

**PUBLIC PROCUREMENT AND GLOBALIZATION**

**ANNUAL REPORT – ITALY - 2013**

*(December 2013)*

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## 1. GLOBAL RULES ON PUBLIC PROCUREMENT

During the last thirty years public procurement has been characterized by « an unprecedented diffusion of sophisticated (...) **regimes** on a global scale ».<sup>1</sup>

More than forty supranational sets of rules have been established by a variety of international organizations, institutions and bodies exercising regulatory power over contracting.

Such rules and standards formulated outside a national context, primarily call upon international trade, development, cooperation, investment and money laundering. These sets of rules concur with domestic regulations to discipline the same issues. In this sense, economic and legal globalization caused increasing challenges in public procurement.

Among the supranational rules-setters, a prominent role is played by the World Trade Organization (WTO),<sup>2</sup> the World Bank<sup>3</sup> and the Regional Development Banks, as well as the various States bound by formal bilateral and multilateral agreements, the Organization for Economic Co-operation and Development-OECD, the United Nations, the International Centre for Settlement of Investment Disputes-ICSID and the Canadian International Trade Tribunal-CITT. The regulatory activity of these global actors has a strong impact on national procurement systems.

Why do international organizations adopt global rules on public contracts? Which characteristics can be found in identifying these

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<sup>1</sup> J.J. Schwartz, *On Globalization and Government Procurement*, in *Public Procurement. The Continuing Revolution*, S. Arrowsmith, M. Trybus (eds), Kluwer Law International, The Hague, 2003, 23 ff., esp. 44.

<sup>2</sup> The plurilateral agreement on government procurement (Government Procurement Agreement - the "GPA") was negotiated during the Tokyo Round (1979) and the Uruguay Round (1986-1994).

<sup>3</sup> The World Bank is to be taken as the organization managing funds provided by the International Bank for Reconstruction and Development (IBRD) and the International Association for Development (IDA).

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procurement regimes? And how these regimes impact on domestic legal order?

To answer these questions is useful to focus on a four steps analysis. First, an accurate survey of the historical origins and different cultural background of the single sets of rules already indicated<sup>4</sup>. Second, it is necessary to consider the specific rules and standards set by each organization and regulatory body. Third, by studying the concrete application and material results of the relevant dispute settlement and compliance systems. Finally, the national legal order has be overlooked to test the validity of the traditional approach and the analytical framework so far used, to explain the most recent transformations.

### ***1.1 International trade rules***

The opening of public contract sector to competition in the last three decades has been determined by several concurring factors.

Administrations and public authorities find increasingly convenient to negotiate contracts with foreign competitors that may offer goods and services at lower price than national ones. Technological developments (in transport systems, information and communications) and enlargement of free movement areas have significantly improved the opportunities for economic operators (including administrations) to avoid extra-costs and save consistent amounts of money even in traditional home-biased sectors, like public procurement.

Globalization or “internationalization”<sup>5</sup> is mainly due to the ambitious initiative launched by the International Trade Organization in 1946: the

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<sup>4</sup> H. Caroli Casavola, *Internationalizing Public Procurement Law: Conflicting Global Standards for Public Procurement*, in *Global Jurist, Advances*, Vol. 6, n. 3, 2006, 1- 30.

<sup>5</sup> **INTERNATIONALISATION AND GLOBALISATION OF PUBLIC PROCUREMENT** : J.B. Auby, *L'internationalisation du droit des contrats publics*, in *Droit administratif*, august- september 2003, p. 5-10, ID., *La globalisation, le droit et l'États*, Paris, Montchrestien, 2003, 37 ff.; J.I. Schwarz, *On Globalization and Government Procurement*, in *Public Procurement. The Continuing Revolution*, S. Arrowsmith, M. Trybus (eds), Kluwer Law International, The Hague, 2003, 23 ff.; under the International Law perspective, amongst

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Agreement on Government Procurement<sup>6</sup>. It aimed to remove unnecessary barriers to national market access,<sup>7</sup> including discriminatory treatment and restrictions of competition in the awarding procedures, often allowed by domestic contract law.<sup>8</sup>

Within the Organization, the United States devoted strong efforts to create a global public procurement market<sup>9</sup> through the adoption of common tendering procedures. Such procedures are now set in the Government

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others, M. Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, in *Recueil des Cours de l'Académie de droit international de La Haye*, 1960, II, 101 ff., esp. 189 ff.; A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, London, Kluwer Law International, 1999; P. Trepte, *Regulating procurement: understanding the ends and means of public procurement regulation*, Oxford - New York, Oxford University Press, 2004; H. Caroli Casavola, *Global Rules for Public Procurement*, in *Droit comparé des Contrats Publics /Comparative Law on Public Contracts*, edited by R. Noguellou, U. Stelkens, 1<sup>st</sup> Part, Bruxelles, Bruylant, 2010, 27-61.

<sup>6</sup> The Agreement on Government Procurement -AGP (*see supra*, n. 3) will enter into force only in 1981. The text of the plurilateral GPA, signed in 1994, has been recently revised (April 2012) in the view of extending its coverage. For a comprehensive analysis of the new text, S. Arrowsmith, *Government Procurement in WTO*, The Hague, 2003; on the last challenges, *see the bibliography in the previous note.*

<sup>7</sup> M.G. Herander, *Discriminatory Government Procurement with a Content Requirement: its Protective Effects and Welfare Costs*, 1986, 14 *Atlantic Economic Journal*, p. 20; A. Mattoo, *The Government Procurement Agreement: Implications of Economic Theory*, 1996, 19 *The World Economy* p. 695; F. Trionfetti, *Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence*, in S. Arrowsmith, M. Trybus (editors), *Public Procurement. The Continuing Revolution*, cit., pp. 223-233.

<sup>8</sup> S. Arrowsmith, *Public Procurement as an Instrument of Policy*, 1995, *Law Quarterly Review*, p. 235, and in a different perspective, C. McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change*, Oxford University Press, 2007.

<sup>9</sup> C.R. Yukins, S.L. Schooner, *Incrementalism. Eroding the Impediments to a Global Public Procurement Market*, in *Georgetown Journal of International Law*, 2007, vol. 38, pp. 529- 576, esp. p. 569 ff.

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Procurement Agreement-GPA (1994)<sup>10</sup>. Enforcing transparency and free trade principles, as well as best value for money, common (international) technical standards and efficiency rules, the Agreement opened up to foreign competition rich domestic procurement markets, including the European internal market. Notably, it applied to substantial value contracts (above specific thresholds) of large potential interest among the sector economic operators.

The GPA represents a supranational trade law strategic tool under a twofold perspective. It enhances competition in public purchasing by forbidding discriminatory treatments, quotas and other restrictions in the procedure (that may prevent potential competitors from taking part) and it binds purchasing domestic authorities and administrations (central, regional, local or sub-national) of countries with different legal traditions, to a minimum set of fundamental principles, rules and standards with substantial and procedural nature.

Based on the rule of national and non-discriminatory treatment (art. III), the Agreement includes procedural provisions on technical specifications, general requirements on publicity for contract opportunities, transparency, participation and openness in the procurement process.

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<sup>10</sup> The recent revision of the GPA, finally adopted in December 2011 (GPA/112, December 16, 2011), brought the text of the Agreement up to date, amending several provisions, enhancing the use of electronic auctions and control electronic communications, strengthening transparency rules for selective suppliers in selective tendering and improving flexibility.

**ON THE GPA:** S. Arrowsmith, *Government Procurement in the WTO*, The Hague, Kluwer Law International, 2003; S. Arrowsmith, R. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, Oxford University Press, Oxford, 2011;

M. Dischendorfer, *The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO*, in *Public Procurement Law Review*, 2000,

n. 9, 1; S.J. Evenett, B.M. Hoekman, *The WTO And Government Procurement. Critical Perspectives on the Global Trading System and the WTO Series*, Edward Elgar, 2006; A. Gelbrich, *Regulation of Government Procurement within the WTO. Procurement Policies and Multilateral Trade Rules*, Paperback, 2008.

All interested suppliers may submit a tender (*open tendering procedure*) or be invited, if qualified (to satisfy the conditions for participation), to submit a tender (*selective tendering procedure*). A third procurement method is exceptional and provided only for a listed number of cases: in these cases, the procuring authority contacts the potential supplier or suppliers of its choice and may negotiate the contract conditions individually (*limited tendering*).<sup>11</sup>

At the aim of consenting procuring authorities to adapt procedures to their needs, a certain degree of flexibility is given by providing that they use « methods such as » the three above indicated. In this way, each Party is allowed to introduce slightly different procedures and can evolve domestic procedures consistently with its specific circumstances and needs (i.e. encouraging greater use of electronic tools), under condition of respect of the GPA fundamental principles and rules (i.e. transparency, non- discrimination).

The revised text of the Agreement refers to a new requirement for procuring bodies: the need to conduct procurement in a transparent and impartial manner « that avoids conflicts of interests and prevents corrupt practices » (art. IV, co. 4) and to enhance integrity as a condition of efficient and effective resources management. These new objectives are highly innovative, as *unicum* in the context of WTO agreements<sup>12</sup>.

The GPA is a plurilateral agreement, binding as such, only its signatories or State Parties on basis of « mutual reciprocity ». Each Party is bounded to the extent it has chosen in advance: mutual concessions between Parties are negotiated “at separate tables”, thereby producing and formalizing sector procurement markets. The circumstance that each ratifying Party defines and agrees GPA’s subjective and objective field of application separately makes it appear, in fact, a collection of bilateral agreements. Reciprocal concessions and the obligations extent anyway must

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<sup>11</sup> Art. I, (l) (p) (g).

<sup>12</sup> R.D. Anderson, W.E. Kovacic e A.C. Müller, *Ensuring integrity and competition in public procurement markets: a dual challenge for good governance*, in *The WTO Regime on Government Procurement: Challenge and Reform*, cit., 681-718 ff.

be equal and balanced. During the negotiations, the economic value of the reciprocal concessions is often determined by consulting of top international audit firms.

Rules in favor of one Party, disadvantaging an interested supplier or suppliers are in conflict with GPA.

Meaningful examples can be drawn from two disputes submitted to WTO Panels. The first refers to the procurement of a navigation satellite conducted by Japanese authorities.<sup>13</sup> In this case, the administration required, as condition for qualification, technical standards and specifications identified in a manner favorable for domestic firms only. Foreign suppliers were substantially prevented from competing and excluded from the awarding procedure. After the European Community requested the Dispute Settlement Body-DSB for consultations, the Japanese purchasing authority finally based its decision on GPA international standards. The second example is given by the domestic legislation of Massachusetts:<sup>14</sup> to the aim of combating forced labour in Myanmar, this legislation provided a fee for suppliers (in contract with administrations) with economic interests in that Country. In this case, a domestic court, the Supreme Court of the United States, denied application to national provisions before the issue might arise in front of the WTO DSB.

The application of the GPA faces three main problems.

First, a sharp definition of the subjective sphere of application lacks in the Agreement. It is, in fact, unclear who is or may be excluded and the GPA leaves room to make national legislations referred by the State Parties to that regard (i.e., to identify the public or private nature of a procuring entity and its relationship with traditionally intended administrations). This fact had unexpected consequences: in several cases, entities not listed in the

<sup>13</sup> WTO Case *Japan – Procurement of a Navigation Satellite* (WT/DS73), available at [www.wto.org](http://www.wto.org).

<sup>14</sup> WTO Case *United States – Measures Affecting Government Procurement*, submitted by European Community (WT/DS88, GPA/D2/1, on June 26, 1997) and by Japan (WT/DS95/1, GPA/D3/1, on July 21, 1997).

GPA appendices were found by the Panel bound as « associated » to others explicitly named in it. This is the case of a ‘principal-agent’ relationship between the two bodies or a shared legal personality between them. At certain conditions, if national law provides such distinction, Panelists simply ignore it as a mere formal *escamotage* to avoid the GPA rules of application.<sup>15</sup>

A second issue refers to the effectiveness of the Agreement: it actually lacks “claws”. Compliance to supranational rules is highly limited by several structural aspects. These aspects include the possibility for State Parties to recognize discretionary powers in procurement procedures and policies as well as the impossibility to adopt retroacting remedies (i.e. the refunding of the amount lawfully paid to the supplier for the good or service). Further, to competitors unlawfully excluded from the awarding procedure, after its conclusion, only limited economic compensations maybe recognized. Intrinsic limits and jeopardized implications of using domestic legal remedies are also relevant in this sense. The WTO dispute resolution mechanism presents also some weak points: it is complex, expensive and with foreseeable results. Thus, it is worth using such mechanism only in relation to high economic value procurement.

The main positive outcome of the GPA is, on the other side, the spread up of a minimum set of principles, rules and standards (procedural and substantial) for contracts signed by administrations worldwide, with very different legal tradition and economic development. Granting basic rights and fundamental free trade principles (transparency, non-discrimination) to interested foreign suppliers, the WTO Agreement has great potential to perform as global regime.<sup>16</sup>

In this sense, the distance from the UE procurement system deserves consideration.<sup>17</sup> The GPA and the WTO system act as driving force for the

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<sup>15</sup> WTO Case *Korea Airport*, WT/DSB/M/84 del 19 giugno 2000, Panel Report, par. 7.59.

<sup>16</sup> As demonstrated by NAFTA and many other regional trade agreements modelled on GPA.



adoption and diffusion of that core of rules and standards shared by the EU too, far behind the European borders, in domestic legal orders of Asian, African and American countries with strong developing economies and increasing commercial opportunities for public sectors.

Further, to the GPA refer most of the fifty regional (bilateral or multilateral) trade agreements concerning, *inter alia*, public procurement.

These agreements bind State Parties sharing common economic interests and policies or with close cultural background.<sup>18</sup> Twenty agreements provide a detailed discipline of the matter and introduce new solutions for the issues at stake. These solutions need to be tested in order to identify the best practices and consolidate one global model.<sup>19</sup> In particular, an independent quasi-judicial body created in 1994, the above recalled

CITT, gives effective application to NAFTA in Canada. It gained the deference of internal judiciary bodies on the ground of its technical competence and impartiality. This Tribunal played a crucial role in the recent deep transformation of the domestic procurement system: it ensured to national and foreign firms effective protection against the decisions

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<sup>17</sup> For a detailed analysis of the relationship between the two procurement systems, see H. Caroli Casavola, *The WTO and the EU: Exploring the Relationship between Public Procurement Regulatory Systems*, in *Global Administrative Law and EU Administrative Law*, E. Chiti, B.G. Mattarella (eds), Springer, 2011, 293-320.

<sup>18</sup> I.e. the agreements among ex-Commonwealth countries; on the specific meaning of “regional”, see S. Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, in *Harvard International Law Journal*, 2000, 419 ff.

<sup>19</sup> **REGIONAL AGREEMENTS AND THE GPA**, R. Anderson, A.C. Müller, K. Osei-Lah, J. Pardo de León, P. Pellettier, *Government Procurement Provisions in Regional Trade Agreement A Stepping Stone to GPA Accession?*, in *The WTO Regime on Government Procurement: Challenge and Reform*, S. Arrowsmith, R. Anderson (eds), Oxford University Press, Oxford, 2011, 561-656.

adopted by domestic administration and public entities in breach of the GPA and the NAFTA<sup>20</sup>.

### ***1.2. Aid development regime***

Amongst the international institutions of cooperation for development, the World Bank was one of the earliest adopting an autonomous body of procurement norms.

The Procurement Guidelines<sup>21</sup> applied to contracts related to investment projects in countries with weak economies.<sup>22</sup>

The original set of rules reflects the characteristics of the agricultural and industrial projects mostly financed and is generally adapted in coherence with national development policies and internal legal order. During the time, the Bank changed a great part of the Guidelines. An

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<sup>20</sup> **ABOUT THE CITT:** A. Reich, *Government Procurement and Bid Challenging in Canada after Free Trade Agreement*, in *Canadian Business Law Journal*, vol. 18, 1991, 195-244;

A. van Dyk, *Recent Changes in Canadian Government's Contracting Policy*, in *Public Procurement Law Review*, n. 7, 1998, 110; B. Ann, C. Allen, *Unintended Consequences: Procurement Policy and the Canadian International Trade Tribunal (Citt)*, in *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing*, eds. G. Piga and K.V. Thai, PrAcademic Press, Boca Raton, 2007, 304.

<sup>21</sup> The Guidelines for Procurement under Ibrid Loans and Ida Credits date back to 1964 and were modified in 1965, 1974, 1975, 1985, 1994, 1999, 2004, 2006 and 2011 (available at [www.worldbank.org/html/opr/procure](http://www.worldbank.org/html/opr/procure)).

<sup>22</sup> **THE GUIDELINES FOR PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS:** W. Debevoise, C. Yukins, *Assessing the World Bank's Proposed Revision of Its Procurement Guidelines*, in *The Government Contractor*, 2010, vol. 52, n. 21; M. de Castro Meireles, *The World Bank Procurement Regulations: A Critical Analysis of the Enforcement Mechanisms and of the Secondary Policies in Financed Projects*, University of Nottingham, 2006; R. Hunja, *Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines*, in *Public Procurement Law Review*, 1997, n. 6, 217; T. Tucker, *A Critical Analysis of the Procurement Procedures of the World Bank*, in S. Arrowsmith, A. Davies (eds), *Public Procurement: Global Revolution*, The Hague, Kluwer Law International, 1998, 139.

example refers to control mechanisms: in former time blander and applied before the execution, such mechanisms are now more strict and accurate. Furthermore, controls often applied after the national procuring authorities of the beneficiary countries signed the contracts.

In spite of the soft-law nature, the Guidelines apply to national administrations, local agencies and private firms as binding provisions. The beneficiary State commits itself (in the Loan Agreement) to make the Guidelines be observed by domestic administrations and agencies, as condition to be financed.

Like the GPA, the World Bank's Procurement Guidelines identify competition as fundamental juridical requirement for creating a public procurement market. In some cases, preferential treatment in favor of specific suppliers, based on their country of origin, is allowed.<sup>23</sup> In these cases competition meets the limit of the World Bank institutional goals.<sup>24</sup>

The Guidelines provide procedural and substantial measures on technical specifications (with preference for internationally recognized ones), transparency and publicity before and after the award decision<sup>25</sup> and

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<sup>23</sup> On the non-discrimination principle in the *Guidelines*, F. Weiss, D. Kalogeras, *The Principle of Non-discrimination in Procurement for Development Assistance*, in *Public Procurement Law Review*, n. 1, 2005, 1-14. On the "tied aid": G. Cataldi, *Gli aiuti c.d. «legati»: questioni aperte fra diritto allo sviluppo e obblighi internazionali ed europei in tema di concorrenza*, in *Problemi e tendenze del diritto internazionale dell'economia*, A. Ligustro, G. Sacerdoti (eds), cit., p. 3 ff.; with regard to the WTO, S. Arrowsmith, A. La Chimia, *Addressing Tied Aid. Towards a More Development-Oriented WTO?*, in *Journal of Int.al Economic Law*, 2009, n. 12, p. 707 ff.

<sup>24</sup> Concerning the procedural provisions, the focus of the World Bank Procurement Guidelines rules is on the *International Competitive Bidding -Icb* (part II, parr. 2.1-2.68). Only as exception, the *Other Methods of Procurement* (parte III, parr. 3.1-3.17) include the *National Competitive Bidding -Ncb* procedure (par. 1.4), the *Limited International Bidding -Lib* procedure (par. 3.2) and other limited procedures, as the so-called *shopping* and *direct contracting*.

<sup>25</sup> **ON DEVELOPMENT LAW AND PARTICIPATION PRINCIPLE:** I.D. Bunn, *The Right to Development and International Economic Law. Legal and Moral Dimensions*, Oxford, 2012; P. Dann, *Entwicklungsverwaltungsrecht*, Tübingen, 2011.

on impartial tendering methods. Anti-corruption measures are also crucial for granting procurement conducts related to Bank-financed project, consistent to the peculiar financing purposes.

Compared to the GPA, the World Bank Guidelines protection mechanisms are informal, non-judicial and less rigorous: it lacks an independent reviewing body or a central dispute settlement authority. Challenge procedures only partially evolved taking the limited form of an internal complaint. Information about complaints to the executive directors (competent for each State Party) or other international financing institutions within the system of development cooperation, is excluded. The WB Guidelines do not recognize any procedural active role to the interested suppliers (those excluded by the award decision) in order to facilitate protection against irregularities and abuses, and mere domestic judicial remedies are available. In less developed countries, the latter might be ineffective for instance because of situations of widespread and high judicial level corruption. Thus, domestic judicial system may represent a complex and decisive variable factor in foreign investors' evaluation.

There are no precautionary interim measures and economic sanctions apply – on the initiative of the Department of Institutional Integrity – only in case of fraud, corruption and collusion. To this regard, furthermore, the problem of compliance arises: firms, in fact, can easily change name, site, market activity and so avoid sanctions. Opportunistic choices are relevant for multinational operators too: they have interest in taking advantages from preference mechanisms in award procedures conducted by administrations of developing countries.

In this light, global rules and standards – as those adopted by more than hundred thirty signatories States of the Paris Declaration on Aid Effectiveness – constitute the most effective tool for promoting convergence among national legal orders and development of the less developed ones (through the common fundamental principles of development law).

In the same perspective, the World Bank has launched, from 2012 through 2015, a wide program of public consultation about the revision of

its own procedural and substantial procurement regulation.<sup>26</sup> The initiative underlines the increasing importance of promoting domestic reforms in the countries with economies highly dependent from the international cooperation system.

### ***1.3 Trans-frontier cooperation, investment and anti-corruption regimes***

Procurement relating to projects covered by trans-frontier co- operation, investment and anti-corruption agreements is subject sometime to peculiarly qualified supranational regimes.

The first group of agreements<sup>27</sup> often have environmental purpose and origin from extra-territorial or ultra-national phenomena (i.e. climate changes, floods, natural disasters). These circumstances make frontier communities interdependent, so that they have strong incentives to co- operate and set common rules. The Madrid Convention signed under the aegis of the Council of Europe in 1980 provides a general legal framework for collaborative relations between territorial (central or sub-national) entities of contiguous, ratifying States.<sup>28</sup> It constituted a model for a number of agreements adopted between the end of the last Century and the beginning of the Two Thousand.<sup>29</sup>

<sup>26</sup> See the *Procurement Policy Review*, regularly published at <http://consultations.worldbank.org/consultation/procurement-policy-review-consultations>.

<sup>27</sup> **ON TRANS-FRONTIER CO-OPERATION:** P.M. Dupuy, *La coopération régionale transfrontalière et le droit international*, in *A.F.D.I.*, vol. 23, 1977, 838; M. Perez Gonzales, *La coopération interregionale et sa possible couverture conventionnelle*, in Aa. Vv., *Le droit appliqué à la coopération interrégionale en Europe*, Paris, 1995, 103 ; R. Seerden, *The public international law character of transfrontier agreements between decentralized authorities*, in *Leiden J. Int'l L.*, n. 5, 1992, 187 ff.; M. Vidal, *Accountability and judicial review in the case of local trans-frontier co-operation*, Global Administrative Law Seminar Working Paper, June 2006.

<sup>28</sup> It aims to promote «the conclusion of any agreements and arrangements (that may prove necessary for (its) purpose) with due regard to the different constitutional provisions of each Party» (article 1) in the European context.

These agreements are concluded by sub-national public authorities and private entities even if they lack international law responsibility.<sup>30</sup> In force of such agreements, they exclusively assume financial obligations and commitments, without any involvement of the belonging State. Contracts are often subject, in these cases, to a mix of domestic legislations, supranational rules and basic procedural guarantees (transparency and competition of the tendering procedure): consensual provisions define performances, powers and obligations, including the guarantee of a competent review body.<sup>31</sup>

Traces of this phenomenon in the jurisprudence are few. Among the most important decisions taken by the European Court of Justice, the one related to the *Secap* case deserves mention.<sup>32</sup> This decision offers the

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<sup>29</sup> Implementing the Madrid Convention, at least eleven agreements were signed: the Agreement of Bayonne between France and Spain (dated 10<sup>th</sup> March 1995), the one of Karlsruhe among France, Germany, Luxemburg and several Swiss cantons (dated 23<sup>rd</sup> January 1996), the Agreement of Brussels between France and Belgium (dated 16<sup>th</sup> September 2002), the Benelux Convention among Luxemburg, Holland and Belgium (12<sup>th</sup> September 1986), the framework Agreement between Italy and Austria (dated 27<sup>th</sup> January 1993), the Agreement of Isselburg-Anholt between Holland and Germany (dated 23<sup>rd</sup> May 1991), the Agreement of Rome between Italy and France (dated 26<sup>th</sup> November 1993), the Agreement of Valencia between Spain and Portugal (dated October 2003), the framework Agreement between Italy and Swiss (dated 24<sup>th</sup> February 1993), the one between Finland and Russia (dated 20<sup>th</sup> January 1992) and between the Region of Walloon, the German-speaking Belgian community, the North-Rein Westphalia and the Rein Palatinate (dated 8<sup>th</sup> March 1996).

<sup>30</sup> S. Bariatti, *L'accordo nel sistema delle fonti e il diritto dei trattati*, in *Istituzioni di diritto internazionale*, S.M. Carbone, R. Luzzatto (eds), A. Santa Maria, 2<sup>a</sup> ed., Torino, 2003, 82; G. Burdeau, *Les accords conclus entre autorités administratives ou organismes publics de pays différents*, in *Mélanges Reuters*, Paris, 1981, 103.

<sup>31</sup> See the *Tegos* decision, Conseil d'Etat, 9 novembre 1999, n. 183648.

<sup>32</sup> European Court of Justice, *Secap and Santorso*, 15 May 2008, C-147/06 and C-148/06. Before, ECJ *Commission v. Irland*, 13 November 2007, C-507/03, and ECJ C-119/06, 29 November 2007.

definition of “trans-frontier” and “certain” public interest that is crucial for identifying those conditions that, under European law, justify legal protection in the awarding procedure, regardless to national law. The so defined peculiar interest outlines, in other words, the necessary limits to the sub-national or local entities powers in regulating contracts in a manner different from national legislation. The de-nationalization (or de-statalization) of public interest matches the increasing de-localization following pro-competitive policies. In the Italian context, the Constitutional Court case-law, notably careful to open market conditions (at domestic level), has granted full application of EU law.<sup>33</sup>

Turning to international investment regimes, the 1965 Washington Convention represents a fully autonomous system, separated from the national legal orders.<sup>34</sup> With almost two thousands bilateral investment treaties signed within its legal umbrella, it constitutes the longest running multilateral regime.<sup>35</sup> These treaties set up measures applicable in the relationship between foreign investors and States of investment (usually, developing States). The Convention gives a general legal framework to such treaties and establishes the arbitration proceedings administrated by the International Centre for Settlement of Investment Disputes (or ICSID Tribunal) as the only way to solve disputes between contractors, thus insulating foreign investors from the local legal, economic, monetary and tax system. The ICSID arbitration clause fixes peculiar legal guarantees on

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<sup>33</sup> Corte costituzionale, decision n. 207 of 2001 and n. 440 of 2006.

<sup>34</sup> **ON THE WASHINGTON CONVENTION:** I. Shihata, A. Parra, *Applicable, Substantive Law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, in *ICSID Rev.*, 1994, 183 ff.

<sup>35</sup> **ON ICSID CASELAW:** L. Lankarani El-Zein, *Les contrats d’État à l’épreuve du droit international*, Bruxelles, 2001, and *ivi* B. Stern, *Préface*, IX ff.; more recently, S. Schill, *Contracting with Foreigners: International Investment Law Implications*, in *Droit comparé des Contrats Publics - Comparative Law on Public Contracts*, R. Noguellou, U. Stelkens (eds), Brüssel, 2010, 63 ff.

remedies and for cases of changes in the national foreign investment law. The distance from international law consists in the mix of national discipline and international law principles that apply in case of no-determination by the contractual parties of the applicable law.<sup>36</sup> The ICSID arbitral awards bind the parties in force of a common determination they previously expressed in the arbitration agreement. The ICSID arbitrations concerning public contractors and procurement, available on the official website are a small part of the whole.<sup>37</sup> The relevant awards have mostly economic development contracts, concessions or public service contracts as object.

In these cases, the Tribunal frequently deals with issues on its own arbitral jurisdiction (and limits) or on arbitrable disputes. The first requires the definition of the concept of foreign investment: in this sense, a trend favorable to an extensive interpretation is evident in the ICSID case-law. It includes also the economic rights deriving from procurement of works (decision *Salini-Marocco*).<sup>38</sup> To this regard, the ICSID Tribunal elaborated a peculiar test, based on the evaluation of five parameters of importance of the investment contract. About the second issue, the difficult distinction between facts concerning the bilateral treaty and facts related to the investment contract is relevant. In this regard public entities can play, in fact, a twofold role: they can act exercising sovereign powers or they can act as a private (contractor). The distinction has important implications in terms of protection of private parties in hypothesis of exclusive national administrative jurisdiction clauses on the interpretation and application of the contract (decision *Vivendi*). On the notion of public body, the legal personality criterion and the indexes of autonomy reserve great importance in the ICSID arbitration awards. In the Tribunal jurisdiction mainly fall the

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<sup>36</sup> K.V.S.K. Nathan, *Icsid Convention*, New York, 2000, 70 ff.

<sup>37</sup> Most of the disputed cases end by conciliation.

<sup>38</sup> See also the ICSID decision *CMS Gas Transmission Company v. Argentine Republic*, n. ARB/01/8, 17 July 2003, in I.L.M., v. 42, 2003, 788, and *Elettronica Sicula S.p.A. (ELSI)*, (*United States of America v. Italy*) in *I.C.J. Reports 1989*, 15, par. 73.



cases of public entities explicitly indicated in the investment treaty as bodies separated by the State.<sup>39</sup>

The third group of supranational rules on procurement aims at combating corruption of public officials at trans-national level. The OECD Convention of 1997<sup>40</sup> and more recently the revised text of the GPA recognize the same objective as general principle for open, competitive, fair and efficient public procurement markets. Following the Convention, the main exporting States introduced specific criminal provisions sanctioning bribery of foreign public officials in the national legal orders. Thus, an important step has been taken forward the harmonization of internal legislations, that in some cases even allowed to declare (without charge by fiscal authorities) the costs for presents given by domestic firms to foreign public officials, as “sponsorship” or “intermediation” expenses. The USA played a significant role in promoting a strong approach to the problem (see the *Foreign Corrupt Practices Act–Fcpa*). On basis of the Convention, liable for the crime will be held legal persons (corporate liability) as well as natural persons. To avoid the sanctions, interested firms are required to adopt and implement internal organizational schemes and compliance programs aimed at minimizing the risk of an offence being committed, especially by persons acting in a leading position. These corporate burdens

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<sup>39</sup> With regard to the subjective field of application, the trend to interpret literally and strictly the contract is prevailing.

<sup>40</sup> **ON THE OECD CONVENTION:** C.F. Corr, J. Lawler, *Damned If You Do, Damned If You Don't? The Oecd Convention and the Globalization of Anti-Bribery Measures*, in *Vanderbilt Journal of Transnational Law*, n. 32, 1999, 1249; B. Crutchfield George e al., *The 1998 OECD Convention: an Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, in *American Business Law Journal*, 2000, 485; N.M. Rubin, *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the Oecd Recommendations and Convention for the United States, Germany and Switzerland*, in *American University International Law Review*, 1998, n. 14, 257; G. Sacerdoti, *The 1997 Oecd Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, in *International Business Law Journal*, 1999, n. 1, 3-17.

are necessary to protect a trans-national public interest fundamental for increasing economic opportunities for private contractors.

For the first time, Italian judges found substantial evidence of the crime committed by a legal person (a foreign corporation) in the *Enelpower* case.<sup>41</sup> The related decision considers the supranational rules directly binding and national judges mere executors *vis á vis* foreign competing parties. Following the adoption of the Convention by the States, protection of relevant global public interests affect individual citizens and interested contractors. The different national implementing legislations cannot limit or nullify the binding effects of the supranational regulation. Domestic courts are competent for the effectiveness of the emerging regime and for the coherence of internal and supranational rules.

On the model of the Madrid Convention, several regulatory initiatives have been launched by international organizations (i.e. ONU, OAS) aimed at introducing public officials disciplines consistent with procurement anti-corruption and integrity principles.<sup>42</sup>

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<sup>41</sup> Decision of the Judge for preliminary investigations of the Tribunal of Milan, of disqualification from contracting with public administrations, 28<sup>th</sup> April 2004. See U. Draetta, *Prime sanzioni interdittive in Italia a carico di persone giuridiche per corruzione di pubblici ufficiali*, in *Dir. del comm. intern.*, 2004, 241-44, e commentata da L. Borlini, *La lotta alla corruzione internazionale: le Convenzioni dell'OCSE e delle NU, il caso Enelpower, la "tangentopoli" irachena*, in *Comunità intern.*, 2005, 75-95.

<sup>42</sup> Among others, the Inter-American Convention against corruption, launched by the Organization of the American States-Oas and adopted on the 29<sup>th</sup> March 1996, the African Union Convention on preventing and combating corruption (9<sup>th</sup> July 2002) and the United Nations Convention Against Corruption-Uncac, signed in Merida, on the 31<sup>st</sup> October 2003. **ON UNCAC**: P. Neumann, *United Nations Procurement Regime*, Frankfurt, Lang, 2008; C.R. Yukins, *Integrating Integrity and Procurement: The United Nation Convention against Corruption and the Uncitral Model Procurement Law*, in *Public Contract Law Journal*, 2007.

## 2. CONVERGING AND CONFLICTING GLOBAL STANDARDS

Studying forty-six sets of provisions, a relevant innovation becomes evident: the significant enhancing trend of supranational public procurement law. This is a recent phenomenon, dated between the two centuries.

The analytic consideration of the rules and standards of each set of norms shows important permanent features and several variable elements.

Among the first, all the relevant regimes concur in limiting State traditional exclusive powers on procurement. Data on contract financial amounts and service value size the phenomenon as one of the most prominent economic implications of the exercise of public power in legal globalization.

Second, procurement regulation at global level is mainly based on a structure of States' consent relationships. Most of the legal instruments providing global standards has pactual nature: consensual acts and voluntary rules. Thus, the relevant regimes are inclusive, that means are open to all interested States, even if not yet members (of the organizations) or parties (of agreements and conventions). Beside consensual bounds, in several cases soft-law acts, like rules of conduct (for example, Oecd recommendations, the World Bank Procurement Guidelines and the UN Procurement Manuals), also occur. These acts are formally not binding and must be expressly accepted by contractors, but the latter often depend on the connected financial support and, as a result, are bound by those measures.<sup>43</sup> In some cases, States or public authorities, agencies or administrations are involved in the exercise of supranational regulatory powers and bind themselves, private and public bodies to a certain degree. In other cases, regulation comes from bilateral agreements. Thus, the problem of

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<sup>43</sup> On the concept of *Verrechtlichung* or the enhancing of the law sphere, as consequence of the legal globalization, see S. Cassese, *Eclissi o rinascita del diritto?*, and G.U. Rescigno, *Pluralità di ordinamenti ed espansione della giuridicità*, in *Fine del diritto?*, P. Rossi (ed.), Bologna, 2009, p. 29 ff. e 81 ff.

identifying case by case the subjective sphere of application of the global regimes arises.

Third, even if each set of rules pursues peculiar main aims – trade, cooperation for development, anti-corruption, environment and human right protection –, supranational procurement regimes affirm a core of common principles, including competition, transparency, publicity for contract opportunities, fairness and impartiality of the reviewing body, guarantees of due process.

Those principles apply by mean of different methods and in a flexible or rigid manner according to the competing purposes of the supranational institution or regulatory act. A good example is given by the rules on qualification and on conditions for exclusion: more rigid (the first) and few (the second) in the Guidelines than in the GPA. Open competition in World Bank procurement policy is, in fact, less important than cooperation for development.

Fourth, despite the minimum set of common principles, the single regulatory act of origin provides peculiar technical standards. A meaningful example can be drawn from the exceptions to non-discrimination and equal treatment of competing suppliers. Among the relevant standards, technical specifications are object of specific contract provisions and general clauses, defined as essential part of the applicable regime. The prevailing favor for international specifications notably limits the protectionist tendencies recently emerged in several States as consequence of the economic crisis.<sup>44</sup>

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<sup>44</sup> On the economic crisis and commercial protectionism, recently, F. Erixon, R. Sally, *Trade, Globalisation and Emerging Protectionism Since the Crisis*, European Center for International Political Economy Working Paper n. 2, 2010, 8, e A. Krueger, *Protectionism and the crisis*, in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20*, R. Baldwin, S. Evenett (eds), London, Centre for Economic and Policy Research, 2009, 37. On protectionism and public procurement, lastly, J. Linarelli, *Global Procurement Law in Times of Crisis: New Buy American Policies and Options in the WTO Legal System*, in *The WTO Regime on Government Procurement: Challenge and Reform*, cit., 773 ff., G.C. Hufbauer, J.J. Schott, *Buy American: Bad for Jobs, Worse for Reputation*, Peterson Institute for International Economics Policy Brief No. PB09-2 (2009), S.L. Schooner, C.R. Yukins, *Tempering “Buy American” in the Recovery*

Fifth, substantial and procedural provisions of these global sets of rules directly affect citizens and public entities of the State Parties and non-State Parties. Furthermore, the activity of the relevant institutions, organizations and bodies – rule-setters, committees, public officials, groups of experts – shows a prominent administrative nature (procedures, controls and other kind of activities), as well as the tool used at the various stage (rule-making, decision-making and execution). These features, in particular, are important in qualifying the emerging phenomena as a part of the Global Administrative Law phenomena.<sup>45</sup> Global procurement regimes apply behind national barriers and States geographic borders, within a non-state legal sphere. Last, in many cases these regimes apply by enforcement mechanisms when State consent is lacking or even against national determinations.

The main differences, on the contrary, concern the field of application, the characteristics and effectiveness of the various enforcement methods. With regard to the first, the definition and the different range of public entities subject to the application varies according to the global regime: it is enough to consider the lists of procuring authorities that are part of the GPA, as included in its Appendices. Concerning the second, in several cases global regulatory regime creates its own remedial mechanisms and even an *ad hoc* review body (as the WTO Dispute Settlement Body or the ICSID arbitration Tribunal). In other cases, national courts and domestic agencies are competent to apply these regulations to settle disputes through the internal remedial system (as according to the Guidelines and for the

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*Act - Steering Clear of a Trade War*, in *Government Contractor*, n. 10, 2009, 78, and ID., *Public Procurement: Focus on People, Value for Money and Systemic Integrity, not Protectionism*, in *The Collapse of Global Trade, Murky Protectionism, and the Crisis: Recommendations for the G20*, cit., 87-92.

<sup>45</sup> For the theoretical framework of GAL see S. Cassese, *Il diritto amministrativo globale: una introduzione*, in *Riv. trim. dir. pubbl.*, 2004, n. 3, 657, S. Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, Einaudi, 2009, 20-22, B. Kingsbury, N. Krisch, R. Stewart, *The Emergence of Global Administrative Law*, in *Law & Contemporary Problems*, 2005, vol. 68, n. 3/4, 15-61, esp. 20.

mentioned *Enelpower* case). Further, in hypothesis of violation, precautionary measures, disqualification (or ineligibility) sanctions and rights to economic damage compensation sometime are provided; other times, the mere repayment of given funds applies (as in the World Bank procurement discipline). In this sense, the global procurement regulatory phenomenon is fragmented, jeopardized and heterogeneous, showing considerable contradictions. Moreover, it can be understood as a new paradigm emerging from a complex development, only partially defined as an earlier evolutionary stage.

### **3. MUTUAL IMPACT AND INTERACTIONS BETWEEN GLOBAL AND NATIONAL REGIMES**

The fast and large widespread of global procurement regulations stress the fact that traditional exclusive application of national disciplines to public sector contracts is definitely passed. With the time, global procurement regimes show an increasing impact on national legal systems. These regimes offer the advantage of a common set of rules and standards based on general principles of good administration, like competition, efficiency and transparency. At the same time, this emerging law appears to have room for significant improvement.

The innovations on domestic regulations are consistent: the emerging regimes challenge priorities amongst the relevant interests and have significant impact on procedures, types of regulatory acts and enforcement mechanisms.

#### ***3.1 Functional issues***

The main innovation consists in updating the national procurement regulatory criteria. In the Italian legal order, for instance (like in the French one), traditionally public procurement discipline is a part of the public sector accounting system, ruled as such within the accounting laws. The normative approach to this matter thus pursued the scope of containing public resources expense for procurement. In other words, the need of

preferring the lowest price tenders or best-value-for-money offers notably prevailed.

Supranational regimes penetrate and have impact on national legislations by affirming and sometime introducing new public interests and policies, as foreign competition, international trade, economic cooperation for development, foreign investment protection, fighting corruption and money laundering. The emergence of new interests and policies partially is connected to problems of global scale, like reducing the burden on public budgets or leveling the playing field for international trade. To solve these problems cooperation among States, regulatory bodies, public and private entities is required.

Because of the multiple-interests nature of these regimes, relevant powers are exercised in order to realize different functions in different manner. In some cases, to satisfy global interests non-application of national conflicting rules is necessary: this is the case concerning Massachusetts internal legislation providing dis-favorable treatment of suppliers (contract part of the administrations) with economic interests in Burma. The ground for abrogation was that those rules violated the GPA and established an unnecessary barrier to international trade. Several other interests can be satisfy by means of assessments in the opposite sense: as for the Third Fisheries Project, a World Bank development project financed and realized in Bangladesh. The competent internal staff had to set aside the international competitive bidding procedure, including qualification requirements, in order to reach the expected results in favor of a targeted social group.<sup>46</sup>

National interests often appear fragmented at global level. Case by case, these interests converge or diverge depending on the interest-holders (national and supranational institutions and organizations) activities. The dominant regulatory model – the GPA – is mainly based on competition and serves the so-called “purity principle”, that is to say the establishment of a system that leaves minimum space to non-economic criteria in procurement

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<sup>46</sup> On the World Bank Bangladesh Third Fisheries Project see H. Caroli Casavola, *Global Rules for Public Procurement, in Droit comparé des Contrats Publics /Comparative Law on Public Contracts*, cit., esp. p. 40 ff.

proceedings. Supranational regimes are, thus, essentially defined on basis of economic criteria, market dynamics and game strategies (such as comparative advantage, transaction costs, information asymmetries, best- value-for money, minimum value thresholds, incentive mechanisms).<sup>47</sup>

Non-economic criteria, like social policy conditions,<sup>48</sup> often arise the problem of compatibility: in fact, those criteria imply to use procurement as a policy tool and new barriers to market access. Furthermore, general interests often converge or diverge from the private ones. Private individuals try, in fact, to exploit the mismatches (and black holes) between national and supranational or distinct supranational procurement regimes.<sup>49</sup>

In this perspective, the attraction of national systems toward the global set of principles, rules and standards maybe the starting point for a future more structured sector legal harmonization.

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<sup>47</sup> On the economic interests related to the regulation: A. Blüthner, *The Global Compact and the WTO "Trade ands" – Implementing Universal Value in the Globalization Process*, in *WTO-Recht und Globalisierung*, M. Nettesheim, G. G. Sander (eds), Berlino, Duncker & Humblot, 2002, 313-334; C. McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change*, Oxford University Press, 2007; D.W. Leebron, *Linkages*, in *The Boundaries of Wto*, in *American Journal of International Law*, 2002 (96), 5.

<sup>48</sup> S. ARROWSMITH, *Horizontal Policy in Public Procurement: A Taxonomy*, in *Journal of Public Procurement*, 10 (2010), p. 149; C. MCCRUDDEN, *Buying Social Justice. Equality, Government Procurement & Legal Change*, Oxford University Press, 2007, ID., *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, in *Journal of International Economic Law*, 1999, p. 3-48. On the environmental interest, P. KUNZLIK (ed.), *The Environmental Performance of Public Procurement*, Oxford University Press, 2007.

<sup>49</sup> See S. Cassese, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Riv. trim. dir. pubbl.*, 2001, 607 ff., esp. 643 ff.; on the *black holes* and global regimes, Id., *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, Einaudi, 2009, 143.



### 3.2 *The impact of global regimes on the national legal order*

A second innovative aspect is that State powers lost their traditional exclusive regulatory prerogative in public procurement. Thus, national legal order is no longer the exclusive juridical order for the relevant matter.

Together considered, national and global regimes show to be not yet completely consistent neither fully integrated; these regimes rather concur in defining a new regulatory framework. Within such framework, the emerging differently originated provisions interact and interplay.

At supranational level mostly tools of peculiar nature, like technical specifications or standards and award requirements, are defined. International organizations and hybrid private-public institutions usually set these tools and regulate contains and procedural criteria: the ISO,<sup>50</sup> CEN and ASTM standards, for instance, have prominent importance in environment, safety, quality management and social responsibility regulations. The WTO DSB case-law,<sup>51</sup> the World Bank Procurement Guidelines,<sup>52</sup> the EU law,<sup>53</sup> NAFTA and several free trade agreements facilitate the adoption of these technical standards in public contracts.

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<sup>50</sup> **ON THE ISO STANDARD:** K. Tamm Hallström, *Organizing International Standardization: ISO and the IASC in Quest of Authority*, Cheltenham, 2004; Id., M. Boström, *Transnational Multi-stakeholder Standardization: Organizing Fragile Non-State Authority*, Cheltenham, Elgar, 2010; Roht-Arriaza, *Shifting the Point of Regulation: the International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *Ecology Law Quarterly*, 1995, 479 ff., esp. 486; for the analysis of a peculiar case, A. Prakash, M. Potoski, *Racing to the Bottom? Trade, Environmental Governance, and ISO 14001*, in *American Journal of Political Science*, vol. 50, n. 2, April 2006, 351.

<sup>51</sup> See the GPA case *Japan – Procurement of a Navigation Satellite*, WT/DS73. An accurate analysis is given by E. Clerc, *La mondialisation des marchés publics: bilan et perspectives de l'accord OMC sur les marchés publics*, in *Les marchés publics à l'aube du XXIe siècle*, Batselé et al., Bruxelles, 2000, 176-177.

<sup>52</sup> Among others, the standards Iso 2859 and Iso 4074 apply to landmine clearance and health sector procurements: World Bank, *Landmine Clearance Projects: Task Manager's*

States are often bound to implement the same standards in the domestic legal order. Thus, the margins of discretion traditionally reserved to procuring administrations are highly narrowed by supranational regimes.

In this light, procurement global regulations trigger a process of harmonization of legal contents at supranational level with a revolutionary impact on national laws.

In the Italian system, the Code on public contracts (law decree n. 163, adopted on 13th April 2006), at article 18, excludes from its field of application those « contracts awarded according to [...] a specific procedure set by an international organization » (para. 1).<sup>54</sup> This provision means that *vis á vis* supranational regulated procurement procedures the Code steps back and gives the first space.

In many other cases, national legislators are bound only to implement fundamental supranational procurement principles, being free to choose how to do it. An example can be found in the relevant global regimes: the execution phase almost always is excluded by the range of regulated contents. Thus, differently from awarding procedures, the discipline on procurement execution is almost exclusively domestic.

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*Guide*, 1° November 2003 (NWP 28070) and *Procurement of Health Sector Goods*, May 2000.

<sup>53</sup> On the European Committee for Standardization-Cen, the European Committee for Electrotechnical Standardization-Cenelec, H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford, 2005, 201.

<sup>54</sup> **ON THE ITALIAN PROCUREMENT CODE:** C. Franchini (eds.), *I contratti di appalto pubblico*, Torino, UTET, 2010; C. Franchini (eds.), *I contratti con la pubblica amministrazione*, Torino, UTET, 2007, I e II, in P. Rescigno – E. Gabrielli (eds.), *Trattato dei contratti*, Torino, UTET, 2007; M. D'Alberti, *Interesse pubblico e concorrenza nel codice dei contratti pubblici*, in *Diritto amministrativo*, 2008, 301 ff.; M. Clarich (eds.), *Commentario al Codice dei contratti pubblici*, Torino, Giappichelli, 2010.

To this regard, the following problem deserves consideration: national legal systems often make a stand at supranational regulatory ties.<sup>55</sup> These hypothesis may result in quite unexpected consequences, as those relating several peculiar organizational provisions (as in the *Korea Airport* case).

Not only State legislators and domestic administrations, but also domestic Tribunals are bound to apply global rules and standards beside national and European law. In case of disputes, lacking a supranational judicial authority competent for settlement, it will belong in fact to these Tribunals to ensure the effectiveness of those rules and standards (as according to the *Enelpower* case). To this aim, national judges or other adjudicatory authorities can no longer ignore acts providing global regulations, neither – when it is the case – formal interpretations of those regulations given by supranational adjudicatory bodies.

The latters have often showed a twofold tendency. On one side, to extend their jurisdiction in the subject matter by interpreting key concepts, which are undetermined, opaque or vague in the regulations (such as “entity covered”, “value of the contract”). On the other, to prefer a substantial and creative approach, aimed at developing principles and specifying existing rules and criteria (like in the ICSID arbitral awards and the CITT case-law).

### ***3.3 Institutional aspects***

All the relevant aspects of legal globalization concur in the examined phenomenon: the re-definition of State traditional sovereign powers, an enhanced concept of law and types and number of normative acts, the horizontal (lateral opening of national legal orders and supranational regimes, law transfer) and the vertical dimension (self-contained regimes, national-global) of interaction among actors in the global space.<sup>56</sup>

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<sup>55</sup> Regard the European context, see G. Vesperini, *Il vincolo europeo sui diritti amministrativi nazionali*, Milano, Giuffrè, 2011.

<sup>56</sup> On the emerging phenomena of « mutual penetration and harmonization », develop through linkages and «mutual connections» among domestic, international and global laws (connecting regimes), as well as on the transfer of legal institutes, rules and standards takes place along vertical and horizontal lines, see S. Cassese, *The Globalization of Law*, cit.,

This interaction mainly consists in the institutional activity of a set of new national and supranational entities and independent sector bodies, with administrative, judicial or quasi-judicial nature. These emerging actors pursue the protection of global interests often in an exclusive way. The insulation of the given functions is based on the ground of the influence that national and local organized interests are likely to exercise in decision-making processes (consider, for instance, the risk for CITT to be “caught” by domestic actors). These new entities elaborate practical solutions for comparing and identifying emerging interests that deserve juridical protection. Furthermore, they grant interests satisfaction in coherence to (and by applying) global regulations, adapting those rules to national peculiarities. In other terms, they act as *trait d’union* among existing and emerging legal systems.

Even if a single coordination mechanism for all the specific methods and systems provided by the distinct supranational regimes (or a compendium of global standards for public procurement as the financial services one) lacks, cooperation and networking among global regulators and international institutions exist.<sup>57</sup> For instance, as collective action can be seen the deference relationship that authorities with corresponding competences acting at different political level (supranational, national and local) reciprocally reserve or the operating of informal network of experts and public managers. In this perspective, the OECD and UN anti-corruption Conventions required the creation of special bodies within national central administrations of the Member States – as the Italian Autorità nazionale anticorruzione e per la valutazione e la trasparenza delle amministrazioni

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980; Id., *Administrative law without the State? The challenge of global regulation*, in “Journal of International Law and Politics”, v. 37 (2005), n. 4, pp. 663-694.

<sup>57</sup> P.G. Cerny, *Globalization and the Changing Logic of Collective Action*, in *International Organization*, 1995, 49, n. 4, Autumn, 620, now in J.A. Frieden, D.A. Lake (eds.), *International Political Economy: Perspectives on Global Power and Wealth*, London, Routledge, IV ed., 2000. On the governance of the global legal space, S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law*, Global Law Press, Editorial Derecho Global, 2012.

pubbliche (A.N.AC.)<sup>58</sup> of the Ministero per la semplificazione e la pubblica amministrazione –, in charge to provide all the necessary information on the relevant phenomenon to international organizations and interested parties (non-governative organizations like Transparency International). That is the case of public law entities, sometime dependent, often independent from national governments. On the opposite, trans-frontier cooperation agreements constitute public-private bodies networks: it is an hybrid mix of actors with different nature, organization, structure and law.

Functional interconnections not responding to any specific organizational model (like delegation of powers or principal-agent relationship) and that maybe understood as part of a complex, original and evolving phenomenon, spontaneously framed by prevailing economic logic, also exist.

In this light, the dominant pro-competitive approach of the emerging global procurement sphere outlines the importance and essential complexity of the contract as general institute and regulatory framework for multiple interest assessment, behind the blurring traditional public/private divide.<sup>59</sup>

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<sup>58</sup> Law 6<sup>th</sup> November 2012, n. 190, art. 1, para. 2, as modified by law 30<sup>th</sup> October 2013, n. 125, converting law-decree 31<sup>st</sup> August 2013, n. 101 (information about the Authority are available at [www.anticorruzione.it](http://www.anticorruzione.it)).

<sup>59</sup> The evolution of the notion of public procurement in the ECJ and national caselaw offers a meaningful example to this regard (C. Franchini, *Intervento*, Atti dell'incontro su *La globalizzazione dei contratti delle pubbliche amministrazioni*, Rome, 26 November 2012, draft, 18).

**ON THE TRADITIONAL DICOTOMY PUBLIC / PRIVATE LAW:** M. Freedland, J.B. Auby, *The Public Law/Private Law Divide: Une Entente Assez Cordiale?*, Oxford, 2006, P. van Ommeslaghe, *Le droit public existe-t-il?*, in *Le droit public survivra-t-il à sa contractualisation?*, Aa.Vv., Bruylant, Bruxelles, 2006, 15 ff.; M. Fromont, *L'évolution du droit des contrats de l'administration. Differences théoriques et convergences de fait*, in *Droit comparé des Contrats Publics - Comparative Law on Public Contracts*, R. Noguellou, U. Stelkens (eds), Bruylant, Bruxelles, 2010, 263 ff.; A. Benedetti, *I contratti della pubblica amministrazione fra specialità e diritto comune*, Torino, Giappichelli, 1999;

G. Napolitano, *Pubblico e privato nel diritto amministrativo*, Milano, Giuffrè, 2003; N. Symchowicz, *Droit public des montages contractuels complexes*, Paris, 2003.

## 5. WEBSITES

[www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm/](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm/) WTO Government Procurement Agreement

[www.worldbank.org/html/opr/procure/](http://www.worldbank.org/html/opr/procure/) World Bank Procurement Guidelines

[www.citt-tcce.gc.ca/](http://www.citt-tcce.gc.ca/) Canadian International Trade Tribunal International

<http://icsid.worldbank.org/> Centre for Settlement of Investment Disputes

[www.oecd.org/](http://www.oecd.org/) Organisation for Economic Co-operation and Development

[www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm/](http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm/) Oecd Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

[www.bilaterals.org/](http://www.bilaterals.org/) Bilateral Trade Agreements

<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx/> Regional Trade Agreements Information System

[www.unodc.org/unodc/crime\\_signatures\\_corruption/html/](http://www.unodc.org/unodc/crime_signatures_corruption/html/) United Nations Convention Against Corruption

[www.avcp.it/](http://www.avcp.it/) Autorità per la vigilanza sui Contratti pubblici [www.consip.it/](http://www.consip.it/) Consip S.p.A.

[www.planpublicprocurement.org/main/](http://www.planpublicprocurement.org/main/) Procurement law academic network

[www.contrats-publics.net/inhalte/home.asp/](http://www.contrats-publics.net/inhalte/home.asp/) Public contracts in legal globalization