legislative Guide on Privately Financed Infrastructure Projects in 2000, the first ever synthesis on complex infrastructure contracts not yet called « PPPs »[14]. A new updated edition renamed « Legislative Guide on PPPs » was published in 2019, after a long battle among countries for and against the

[11] The United Nation Commission on International Trade Law (https://uncitral.un.org/) produces both International convention with biding effects (such as the United Convention Against Corruption – UNCAC https://www.unodc.org/unodc/en/corruption/uncac.html) and soft law instruments.

[12] L. MASTROMATTEO, *Internationalizing Public Contracts Through Model Laws: The Case of UNCITRAL Model Law on Public Procurement*, in S. Schill & M. Audit, *Transnational Law of Public Contracts*, Bruylant, Administrative Law coll., 2016, p. 407-435.

[13] UNCITRAL had a Working Group dedicated to Public procurement issues. It produced the Model Law on Procurement of Goods and Construction (1993), followed by the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) and its Guide to Enactment. They were updated by the UNCITRAL Model Law on Public Procurement (2011) (https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement) with reference to the UNCAC (entered into force in 2005), along with a Guide to Enactment (2012), a Guidance on Procurement Regulations (2013), which consolidates all provisions of the Model Law, and a Glossary (2013).

[14] As a matter of facts, in 1987, UNCITRAL published the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. After 8 years of work, in 2000, it adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (https://uncitral.un.org/en/texts/procurement/modelprovisions/privately_financed_infrastructure_projects) followed in 2003 by the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. For many years discussions were conducted among countries and International organizations about the opportunity to transform the Guide into a model law on PPPs. Finally in 2015, the Secretariat prepared a revision of the texts on infrastructure development. It led to the adoption by the Commission in 2019 of the UNCITRAL Legislative Guide on Public-Private Partnerships (https://uncitral.un.org/en/mlpppp) and the UNCITRAL Model Legislative Provisions on Public-Private Partnerships.

enactment of a Model Law on PPPs. Indeed, these ready-made soft law products, specially the model laws, attract the interests of many governments, most of them from developing countries lacking capacities and resources to prepare their customized public acquisition rules.

Then the OECD could be qualified as a concurrent source of international economic law since it has developed numerous instruments in the area of public purchasing, all of which falling into the category of soft law, with the notable exception of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[15]. Initially more focused on its members' needs, now the 35 whealthiest countries in the world, it tends to provide assistance in reforming public sectors in developing countries as well[16]. It has specialized itself, along the years, in elaborating public policy and governance guides, tools and other technical helps for Governments. PPPs are also covered by OECD work with the OECD Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships proclaiming « principles of good governance »[17].

In the financing institutions' category[18], the World Bank's Procurement rules and Guidelines, and its Standardized models of contracts, duplicated by fellow regional multilateral banks', must also be recognized as the main source of international « principles » governing the formation phase but also the performance phase. Interestingly the initial trigger of the WB procurement reform, (starting in 2012), was to get rid of the old WB

[15] https://www.oecd.org/corruption/OECDantibriberyconvention.htm

[16] In accordance with its founding convention (14 december 1960), art. 1 : https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm

[17] 2012, https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf

[18] SOPE WILLIAMS, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems*, Bloomsbury, Hart, 2017.

Procurement Guidelines, with their complex procedures and red-tape to focus on a « principles-based » procurement system. However, such endeavor did not succeed since the WB ended up in 2016 with a pyramid of internal procurement norms in a construed order (Procurement Policy addressing Bank operations[19], Procurement Regulations for Borrowers[20], Procurement Directive in IPF[21], Procurement Procedure[22], and, so far, 28 Guidances[23]) and a longer list of principles. Seven «Core procurement principles » are now listed: Value for money, Economy, Integrity, Fit-for-Purpose (= proportionality), Efficiency, Transparency, Fairness. They are separated from « Governance », not specifically qualified as a principle, but which is divided into: Accountability, Conflict of Interest, Eligibility, Complaint and contract-related communications, Non-compliance. According to the risks assessment of the country and of the potential project it intends to finance, the WB must ensure that the core principles are duly implemented.

In search for efficiency and maybe legitimacy, international organizations may also regroup forces in creating common soft law tools such as benchmarking and assessment methodologies[24]. With a defined set of standards, or baseline indicators, these tools derive from an unwritten « model system » [25]. The initial Methodology for Assessing Public

[19] Bank Policy Procurement in IPF and Other Operational Procurement Matters, (7 p), November 2017.

[20] They have already been revised 4 times, showing that the area is under constant adaptation: The World Bank Procurement Regulations for IPF Borrowers, (142 p), Fourth Edition, November 2020.

[21] Bank Directive Procurement in IPF and Other Operational Procurement Matters (10 p), June 2021.

[22] Bank Procedure Procurement in IPF and Other Operational Procurement Matters (46 p), June 2021.

[23] Such as the WB Procurement Guidance on Project Procurement App Understanding how to use the World Bank Project Procurement Mobile Application, June 2019.

[24] See EBRD Public Private Partnership Assessment 2017/2018.

[25] L. FOLLIOT LALLIOT, *The harmonization process in developing countries*, in A. La Chimia & P. Trepte (eds), *Public Procurement and Aid Effectiveness. A Roadmap under Construction* (Oxford, Hart/Bloomsbury, 2019), Chap. 6, p. 97-118.

procurement System (MAPS) was actually drafted by the World Bank then endorsed by the DAC (Development Assistance Committee) with other international institutions, donors countries and finally by the OCDE which took the lead in preparing a second version of the MAPS, with the MAPS Initiative[26]. Today, the MAPS presents itself as being « universal », supporting « countries in implementing modern, efficient, sustainable and more inclusive public procurement systems, in line with the Sustainable Development Goals »[27]. What is interesting is that developed countries are also now taking advantage of such tool, with USA, New Zealand, or more recently Norway, assessed procurement systems. With this obvious impact, the MAPS proclaims several « principles » such as Value for money, Transparency, Fairness, and Governance (comprising integrity principles).

With an essentially regional vocation, some procurement principles have also been included in instruments that are only proclamatory (such as the 2006 APEC non-binding principles on public procurement[28]) or sometimes more (WEAMU Procurement Directives[29]) or less binding (Common Market Procurement regulation in East Africa[30]). Much more

[26] https://www.mapsinitiative.org/about/. Now it is available in English, French, Arabic, Spanich, Portuguese and Russian. Supplementary modules have been designed: Sustainable Public Procurement (2021), Professionalization, and other are forthcoming: E-procurement, Entity level assessment, PPPs and concessions, and Sector level assessment.

[27] MAPS User's Guide, Section 1, point 3, https://www.mapsinitiative.org/methodology/MAPS-user-guide.pdf

[28] Which are: « 1. Value for Money 2. Open and Effective Competition 3. Accountability and Due Process 4. Fair Dealing and 5. Non-Discrimination ». See as well, 2018 APEC Business Ethics for SMEs Forum – Guide to Facilitate Multi-Stakeholder Ethical Collaborations in the Medical Device and Biopharmaceutical Sectors, Asia-Pacific Economic Cooperation, (Port Moresby, Papua New Guinea 2018), http://mddb.apec.org/Documents/2018/SMEWG/SMEWG47/18_smewg47_014.pdf.

[29] BAKARY DRAMÉ, Droit comparé de la commande publique au sein de l'UEMOA, Coll. Etudes Africaines, L'Harmattan, 2021

[30] COMESA Public procurement regulation, 2009 : Article 4 « General Procurement Principles. A Member State shall, in its domestic legislation relating to public procurement ensure and in conducting public procurement apply, the principles of – (a) competition and openness in public procurement proceedings; (b) fairness; (c) transparency, including disclosure of all relevant information for participation in, and oversight over, public procurement; (d)

structured, the role of the EU could be analyzed as the main center of production of public purchasing rules and principles, although several are binding, with a guiding purpose underscored by Patricia Valcarcel in her chapter: « All the principles which underlie the EU regulations in this sector are aimed at safeguarding the same objective: to guarantee a real and effective opening of the public procurement markets in the member States, leading to the existence of a genuine single public procurement market. »

2.2. Private sources

Alongside these multilateral public sources, private sources are multiplying, with even greater recourse to flexible law, because for them, non-binding instruments remain the only available mean of regulation. International consulting and audit firms, often in the role of accompaniers to major projects or participating in arbitration processes, also contribute to the forging of a legal vulgate relating to transnational public contracts. As recognized by the former Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT), current UNCITRAL Principal Legal Officer and Head of the Legislative Branch of the International Trade Law Division, José Angelo Estrella Faria : « On the sources, stronger influence of private actors is illustrated by the evolution of privately conceived commercial rules and concepts through nongovernmental adjudication including arbitration. As an illustration of this complexity which may affect the harmonization process in public procurement, it is worth mentioning that harmonization of private commercial law is still itself under way with several initiatives but no binding results so far[31]. »

accountability; and (e) value for money ». See EY, *Overview of government procurement procedures in sub-Saharan Africa Angola*, Botswana, Namibia & South Africa April 2015.

[31] J.A.E. FARIA, *Future Directions of Legal Harmonisation and Law Reform : Stormy Seas or Prosperous Voyage ?*, Rev. dr. unif. 2009, p. 5.

Codes of good conduct, guides and Ethic instruments are flourishing, driven by the desire to ensure compliance with new obligations. Alongside companies' or banks' organizations producing ex-ante principles striving to prevent sanctions, Governmental organizations such as the OECD[32], or NGOs specialize in formulating integrity policies (e.g. Transparency International), protecting economic and social/human rights (e.g. OXFAM), and preserving the environment (e.g. IISD, International Institute for Sustainable Development) in order to defend employees and/or citizens' interests, and orchestrate good governance as a meta-objective. Today, all of them are united in a strategic vision of public procurement as a privileged vector for achieving the Sustainable Development Goals (SDGs), including but not limited[33] to SDG 12 on responsible consumption & production and its public procurement relevance[34].

2.3. Mixed sources

Finally, in the international regulation of public procurement's arena, « revelations » of principles are discussed in restricted circles where representatives of States, representatives of international financial organizations and identified experts gravitate. As an

[32] G20/OECD Principles of Corporate Governance, (2nd ed. 2015) First issued in 1999, the Principles have become the international benchmark in corporate governance and they have been endorsed by the G20 countries https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en

[33] Public procurement and PPPs can be mobilized to achieve almost all SDGs. This is one of the conclusions of the March 2021 Meeting of the OECD Council and Partners on the 2030 Agenda for Sustainable Development.

[34] « Ensure sustainable consumption and production patterns » through eleven different targets, one of which – target 12.7 – aims to « Promote public procurement practices that are sustainable, in accordance with national policies and priorities ». Accordingly, Indicator 12.7.1 – officially designated as the « Number of countries implementing Sustainable Public Procurement policies and action plans » – has been specifically set to measure the achievement towards this target ». https://www.unep.org/explore-topics/resource-efficiency/what-we-do/sustainable-public-procurement/sdg-127-target-and

example, at their 2014 Summit, the B20 called on G20 governments to apply best practice procurement processes in all large and/or publicly significant infrastructure projects. The B20 Anti-Corruption Task Force also established a work stream on Government Procurement. G20 countries committed to ensure they have in place « systems of procurement based on transparency, competition and objective criteria in decision-making to prevent corruption » and called on the OECD to develop the Compendium of Good Practices for Integrity in Public Procurement[35] approved by the G20. Containing counsels and recommendations, the Compendium pertains obviously to the soft law category, but nonetheless endorsing a prescribing purpose: « This Compendium supports G20 countries in mapping good practices and sharing lessons learned in order to shape the global debate and set example for fighting corruption and promoting integrity in public procurement while implementing national standards ».

As another example of mixed sources, the Open Contracting Global Principles[36] « reflecting norms and best practices worldwide » in using data to analyze and monitor public procurement, were developed in a collaborative process involving nearly 200 members from government, private sector, civil society, donor organizations, and international financing institutions. From a substantive approach it is more a list of proclamatory right to access information and mandatory disclosure in the area of public procurements such as : « Governments shall recognize the right of the public to participate in the oversight of the formation, award, execution, performance, and completion of public contracts ». However, more than 30 countries have decided to implement such principles, the latest being the UK with its post-Brexit new public procurement policy.

[35] OECD GOV/PGC/ETH(2014)2/REV1.

[36] https://www.open-contracting.org/what-is-open-contracting/global-principles/ access on May 2021.

3. CONVERGING SCOPES AND CONVERGING GAPS

3.1. Converging principles?

The simultaneous nature of the formulation of principles applicable to public procurement contracts under soft law requirements explains the observance of a relative substantial convergence emanating from different sources. Several typologies of principles can be drawn up, either by focusing on the criterion of their subject matter (substantive typologies) or by focusing on the geographical area of application of the principles (spatial typologies). With regard to the substantive criterion, flexible law, which is essentially non-binding, has the merit of being particularly well suited to the contractual universe which claims the freedom of the parties and the autonomy of obligations. In the more specific field of public procurement contracts, it preserves the sovereignty of the States, which can be inspired by it when it serves their interests

Based on a spatial taxonomy, one can separate principles intended to govern domestic public contracts and principles intended to govern transnational public contracts, principles with a bilateral vocation that must be applied between two States, or principles with a plurilateral vocation that will govern a limited circle of countries on the basis of the reciprocity principle.

Collateral objectives can also be added, leading to the incorporation of new principles. For many years, multilateral development Banks (MDBs) but also International Institutions involved in improving development and aid efficiency have promoted an agenda addressing corruption in public contracting. Part of this fight tends to rely on debarment process based

on established cases of fraud or collusion[37], with a more recent twist expanding the debarment effects. Expand it from an horizontal point of view, with several MDBs applying automatic debarment decisions when decided by another MDB but also a recent inventory of national debarment decisions to be centralized and published on the Word Bank website. Moreover, debarment is now also considered by the World Bank as a way to actively promote an anti-gender-based violence (GBV) policy through new cases of bidders disqualification[38].

Launched in January 2021, prevention and compliance in this specific field of human rights will rely on continuous independent monitoring of compliance with GBV related obligations in large works contracts rated high risk for sexual harassment, exploitation and abuse. Such requirements must be listed in the mandatory Code of conduct imposed by the World Bank on any Private contractor part of its financed projects since 2017.
According to the substantive typologies listing the covered topics, core principles may address the formation of contracts (Transparency and Competition. Although competition is more a meta-principle declined through sub-principle such as Equal access, Equal treatment, Non-discrimination, Fairness. Rarely, the international written framework provides for rules for interpretation in case of potential contradiction between principles[39].

[37] D. C. DRAGOS, *Sanctions Mechanisms of the World Bank on the Matter of International Corruption*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, p. 879-904. See also: World Bank Procedure: Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects, 2016.

[38] The World Bank printed a guideline for its staff : Good Practice Note, Addressing Sexual Exploitation and Abuse and Sexual Harassment (SEA/SH) in Investment Project Financing involving Major Civil Works, 2020, 2nd ed.

[39] Interestingly, Article 21 of the Panamanian law (Ley de Panamá nº 22, de 27 de junio de 2006) includes important rules when it states that « in the interpretation of the rules on public contracts, of the procedures for the selection of contractors, of the cases of exception to the procedure for the selection of contractors and of the clauses and stipulations of the contracts, the public interests, the purposes and principles of this Law, as well as good faith, equality and balance between obligations and rights that characterize commutative contracts, shall be taken into consideration. » José Antonio Moreno Molina, Panorama comparado de la Contratación Pública en América Latina, 2015, available at http://www.obcp.es/opiniones/panorama-comparado-de-la-contratacion-publica-en-america-latina.

3.2. A lack of Soft law principles governing the grey zone of performance in public acquisition contracts?

There is a huge contrast between the over regulated area of procurement rules, subject to the influences of overlapping soft law « principles » and hard law rules, and the lack of both when it comes to frame the execution of these contracts.

International contractual principles for the performance of public purchasing contracts remained undefined, uncertain, and uncompleted when referring to international guidance and soft law instruments mentioned previously. Whilst the formation of public contracts and methods of procurement are heavily regulated by international (trade) public norms, the rules governing the performance of these contracts is still lagging behind. It reveals a parallel between domestic legal framework and international principles: the overregulated area of public contracts formation rules contrasts with the under-framed area of public contracts' administration. Such parallelism raises a question about the actual role of international soft law principles: they might complement existing domestic rules rather than anticipating such rules, and they may be more focused on regulating interstates relations (facilitating trade and access to foreign procurement markets) rather than addressing principles to be applied between the contractual parties.

Indeed, concerning the execution of transnational public contracts, there is no equivalent to the Unidroit Principles of International Commercial Contracts[40]. « The most important soft law instrument in the field of general contract law »[41], was first published in 1994 and are now in their fourth edition. Following the example of the US Restatements of the Law, the

[40]The 2016 UNIDROIT Principles of International Commercial contracts prepared by the International Institute for the Unification of Private Law. The 2016 edition of the UNIDROIT Principles covers virtually all the most important topics of general contract law: https://www.unidroit.org/fr/instruments/contrats-du-commerce/principes-d-unidroit-2016

[41] M. JOACHIM BONELL, *The law governing international commercial contracts and the actual role of the UNIDROIT Principles*, Uniform Law Review, Volume 23, Issue 1, March 2018, Pages 15–41, 20 March 2018.

current 2016 edition comprises, « a total of 211 articles divided into 11 chapters-each of which is accompanied by comments and by illustrations largely based on actual cases and intended to explain the reasons for the black-letter rule and the different ways in which it may operate in practice. » Thus the « 2016 UNIDROIT Principles now cover the performance of long term contracts, on the verge of issues encountered as well in public contracting including PPPs » [42]. However, lengthy discussion about expanding the scope of the Unidroit Principles in 2016 failed to cover long-term contracts, in particular to introduce a right of termination for « compelling reasons » [43].[44]

However, to fill this gap, there exist Standard Bidding Templates including standard clauses[45] for transnational public contracts. FIDIC forms and FIDIC related standards usually rely on principles of good faith, change/right to modification, right to termination, right for compensation, sanctity of the contract, and arbitration as the main way of settling contractual disputes. As soft law tools, contractual models with standard clauses designed to protect public or private interests, or both, are prepared by powerful transnational private bodies (e.g. FIDIC with its FIDIC Books[46]) or by networks of lawyers. All the WB Standard Procurement Documents have been initially drafted by FIDIC, with customized provisions adapting WB

[42] A. RILES, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, (2008). Cornell Law Faculty Publications. Paper 36. About transnational contracts, Gilles Lhuilier observers that « the private actors now « localise » themselves on singular « normative spaces » *in* « The Concept of « Normative Space » in Rethinking the Globalization of Law, p.67, and in his book: Le droit transnational, Dalloz, 2016.

[43] The suggested wording was rejected: « if, having regard to all the circumstances of the case it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship. » Cf. UNIDROIT 2016, Study L Doc. 135 rev., January 2016 Annex 10.

[44] M.J. BONELL, *The Law Governing International Commercial Contracts : Hard Law versus Soft Law* (Volume 388), Collected Courses of the Hague Academy of International Law, 2016.

[45] See the World Bank Standard Procurement Documents elaborated by FIDIC. Other Development agencies and MDBs have developed their own sets, based on the WB's models.

[46] B. DUPUIS & J.-B. MOREL, *The role of FIDIC in the Standardization of Infrastructures Model Contracts*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, 2016, p. 489- 519.

policies, such as non-discrimination among employees[47]. However, the World Bank has more recently revert to FIDIC Books, suppressing the Section on general conditions of contracts (GCC) in its model contracts. Countries and public contracting entities are thus required to use the original FIDIC GCC, an interesting outsourcing decision which forces the parties to use contractual stipulations that are not necessarily well adapted to the particular situation of large public contracts. In the mist of its deep procurement reform engaged in 2016, the WB has adopted a procurement Guidance addressing the performance phase of public contracts [48]. Although the detailed WB Standard Procurement Documents[49] have been, so far, duplicated and adapted by many international donors and MDBs, they remain exceptional in the landscape of freedom governing transnational public contracts. Understood as the area of contractual freedom, albeit framed by domestic law, the performance of transnational public contracts is still today either driven by domestic law, including mandatory conditions of contracts if apply, or by the *ad-hoc* contract negotiated by the parties.

[47] SPD Request for Proposals Works and Operation Service, Design, build and operation of *[water treatment plant (WTP)/ wastewater treatment plant (WWTP)]* (Two-Stage Request for Proposals, after Initial Selection) revised 2021, General conditions of contracts, Sub-clause 6.24, Non discrimination and equal opportunity : « the contractor shall not make decisions relating to the employment or treatment of Contractor's Personnel on the basis of personal characteristics unrelated to inherent job requirements. The Contractor shall base the employment of Contractor's Personnel on the principle of equal opportunity and fair treatment… »

[48] Procurement Guidance, Contract Management General Principles, September 2017, https://thedocs.worldbank.org/en/doc/531561507743080555 0290022017/original/ContractManagementGuidance2017.pdf

[49] Over 50 standards documents are available, addressing specific contracts and topics such as COVID emergency responses. https://projects.worldbank.org/en/projects-operations/products-and-services/brief/procurement-new-framework

Facing the lack of normative framework when it comes to solve transnational public contracts issues[50], arbitration law has been tempted to resort to investment law principles[51] or borrow somehow international business law principles, or the protective regime attached to the theory of State contracts[52], for resolving public contractual conflicts[53].

3.3. Towards the recognition of common contractual performance principles gathered in a Lex mercatoria publica?

As one case of international arbitration after another, the formation of a set of case-law principles to govern the performance of international public contracts must now be given attention. Several origins of this arbitration jurisprudence should be highlighted. On the one hand, standard models of infrastructure contracts and other international contracts largely refer to arbitration as a means of resolving disputes between the parties, thanks to the systematic insertion of an arbitration clause in these contractual models. Converging solutions are also being developed in the Investment arbitration area when an Investment treaty has been entered into by the Host State and the State of the foreign contractor. Despites

[50] However, principles governing the execution of major infrastructure projects have been thoroughly discussed, and timidly promoted, in the area of transnational PPPs, as in the 2000 UNCITRAL Legislative Guide mentioned above. Interestingly, the vast majority of international soft law instruments which took inspiration from the UNCITRAL Legislative Guide to produce several PPPs guidelines, did not tackle this area, never proclaiming any soft law principles governing the performance of public acquisition contracts.

[51] See Ph. COLEMAN, *Contrats publics et arbitrage d'investissements*, PHD Thesis, LGDJ, 2021, p. 566, n° 901.

[52] Ph. COLEMAN, op. cit. The author demonstrates how the theory of State contracts, which allowed many long term public purchasing contracts (as types of PPP) to be exceptionally subject to international law, has been progressively abandoned in favor of a domestic law regime. See also: A. de Nanteuil, Droit international de l'investissement, Pedone, 2014, p. 39, §42.

[53] R. BISMUTH, *Customary Principles Regarding Public Contracts Concluded With Foreigners*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, pp. 323–352.

recurrent issues on how to determine the law to apply[54], Investment law and commercial law arbitration in the area tend to progressively sketch the same picture of transnational public contracts. Not only the International Center for the Settlement of Investment Disputes[55] but other international arbitral forum[56] have moved to align their case law on several common grounds.

We will argue that a customized concept of *Lex mercatoria*[57] *publica*[58] could reflect these *ad-hoc* principles protecting a specific regime governing international public contracts. Similarity could be here pointed at with the private international custom concept. The role of opinio juris in the formation of international custom and of the (private) *Lex mercatoria* in particular have already been extensively studied by specialists in international trade law. As P.M. Dupuis and Y. Kerbrat wrote: « this concordant accumulation may be indicative of the progressive emergence of a new rule. The repeated and close renegotiation and adoption of the same rules hammers and shapes mentalities, thus hastening the normative genesis. Each resolution thus contributes to the catalysis of custom ». Ph. Coleman suggested to refer to a Lex administrativa[59], but without elaborating on the idea. However, some of potential building principles might be borrowed from the international business law environment, such

[54]H. WEHLAND, *Competing Dispute Resolution Mechanisms in Public Contracts and International Investment Agreements*, in S. Schill & M. Audit, Transnational Law of Public Contracts, Bruylant, Administrative Law coll., 2016, p. 375-403.

[55]ICSID, 2020 Annual Report Excellence in Investment Dispute Resolution

[56] ICC Model Turnkey Contract for Major Projects, revised 2020.

[57] Indeed, the *lex mercatoria* traditionally understood is related to private international law governing only merchants and cannot be applied to international public contracts. See P. MAYER, *La neutralisation du pouvoir normatif de l'État en matière de contrats d'État* , JDI, 1986, p. 5 et s. reprinted in Choix d'articles de Pierre Mayer, LGDJ 2015, pp. 243 et s.

[58] Such proposal must be separate from the existing concept of Transnational or International Public Order.

[59] Ph. COLEMAN, states in his published version of his PDH Thesis, op. cit., p. 525, n. 835, : « more broadly, these principles undoubtedly form the heart of a *lex administrativa* which is detached from the rules applicable to transnational relations between private persons ».

as the principle of good faith, of Estoppel[60], the « superior governmental power » opening expropriation protection[61], but completed by public principles such as the invalidity of the contract in breach with administrative formation proceedings, or the, expanding, principle of invalidity of the corrupt international public contract[62]. In the field of Investment law, the concept of Transnational public order (ordre public transnational[63]) has been deployed to cover human rights and anti-corruption requirements. Moreover, such principles are not only elaborated during trial and arbitration cases (as customary principles, or principles borrowed from Investment law), but they are also shared by soft law instruments, such as model clauses[64], (eg see above the anti-corruption policy and human rights requirements[65]), contributing to the construction of a body of principles that could be referred to as *Lex Mercatoria Publica* shared by international public and private actors involved in transnational public contracts either as parties (States and companies) or as third parties such as financers, sub-contractors, NGOs representing employees, users, and civil society.

[60] After several years of performance, a party, even the public one, cannot argue that the contract is invalid or void due to non-compliance with the bidding requirements or other formation rules: such solution was applied to the concession of the construction and operation of an airport terminal to a German company in The Philippines (Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I), ICSID Case No. ARB/03/25), the concession of a railroad in Guatemala (Railroad Development Corporation v. Guatemala, ICSID Case No ARB/07/23, and 18 may 2010)..

[61] Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8: not every breach of a contract is capable of being considered a potential expropriation, but rather only those interferences made through the use of the host state's « superior governmental power ».

[62] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 ; Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8 : « this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy ».

[63] M. FORTEAU, *L'Ordre public Transnational' ou « réellement international - L'Ordre Public International face à l'enchevêtrement croissant du droit international privé et du droit international public* , Journal du droit international, 3, 2011, 138.

[64] ICC Model Turnkey Contract for Major Projects, revised 2020.

[65] World Bank Contract Management General Principles September 2017 deals with obligations for the public contracting entity such as following performance indicators.

4. EXPLICIT AND IMPLICIT HIERARCHIES AMONG THE SOFT LAW PRINCIPLES

4.1. Explicit hierarchy

In the Preamble to the 2011 Model Law on Public Procurement, the United Nations Commission on International Trade Law (UNCITRAL), states from the beginning a list of principles whose order reveals the choices made by the 66 states that participated in this consensual exercise. Following the wording of the first version of 1993, they placed efficiency and economy in first place, but transparency was listed last.[66]**.**

An interesting shift in priorities can also be observed in the World Bank's internally developed texts that are imposed on the operations that this multilateral bank finances in borrowing states. In 2016, the IMF's sister institution in Washington reformed its entire procurement policy by adopting a set of new rules, by such creating an autonomous internal hierarchy of norms. Under the new policy, set out in the WB Policy Document[67]**,** the Bank has established its « vision »[68] and the key principles to be associated with it, in this specific

[66] UNCITRAL Model Law on public procurement of goods, works, and services and the Guide for its implementation (1995) : « it is desirable to regulate procurement in order to promote the following objectives (a) To achieve maximum economy and efficiency in procurement; (b) To promote and encourage the participation of suppliers and contractors in procurement proceedings without distinction as to nationality, and thereby to promote international trade; (c) To promote competition among suppliers and contractors for the supply of the subject matter of the procurement; (d) To ensure the fair, equal and equitable treatment of all suppliers and contractors; (e) To promote the integrity of, and public confidence in, the procurement process; and (f) To ensure transparency in the procurement proceedings. »

[67] Bank Policy Procurement in IPF and Other Operational Procurement Matters (november 2017).

[68] Procurement in IPF operations supports Borrowers to achieve value for money with integrity in delivering sustainable development. To achieve this vision, the Bank seeks assurance from Borrowers that acceptable procurement arrangements are applied to the financial resources it provides to Borrowers, and supports Borrower countries in enhancing and implementing sound procurement systems and institutions. The Bank may support country capacity building at the level of the project or as part of the country dialogue, using a range of measures—

order: Value for Money, Economy, Integrity, Fit for Purpose, Efficiency, Transparency, and Fairness. Proclaiming principles displays a pedagogical virtue: it legitimizes a discourse that takes on the appearance of a mandatory legal framework. Fighting with the unformal vocabulary they have been using, some of these International bodies are thus trying to clarify the scope and purpose of these « rules ». As an illustration, the « Impact Standards for Financing Sustainable development », prepared by OECD and UNEP « seek to fill the gap between high-level principles and the impact measurement and management frameworks and tools that each organization independently choses to use »[69].

4.2. An implicit organic hierarchy of principles?

Beyond the, somehow, blurry procurement global law landscape, one can nevertheless detect an organic hierarchy based on the place and status of the institution that elaborates the soft law principle within the international legal order. This hierarchy resulting from the place of the body that formulated the principle remains essentially implicit and sometimes gives rise to discreet conflicts of influence. In this respect, the respective positions of the multilateral banks and the OECD with regard to the formulation of principles governing public procurement was an enlightening illustration. While the World Bank proclaimed in 2008 the existence of « International Standards » against which it, and most of the other multilateral banks, intended to assess the risks presented by national public procurement systems, this unilateral assertion was defaulted by the multiplication of procurement models promoted by different donors.

On their side, confronted with the deny of using their own procurement rules, even reformed, the borrowing countries started to vehemently contest the loan conditions coupled

funding, technical support, and hands-on expanded implementation support (in selected *cases)*— depending on the specific context of the country, sector, agency, or project.

[69] OECD-UNDP Impact Standards for Financing Sustainable Development, May 2021.

with an increasing complexity of procurement requirements. Between 2012 and 2016, the World Bank took advantage of the complete overhaul of its public procurement policy to carry out a Copernican revolution in order to align its procurement requirements with the principles that had begun to emerge in other international circles, including the EU and the GPA's arenas, *de facto* acknowledging the supremacy of international hard law procurement principles over MDBs soft law proclamations.

From a legal perspective, the principles forged by the OECD have had more impact, due to several factors. The first is the relatively homogeneous composition of the group of 35 OECD member states, developed countries with already advanced public procurement systems, similar in many respects. The second is due to the consensual and collaborative nature of the drafting method followed by the OECD[70], which is not unrelated to the one used by UNCITRAL. The third is the multiplication of initiatives taken by the OECD in the field of public procurement regulation. Various and converging efforts have been displayed by different OECD Directorates specializing in governance[71], anti-corruption (with the OECD Principles for Enhancing Integrity in Public Procurement[72]) and PPPs[73]. Called upon by its member countries to take an interest in cross-cutting issues[74], the OECD is mainly a forum

[70] « An extensive consultation was carried out in 2008 on the Principles and Checklist with various stakeholders. The consultation with representatives from international organisations confirmed that the Principles usefully complement international legal instruments », OECD Principles for Integrity in Public Procurement, 2009.

[71] Reflecting the unification of rules and issues regarding public acquisition contracts, the OCDE public procurement division and the PPPs division have recently merged.

[72] OECD Principles for Integrity in Public Procurement, 2009

[73] « The Principles also reflect the multi-disciplinary work of the OECD in analysing public procurement from the public governance, aid effectiveness, anti-bribery and competition perspectives ». OECD Principles for Integrity in Public Procurement, 2009.

[74] « At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, participants called for the creation of an international instrument in order to help policy makers reform public procurement systems and reinforce integrity and public trust in how public funds are managed. » OECD Principles for Integrity in Public Procurement, 2009.

for discussion between developed States, sharing similar legal/procurement background. In this context, the question of the legal nature of the principles elaborated is not particularly addressed by this institution, which sometimes qualifies them as « Policies », « Pillars »[75], or even Recommendations or statements within toolboxes[76]. Countries will be later on free to determine how and when they may implement the OECD's « principles » through written rules.

This picture also reflects the paradoxical ambiguity of international soft law principles in this domain: they flourish in legal areas that are already overregulated, such as the procedures attached to the formation of public acquisition contracts and their related challenge and protest mechanisms.

4.3. Hierarchy of principles or hierarchy of policy objectives?

These international soft law principles endorse different functions. In theory, the principles of soft law on public acquisition should be used to forge concepts and standards filling the gaps in international public contract law, but actually they also serve to interpret and complement national legislation on public procurement even when only domestic parties are involved. In commercial environment, and sometimes public contracts, parties to an international contract may include a reference to general principles, whether as supplementary to the domestic law chosen or as directly applicable to any possible dispute. Such principles provide flexible interpretative tools in both the domestic and the international order.

[75] « The Principles are anchored in four pillars: transparency, good management, prevention of misconduct, accountability and control in order to enhance integrity in public procurement. » OECD Principles for Integrity in Public Procurement, 2009

[76] Recommendation on Fighting Bid-rigging in Public Procurement (2012) OECD Recommendation on Improving the Environmental Performance of Public Procurement (2002); OECD Recommendation of the Council on Public Integrity (2017); High-Level Principles for integrity, transparency and effective control of major events and related infrastructures (2016)

In addition, some of these « principles » are in fact only objectives to be achieved, targets indicated to governments through international proclamations and recommendations. This feature is particularly notable in the case of the 10 OECD Principles for Enhancing Integrity in Public Procurement. Published in 2009, it presented five themes: « transparency », « good governance », « prevention of improper conduct, compliance with oversight rules », and « accountability », each divided into « Principles ». Thus, the theme of Transparency was articulated around Principle 1/ « Establish a degree of transparency at all stages of the procurement cycle to ensure fair and equitable treatment of suppliers », and Principle 2/ « Strive for maximum transparency in tendering and take precautionary measures to enhance integrity, particularly in the event of deviations from competitive bidding rules ». Clearly, without any interpretative function, these « principles » reflect objectives or means to be implemented by the public authority to ensure the effectiveness of transparency. Furthermore, the second part of the document, even more practical in its purpose, deals with the « implementation of the principles » and explores the detailed implementing phases as well as process for risks mapping.

Last, the policy dimension of the hierarchy of principles should be underlined. The ongoing debate about Sustainable Public procurement (SPP) is a topic illustrative example, accelerated by the COVID crisis, of the lead position taken by these international institutions or at least some of them[77]. For many years, environmental considerations, social goals or SMES empowerment had been considered as "secondary objectives" that could be reflected in « secondary criteria » during the award process. However, with SPP becoming a top priority on the international agenda, the official discourse tends to be recently shifting, with SPP « objectives »/ « goals » considered now to be « complementary » to the core principles such as Competition, transparency or equal access. In the circular movement of ideas, countries may go even faster than International Institutions in exploring that direction, as

[77] The World Bank seems to be more reluctant in leaving behind the primary role of the "best value for money"

shown by the UK Green Paper[78] which, as a main reform promoted in the mist of the Brexit process, recommends to put upfront the Social value of public procurement through the evaluation of the Most Advantageous Tender, dropping the « economically » dimension. « Public good » may become the first procurement principle, as it should support « the delivery of strategic national priorities including economic, social, ethical, environmental and public safety »[79].

In conclusion, the place of the principles of soft law in the formation of a universal law of public procurement contracts must be recognized, but also their evolving and protean nature. However, the very political nature of public purchasing, which is now perceived as a strategic instrument of direct intervention by governments in the economic and social context of their countries, makes the definition and identification of principles subject to a dialectical relationship with the public policy objectives. In this respect, one may wonder whether today the objective of opening up public contracts, which has been the basis of many written and informal principles of public procurement law for years, including, first and foremost, that of competition, is not in the process of giving way to the imperium of sustainable development[80], which would force a reconsideration of the list of principles traditionally attached to public contracts, as well as their order of priority[81].

[78] Cabinet Office, Green Paper: Transforming public procurement, submitted for comments from December 2020 to March 2021. A new law and legal framework should follow in the coming months.

[79] Green paper, p. 14.

[80] See the second edition May 2021 of European Commission's guidance: 'Buying social: A guide to taking account of social considerations in public procurement', https://ec.europa.eu/growth/content/new-practical-guidance-help-public-buyers-integrate-social-considerations-public-procurement_en

[81] As stated by the Buying social guidance (p. 11, ref. 30) : "This includes compliance with the obligations and principles established in the Treaty and in the Charter of Fundamental rights of the European Union, and with the ILO Declaration on Fundamental Principles and Rights at Work, the International Bill of Human Rights and the

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Abstract. *Soft law principles on public procurement focusing on the supra-European level and questioning the scope, function and true nature of these principles are discussed in this article. The investigation will be conducted through an overview of international sources, highlighting converging areas, gaps and potential explicit and implicit hierarchies as well as questioning whether soft law "principles" on procurement are driven by policies and objectives. A slow yet progressive construction of a Lex mercatoria publica based on both soft law principles and customary rules shaped by international recognition is highlighted.*

United Nations Declaration on the Rights of Indigenous Peoples". By contrast the traditional "core" procurement principles are qualified as "basic"(p. 54) : "basic Treaty principles of transparency and equal treatment".