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THE COMPLEMENTARITY OF SOFT AND HARD LAW IN PUBLIC PROCUREMENT: BETWEEN HARMONIZATION AND RESILIENCE

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ABSTRACT:

Increasing complexity and fragmentation challenge the traditional ‘rulebook’ of international law, including the perception and the relationship of hard and soft law. In this context, by combining normative and governance considerations, the aim of the proposed paper is to analyze the interactions and dynamics of soft and hard law in public procurement, an area where the potential of these regulatory developments has not yet been fully explored.

The research will focus on the analysis of the parallel interactions between hard and soft law instruments of international procurement governance, namely the UNCITRAL Model Law of Procurement of Goods and Services and the Revised Text of the WTO Government Procurement Agreement. The complementary actions of hard and soft law will then be explored in the specific case study of the complex regulatory challenges of addressing corruption in public procurement. Based on these considerations, it is argued that soft law instruments, as complements to hard law agreements, can act as viable regulatory solutions to strike a balance between nondiscrimination and legitimate political concerns in light of the intrusive features of international public procurement regulations.

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INTRODUCTION

Increasing complexity and fragmentation challenge the traditional ‘rulebook’ of public international law; this includes the perception and relationship of hard and soft law. In this context, public procurement represents a privileged and innovative research field for the study of hard law and soft law instruments and the potential of their regulatory role, not fully explored yet in academic literature.

Public procurement, with its crucial role in promoting good governance in the public sector and the specifically sensitive and far-reaching characteristics of its regulation, is of great political and economic interest in international trade regimes. The international regulation of public procurement has been slowly but gradually included in the priorities of multilateral and regional free trade agreements, due to the increased importance of public spending and investment infrastructures for economic growth and in particular during periods of financial crisis. These progressive regulatory efforts to address public procurement resulted in a very fragmented landscape of international regulations, hard and soft law mechanisms shared between different levels of procurement governance, with relevant margins for conflicts and overlaps.

The progressive liberalization of the international procurement market, in fact, is seriously threatened by the regulatory conflicts and gaps creating significant barriers to trade for the international procurement regulatory system, which was only recently reformed after an endless negotiating process. By combining normative and governance considerations, the proposed paper aims at analysing the interaction and dynamics of soft and hard law in public procurement, emphasizing their potential of increased harmonization and complementarity.

First, the framework of the international instruments of public procurement regulation will be established and subsequently the regulatory regime of public procurement will be conceptualized. The analysis will be supported by the analytical outline for the defining criteria and concepts of hard and soft law, together with the possible complementary dimensions and consequent challenges. Moreover, the traditional regulatory value of hard law and soft law as regulatory instruments of public procurement regulation will be explored, underlining the major shortcomings and difficulties experienced in the development of binding procurement agreements and the flexibilities offered by the soft law approach.

Subsequently, the aspect of ‘complementarity’ between soft and hard law is being further elaborated with respect to the “intrusiveness” of international procurement rules. The focus in this second section particularly lies on the analysis of parallel interactions between hard and soft law instruments of

international regulation of government procurement, namely the UNCITRAL Model Law of Procurement of Goods and Services and the Revised Text of the WTO Government Procurement Agreement. The study conducted in this section mainly reasons that the hard vs. soft law processes are working complementarily towards a harmonization of the fragmented and overlapping international procurement regimes. The complementary actions of hard and soft law will then be explored in a specific case study of the complex regulatory challenges in addressing corruption in public procurement, a particularly sensitive problem area in both national and international procurement regulations.

Based on considerations deriving from the observation of the developments in the international regulations of public procurement, the paper finally argues that soft law instruments, as complements to hard law agreements, can act as viable regulatory solutions to strike a balance between non-discrimination and legitimate political concerns in light of the intrusive features of international public procurement regulation.

SECTION 1

1. The Landscape of International Public Procurement Regulations and Hard Law and Soft Law Regulatory Mechanisms

The last decade of the twentieth century, the international regulatory framework of public procurement has been characterized by a “global revolution, from both a national and an international perspective¹. If at national level, ambitious programmes of domestic procurement reform have been adopted to promote the principles of value for money and transparency², at the same time, the process of the international liberalisation encouraged the growth of different international instruments of procurement regulation. In the last twenty years, in fact, various soft law and hard law regulatory instruments have been developed with the main purpose of limiting the traditional use of procurement to promote domestic industries, fostering international competition and restrain protectionist and discriminatory practices.

Contextually to these changes in the international framework of public procurement regulation, the evolution of the hard law and soft law regulatory

¹ Sue Arrowsmith and Arwel Davies, *Public Procurement: Global Revolution* (London: Kluwer Law International, 1998). Sue Arrowsmith and Martin Tybus, *Public Procurement: The Continuing Revolution* (London: Kluwer Law International, 2002).

² Sue Arrowsmith, "National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?," in *Public Procurement: Global Revolution*, ed. Sue Arrowsmith and Arwel Davies (London: Kluwer Law International, 1998).

mechanisms has turned into a multi-layered structure between the different levels of public procurement governances. The crucial instruments of international procurement regulation have been developed, in fact, around the major regulatory systems of trade liberalisation and integration, in strictly interrelated multilateral, regional and bilateral layers.

The most important hard law instrument of public procurement regulation, at multilateral level, is represented by the Agreement on Government Procurement (GPA). The WTO negotiations of a possible trade regulation of the field of government procurement started in the 1960s in the OECD, later transferred under the GATT framework, in order to “*opt for enforceable and multilateral disciplines on government procurement, rather than anything weaker*”³. The text of the GPA creates legally binding commitments imposing two main sets of obligations for the Signatories Parties: the general non-discrimination principles are combined with a set of detailed transparency rules in the award procedure. However, the GPA regulation of procurement is built around the commitment that “*each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable*” (Art III GPA 1994)⁴. Even if it has been argued that some provisions of the 1994 GPA have not been drafted with the appropriated level of precision to make them directly implementable for the Signatory Parties, the GPA agreement can be challenged under the WTO’s Dispute Settlement Mechanism, with the only exclusion of possibilities of apply no cross-retaliation ex GPA Art. XXII:7⁵.

At regional level, other important hard law instruments of procurement regulation have been adopted in the context of the major regional institutions and regional trade arrangements (RTAs). With the principal scope of the liberalisation and further integration of the procurement markets at regional level, the European Community procurement directives⁶, the North American

³ From the study of the negotiation documents, the hypotheses of exclusively rely on legally binding commitments has been never in doubt between the Parties. Annet Blank and Gabrielle Marceau, “The History of Government Procurement Negotiations since 1945,” *Public Procurement Law Review* 5 (1996).

⁴ Sue Arrowsmith, *Government Procurement in the Wto* (The Hague: Kluwer Law International, 2003), 154-66.

⁵ The most significant departure from the application of the WTO Dispute Settlement Mechanism in the case of the GPA is represented by the suspension of concessions of any other WTO agreement, not possible under the GPA Art. XXII:7. Lili Jiang, “Evaluation of Soft Law as a Method for Regulating Public Procurement from a Trade Perspective ” (University of Nottingham 2009), 69.

⁶ Sue Arrowsmith, “The Ec Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach,” *European Law Review* 27, no. 3 (2002). Christopher Bovis, *Eu Procurement Law* (Cheltenham: Edward Elgar, 2008).

Free Trade Agreement NAFTA Chapter 10⁷ and the COMESA procurement directive⁸ offer complementary binding commitments of procurement regulations. The EC procurement framework is probably the most advanced regional regulatory system of public procurement, not only representing a pillar in the integration of the European common market, but also serving as model for national and regional experiences, significantly influencing also the development of international regulatory instruments, like the GPA⁹. It is essentially composed by a set of directives regulating award procedures¹⁰ developed around the basic free movement principles of the European common market set in the EC Treaty, providing a system of legally binding commitments that are even directly enforceable for the Member States¹¹.

If the EU procurement framework represents the most developed regional procurement regulatory regime, the most advanced instrument of procurement regulation at multilateral level is the UNCITRAL Model Law on Procurement of Goods, Construction and Services a soft law instrument. The UNCITRAL Model Law provides a highly articulated template helping the Parties in the implementation and improvement of the national procurement system, more oriented to the achievement of best value for money and efficiency. The Model Law is not a binding international agreement but a traditional non-binding instrument, leaving the Parties free to voluntarily follow it in the reform of their national legislation¹². Until now, the Model Law was put into practice by various countries around the world, regardless their level of development or political systems¹³. It is, however, difficult to properly identify the level of “implementation” of the Model Law; states enacting legislation based upon a model law, in fact, have the flexibility to freely depart from the text. Nevertheless, thanks to the flexibilities offered in the text, the Model

⁷ Laura Eyester, "Nafta and the Barriers to Federal Procurement Opportunities in the United States," *Public Contract Law Journal* 4, no. 2002 (2002).

⁸ Stephen R Karangiz and Isaac Ndahir, "Public Procurement Reforms and Development in the Eastern and Southern Africa Region," in *International Public Procurement: A Guide to Best Practice*, ed. Roberto Hernández García (London: Globe Law and Business, 2009).

⁹ Harvey Gordon, Shane Rimmer, and Sue Arrowsmith, "The Economic Impact of European Union Regime on Public Procurement: Lesson from the Wto," *The World Economy* 21, no. 2 (1998).

¹⁰ Christopher Bovis, "Public Procurement in the European Union: Lessons from the Past and Insights to the Future," *Columbia Journal of European Law* 12 (2005).

¹¹ The procurement regulation set in the EU directives represents a regulatory framework of commitments directly enforceable that has to be implemented in the national procurement regulations of the Member States, as required by in Article 288 TFEU. —, *Eu Procurement Law*, 478.

¹² The Model Law could therefore even be regarded as special category of soft law designed to connect (international) soft law in the sense of procurement principles underlying the Model Law with (domestic) hard law.

¹³ On the status of the implementation of the UNCITRAL Model Law, see www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html

Law is widely recognised as a fundamental “global standard” for good governance in the procurement regulation¹⁴.

At regional level of the public procurement governance, it is important to underline the importance of the Asian-Pacific Economic Cooperation Forum (APEC), another soft law procurement mechanism. A framework of “Non-Binding Principles on Public Procurement” (also referred as NBPs), has been developed by the APEC Government Procurement Expert Group and progressively introduced in the procurement systems APEC countries since 1999. The APEC principles, aiming at promoting trade through the improvement of domestic legislature on procurement, comprise “*Transparency, Value for Money, Open and Effective Competition, Fair Dealing, Due Process, and Non-Discrimination*”¹⁵. Given their non-binding nature, as expressly confirmed in its introduction¹⁶, APEC countries have a broad margin of discretion in deciding which principles to apply and how to implement them in the national procurement legislation. The APEC non-binding procurement principles appear to be less detailed and prescriptive in their drafting if compared to the other regional and international procurement regulations, but nevertheless they represent an extremely influential instrument in fostering transparency and good governance in the procurement sector of the Asian-Pacific region¹⁷.

2. Conceptualization and Traditional Regulatory Value of Hard Law and Soft Law in Public Procurement

Before further elaborating on the regulatory value of hard law and soft law in public procurement regulation, worthwhile to briefly address the phenomenon of soft law from a more general angle. The precise conceptualization of soft law and its particular significance are still unclear and have been subject of controversial scholarly discussion from an international law and international

¹⁴ Robert Hunja, “The Uncitral Model Law on Procurement of Goods, Construction and Services and Its Impact on Procurement Reform,” in *Public Procurement: Global Revolution*, ed. Sue Arrowsmith and Arwel Davies (London: Kluwer Law International, 1998). John Linarelli, “The Wto Agreement on Government Procurement and the Uncitral Model Procurement Law: A View from Outside the Region,” *Asian Journal of WTO & International Health Law and Policy* 1 (2006).

¹⁵ www.apecsec.org.sg/fora/activity_group/govproc/non_binding.html

¹⁶ Par. 2 of the Principles clearly states that “*the principles developed by the GPEG are non-binding*”. See www.apecsec.org.sg/fora/activity_group/govproc/non_binding.html

¹⁷ Greg J. Bamber, “How Is the Asia-Pacific Economic Cooperation (Apec) Forum Developing? Comparative Comments on Apec and Employment Relations,” *Comparative Labor Law & Policy Journal* 26, no. 4 (2005). David S. Jones, “Public Procurement in Southeast Asia: Challenge and Reform,” *Journal of Public Procurement* 7, no. 1 (2007). available here http://www.ippa.ws/IPPC2/JOPP7_1/Article_1_JONES.pdf

relations perspective.¹⁸ International law-making differs greatly from law-making in the domestic sphere.¹⁹ Due to the lack of a common superior legislature and compulsory formal jurisdiction to settle disputes, states – as central actors in international law-making – dispose of a broad margin of discretion concerning the adoption of instruments.²⁰ Public international law is established through consent and relies on the willingness of actors to comply with established obligations.²¹ It leaves states free to choose a legally binding agreement or instead opt for informal tools of international governance such as soft law.²² In many instances, the non-legally binding character of these instruments is explicitly negated. Reasons for the adoption of soft law in international relations by states or international organisations are manifold. One important aspect lies in the structural weakness of international law as caused by the diverging stages of political and economic development of states.²³ Moreover, the establishment of a treaty and the subsequent rather rigid legal regime applied in compliance with the Vienna Convention on the Law of Treaties impose high ‘costs’ on states. While rules are necessary to govern inter-state relations, any binding legal commitment constrains state sovereignty. Hard law is enforceable in an adjudicative setting, though

¹⁸ Gregory Shaffer and Mark A. Pollack, "Hard and Soft Law: What Have We Learned?," *Legal Studies Research Paper Series* Research Paper No. 12-17, no. University of Minnesota Law School (2010).

¹⁹ For an in-depth study of formal and informal law-making in international relations, see Gregory C. Shaffer and Mark A. Pollack, "Hard Vs. Soft Law: Alternatives, Complements and Antagonists in International Governance," *Legal Studies Research Paper Series* Research Paper No. 09-23, no. University of Minnesota Law School (2009).

²⁰ Daniel Thürer, "Soft Law," in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2000). 270.

²¹ *Ibid.* 274.

²² The term ‘soft law’ was first coined by McNair to describe norms which are non-legally binding. Soft law instruments can to date be found in virtually all fields of international law and are of key relevance in international economic law. The boundaries established by the restricted scope of the traditionally accepted formal sources of international law as canonised in Article 38(1) of the Statute of the International Court of Justice (hereinafter ‘ICJ Statute’) have hence been pushed considerably. Article 38(1) is generally regarded as enumerating those norms which dispose of binding legal effect and therefore constitute sources of international law *stricto sensu* – i.e. conventions, customary international law as well as general principles of law. Yet, behaviour in international governance is not just regulated by the ‘hard’ law as specified in Article 38(1) of the ICJ Statute and as is generally enforceable in inter-state disputes. The character of social norms which influence actors in international relations varies considerably, ranging from merely moral or political to ‘hard’ legal commitments. Besides legally binding treaties or customary rules, ‘soft’ or ‘para-legal’ instruments such as resolutions, recommendations, declarations, memoranda of understanding, or codes of conduct all potentially shape the actions in the international field, including those of states. See *ibid.*, 269-273.

²³ Shaffer and Pollack, "Hard Vs. Soft Law: Alternatives, Complements and Antagonists in International Governance." 18.

vagueness of provisions can pose considerable obstacles to both enforcement and implementation.

In addition, traditional sources of international law are 'static' in character, their further development after entry into force and their termination must comply with formal procedures.²⁴ This static nature is notably crystalized in the *pacta sunt servanda* principle. However, the strength (and danger) of soft law lies precisely in its dynamic character. While soft law instruments differ *inter alia* in terms of involved actors, development and content (namely in preciseness), their central common denominator is the lack of legal bindingness. Soft law creates a flexible regime, allowing development of inter-state relations in an informal, quick manner. It can potentially stabilize expectations and thereby contribute to reduce 'anarchy' in international relations.²⁵ Despite being non-legally binding, soft law is not void of legal relevance – it functions not as a source of international law but as a 'fact' (or 'tool')²⁶ be it for example through reference in the interpretation of hard law, through voluntary implementation by states or as expression of emerging *opinio juris*.²⁷ Regardless of its informal nature, states still perceive soft law as disposing of a certain factual authority or bindingness through expressing expectations of conduct – a phenomenon which could be labelled *in extremis* as amounting to a 'factual bindingness'.

Some soft law instruments are complemented by an informal enforcement or implementation mechanism, which give expression to the commitment of states to respect the relevant regulations.²⁸ Besides often being the only reachable form of agreement between states, due to the impossibility to find consensus caused by diverging interests, the relevance of soft law can go beyond the role of 'second-best' compared to hard law, being a tool (and not a source) of its own value in international governance.²⁹ For instance states which would not be able to fully comply with a formal agreement for various political, social or economic reasons and would therefore risk liability for its breach, could gradually adapt to the formal regime. In this vein, a functional, graduated system of legalization, taking into account the factors obligation,

²⁴ See the requirements codified in the Vienna Convention on the Law of Treaties.

²⁵ Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly* 38, no. 4 (1989). 851.

²⁶ Hartmut Hillgenberg, "A Fresh Look at Soft Law," *European Journal of International Law* 10, no. 3 (1999).

²⁷ ———, "A Fresh Look at Soft Law," *European Journal of International Law* 10, no. 3 (1999): 514.

²⁸ Such enforcement mechanisms vary considerably in the formality of their procedure.

²⁹ Most notably in complex situations requiring rapid reactions; Lili Jiang, "Developing Multilateral Rules on Government Procurement: The Value of Soft Law," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011).

precision and delegation, can well illustrate the degrees of legality between soft and hard law of each specific instrument.

However, it is also important to contextualize the debate on the regulatory value of hard and soft law mechanisms, adapting it to the public procurement field, necessarily taking into account the peculiarities of the international regulation of public procurement³⁰. Government procurement is not only an extremely sensitive regulatory area where national governments are at the same time regulator and trade actors in the market, but it is also a highly complex government regulation, imposing administrative procedures on a complex bureaucracy structure³¹. Moreover, it is undeniable that international procurement regulations have a special “intrusiveness” if compared with the other fields of international trade regulation. National procurement legislation – and their respective national procurement practices – has traditionally centred on the main scope of achieving national economic and social welfare, pursuing legitimate policy goals reflecting the specific objectives and ideologies of the states³². One of the most controversial regulatory challenges faced by the WTO Procurement Agreement is, in fact, represented by the difficulties in striking a balance between the legitimate promotion of industrial, environmental and social policies at the procurement national level, with the principles of non-discrimination embedded in the GPA.

The difficulties in the negotiation and in the accession to the WTO GPA represent the starting point in the reflection of the peculiarity and the sensitiveness of the challenges faced at international level in the field of public procurement regulation, constituting a valuable starting point for exploring the regulatory value of hard law and soft law mechanisms in the analysis of the regulatory framework of public procurement. If recently the WTO experienced growing concerns with regard to a hard law multilateral framework of procurement regulation, the flexibilities offered by the UNCITRAL Model Law have shown the significant potential of soft law to address particular features of government procurement.

Unfortunately, the regulatory importance of soft law as an instrument of public procurement governance so far has not been fully researched in academic

³⁰ ———, "Developing Multilateral Rules on Government Procurement: The Value of Soft Law," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011), 731–35.

³¹ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford: Oxford University Press, 2005), 11–26.

³² ———, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford: Oxford University Press, 2005), 47–50.

literature³³. The soft law analysis has been progressively extended to new fields of trade regulation, such as the financial sector³⁴, leaving with public procurement an important research field still unexplored. In this paper, the regulatory value of soft law in public procurement will not be approached with a comparative perspective within the international trade law framework, but under a scope of analysis purely focused on public international law. Under this approach the dynamics and the complementary function of the interactions between the different hard law and soft law instruments of procurement regulation will be addressed, that have not been approached yet in the research; this paper representing the first attempt in this respect.

2.A Difficulties in the Negotiation and Membership of Hard Law Instruments of Public Procurement Regulation

Due to its distinct character in the international trade context, the area of government procurement mainly stands outside the original scope of the WTO multilateral regulatory system for both goods and services, under the General Agreement on Tariffs and Trade GATT³⁵ and the General Agreement on Trade in Services GATS³⁶. So far the WTO efforts to develop a binding multilateral discipline for public procurement have experienced two major difficulties, on the one hand related to the negotiating evolution of the GPA and on the other hand concerning the membership of the Agreement.

The only binding instrument of procurement regulation³⁷ within the WTO is represented by the Agreement on Government Procurement (GPA), concluded in 1994 and entered into force in 1996. The GPA is one of the

³³ Jiang, "Evaluation of Soft Law as a Method for Regulating Public Procurement from a Trade Perspective ", ———, "Developing Multilateral Rules on Government Procurement: The Value of Soft Law."

³⁴ Chris Brummer, "Why Soft Law Dominates International Finance," *Journal of International Economic Law* 13, no. 3 (2010). Fabrizio Pagani, "Peer Review: A Tool for Cooperation and Change. An Analysis of an Oecd Working Methods," ed. OECD General Secretariat - Directorate for Legal Affairs (Paris: OECD Publications, 2002).

³⁵ Art III:8(a) GATT expressively states a clear exception to the national treatment principle for government procurement activities, with no similar provision for what concerns the most favoured nation principles, but extensively interpreted in the letter of Art I GATT.

³⁶ Government procurement has been expressively exempted from the main GATS commitments on the national principle and most favourite nation clause GATS Art XIII(1). http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm

³⁷ The other multilateral initiatives inside the WTO system to regulate government procurements are represented by The Working Group on Transparency in Government Procurement started during the the Ministerial Conference in 1996 in Singapore and formally terminated during the Doha Ministerial Conference in 2001, together with the negotiation on Public Procurement of Services under GATS Article XIII.2. Robert Anderson and Sue Arrowsmith, "The Wto Regime on Government Procurement: Past, Present and Future," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Anderson Robert and Arrowsmith Sue (Cambridge: Cambridge University press, 2011).

“plurilateral” Agreements of the WTO: formally the GPA is Annex 4 of the Marrakech Agreement, and, for this reason, it is outside the system of “Single Undertaking”, not binding for all WTO Members, but only for the Signatory Parties. In the WTO’s negotiating history since the 1988 Tokyo Round Government Procurement Code, the protectionist attitude of both developing and developed countries’ governments has been a constant: the negotiating parties were particularly reluctant to undertake commitments enforced by a system of surveillance, remedies and bid challenge mechanisms, and to compromise the freedom and discretion on their own procurement buying power³⁸.

The same difficulties in striking a balance between drafting internationally accepted transparency procedures and protect legitimate policy considerations related to procurement have been experienced in the process of renegotiation the 1994 text of the GPA, proved to be particularly long. It started with its adoption in 1994 based on the provision of GPA Article XXIV:7(b). Only on 15 December 2011 an agreement was reached on the final text of the renewed text of the GPA, formally adopted on 30 March 2012, by the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113)³⁹.

Notwithstanding the improvements obtained in the negotiation and renegotiation phase of the Agreement, the membership of the GPA is still very limited: at the moment only 42 of the 157 WTO Members (14 Parties plus the European Union on behalf of the 27 member states) are bound by the GPA regulation⁴⁰. Developing countries maintain a strong adverse attitude regarding membership of the GPA and other hard law instrument of procurement regulation: not a single developing country appears between the signatories of the GPA, having difficulties in assessing the benefits of the accession and fearing that the GPA non-discriminatory rules would limit their policy space in allocating government contracts alongside their own domestic firms, leading to balance of payment problems and protecting domestic industrial sectors, without a significant counterpart in terms of foreign market access gains⁴¹.

³⁸ Blank and Marceau, "The History of Government Procurement Negotiations since 1945."

³⁹ Robert D. Anderson, "The Wto Agreement on Government Procurement: An Emerging Tool of Global Interacion and Good Governance," *Law in Transition Online* 1, no. 8 (2010).

⁴⁰ For more on the Parties and the Observers of the GPA
http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties

⁴¹ Simon Evenett, "Multilateral Disciplines and Government Procurement," in *Development, Trade and the Wto. An Handbook* ed. Philip English, Bernard Hoekman, and Aaditya Mattoo (Washington DC: The World Bank Publication, 2002).

It is, in fact, undeniable that significant costs are generally involved in the accession process to a hard law instrument of procurement regulation like the GPA. Apart from the direct negotiating costs implicit in any complex trade negotiating process, in relation of the specific case of public procurement, it has been estimated that the costs and the challenges connected to the legislative and institutional adaptation to the transparency requirements set in the GPA are particularly high not only for developing but also for developed countries⁴².

2.B Flexibilities and Potential of Soft Law Regulatory Procurement Mechanisms

In front of the difficulties experienced in the negotiation and in the membership of the only binding agreement in the procurement field, soft law procurement instruments have provided the “*flexibility of implementation*”⁴³ necessary to overcome the negotiating difficulties traditionally related to the ratification of binding agreements of procurement regulation from developing countries⁴⁴. The UNCITRAL Model Law in fact, thanks to its nature as a non-binding standard framework for the evaluation and modernization of national procurement legislation, has been used as the basis for domestic procurement reforms in many transitioning economies and in the former Soviet Union⁴⁵. More recently the UNCITRAL Model Law has been at the centre of the modernisation of procurement systems in African countries, often included between the conditionality of the major international donor institutions⁴⁶.

Moreover, the flexibility offered by the 1994 UNCITRAL Model Law is not limited to the enforcement perspective of the non-binding nature, but it is also demonstrated in the freedom offered to national governments in the

⁴² In the case of developing countries, the GPA – in particular in its Revised Text – offers a series of flexibilities to overcome these costly difficulties, not granting same type of facilitations to developed countries. Robert D. Anderson et al., “Assessing the Value of Future Accessions to the Wto Agreement on Government Procurement (Gpa): Some New Data Sources, Provisional Estimates and an Evaluative Framework for Individual Wto Members Considering the Accession,” in *WTO Working Paper ERSD-2011-15*, ed. WTO Economic Research and Statistics Division (Geneva: 2011).

⁴³ Steven L. Schooner and Christopher R. Yukins, “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*, ed. Richard Baldwin and Simon Evenett (VoxEU.org Publication, 2009).

⁴⁴ Jiang, “Developing Multilateral Rules on Government Procurement: The Value of Soft Law.”

⁴⁵ On the status of the implementation of the UNCITRAL Model Law, see www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html

⁴⁶ Simon J. Evenett and Bernard M. Hoekman, “International Cooperation and the Reform of Public Procurement Policies,” *World Bank Policy Research Working Paper* no. No. 3720 (2005).

choice of procurement methods to adopt⁴⁷. Regarding the public procurement of goods and construction work, for example, the Model not only identifies the open form of tendering as standard method, but it also provides the possibility to recourse, under specific circumstances, to other procurement mechanisms: requests for proposals, two-stage tendering and competitive negotiations representing more flexible procurement procedures available in the Model Law in the case of complex procurement, specific defence purchasing, or research and development⁴⁸. In specific cases even more restrictive types of tendering are allowed by the Model Law with the scope of preserving the efficiency of the entire procurement process and avoiding unnecessary costs, like in the case of requests for quotation for small standardized procurement (Art. 21) and single source procurement in circumstances of urgency (Art. 22). Chapter VI of the Model Law also provides flexible options for procurement review procedures and remedies⁴⁹.

Overall, the flexibilities in terms of enforceability and pragmatism in the procurement options, have contributed to the perception of the UNCITRAL Model Law as an instrument suitable for diverse procurement objectives and traditions, accommodating the regulatory needs in transitioning and developing countries⁵⁰.

SECTION 2

1. Hard Law and Soft Law Dynamics in the Harmonisation of the Major Instruments of International Regulation of Public Procurement

In the previous section the study of the hard and soft law instruments of procurement regulation has been approached from a static perspective, underlying the traditional regulatory value of soft law mechanisms in the multi-layered landscape of international public procurement regulation. The analysis will move into a more dynamic connotation in the following part of the paper. The dynamics and the interactions between hard law and soft law regulatory mechanisms could be observed in the recent developments of the major international instruments of public procurement regulation, serving complementary tools in the light of the progressive harmonisation of different procurement regulatory systems.

⁴⁷ Sue Arrowsmith, "Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard," *The International and Comparative Law Quarterly* 53, no. 1 (2004): 19–20.

⁴⁸ 1994 UNCITRAL Model Law Articles 18–22.

⁴⁹ 1994 UNCITRAL Model Law Articles 52–57.

⁵⁰ Arrowsmith, "Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard," 20.

The normative challenges of the interactions between hard law and soft law have been widely addressed by various legal and political science scholars under different theoretical approaches, underlining both complementary and antagonistic developments. Without entering in the details of the positivist, rationalist and constructivist interpretations of the interactions of hard law and soft law⁵¹, the consideration that the dynamics between hard and soft law instruments are mainly characterised by a complementary dimension will dominate the following analysis of this study. In a graduated system of legalization, taking into account the factors obligation, precision and delegation⁵², the mutual relationship between hard and soft law mechanisms seems to be naturally oriented to complementarity in the development of the different regulatory systems integrated in the international legal order⁵³. In the evolution of public international law and in the specific context of the fragmentation of international trade law, non-binding soft law instruments have proven to be an important complementing tool to strengthen the formulation of the consensus over hard law instruments and, at the same time, to subsequently elaborate the actual content of binding norms⁵⁴.

A privileged field of observation for the complementary dynamics of hard and soft law is represented by the recent developments reached in the major hard and soft law instruments of procurement regulation. The end of 2011, in fact, has been characterized by two crucial moments in the reform of an "international" procurement regulatory system: the achievement of a final agreement on the Revised Text of the WTO Government Procurement Agreement and the approval of a Reformed UNCITRAL Model Law for Public Procurement. The almost parallel conclusion of both negotiations gives the opportunity to observe a convergence in the dynamics of the rule-making processes in the soft and hard law field of public procurement at an international level. If, on one side the GPA has embraced in its revised text a number of flexible solutions already characterising the Model Law, on the other side the reforms in the UNCITRAL Model Law have been oriented towards the harmonization of the major binding international and regional instruments of procurement regulations.

2. The Revision of the GPA as a Process of Softening Hard Law

⁵¹ Shaffer and Pollack, "Hard Vs. Soft Law: Alternatives, Complements and Antagonists in International Governance.", Andrew T. Guzman and Timothy L. Meyer, "International Soft Law," *Journal of Legal Analysis* 2, no. 1 (2010).

⁵² Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000). Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (2000).

⁵³ Timothy Meyer, "Soft Law as Delegation," *Fordham International Law Journal* 32, no. 3 (2009).

⁵⁴ Shaffer and Pollack, "Hard and Soft Law: What Have We Learned?."

During the WTO Ministerial Conference of December 2011, the GPA Parties of the formally concluded the negotiation of the Procurement Agreement with a remarkable increase in the market access concession in the Parties' Schedule of Commitments. The adoption of the Ministerial Decision GPA/113 of 2 April 2012, consolidating the lists of commitments and the revised GPA text, represents not only an important step in the development of WTO trade negotiation dynamics, but also an interesting and innovative approach to the reform the WTO regulatory system of public procurement. Two new aspects in the text of the GPA Agreement assume a crucial importance in the evaluation of the regulatory value of hard and soft law instruments in procurement international regulation: the increased flexibilities offered in the revised text and the progressive introduction of soft law mechanisms in the WTO regulatory framework.

The previously negotiated revised GPA text provides significant improvements in the clarity of the wording of several provisions and important additions in the coverage of the Agreement. Moreover, the GPA Revised Text recognises the importance of increasing flexibility in the international procurement regulation, stating in the new preamble of the agreement "*that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party*". On a parallel path to the UNCITRAL Model Law, the GPA Revised Text increases the flexibilities to the Contracting Parties, like in the case of shorter time framework in case of emergencies or for the purchasing of goods and services of easily available on the commercial marketplace⁵⁵. However, the most significant flexibilities included in the latest reform of the GPA are represented by transitional measures and "special and differentiated treatment" accorded to developing countries⁵⁶. These flexibilities are intended to accommodate the specific necessities of developing and emerging countries in the light of the future accession to the Agreement, providing the possibility to use protective measure for particularly sensitive industries and sectors in terms of "*price preferences, offsets and phased-in addition for specific sectors and gradual thresholds in the coverage*"⁵⁷. The temporary flexibilities,

⁵⁵ Robert Anderson, "The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy," *Public Procurement Law Review* 3, no. 2012 (2012).

⁵⁶ Robert Anderson, Steven Schooner, and Collin Swan, "Revised Government Procurement Agreement—an Important Milestone toward Greater Market Access and Transparency in Global Procurement Markets," *Government Contractor* 54, no. 1 (2012).

⁵⁷ Anna Caroline Muller, "Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: The Current Text and New Provisions," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Arrowsmith Sue and Anderson Robert (Cambridge: Cambridge University Press, 2011).

offering the opportunity to negotiate a more targeted accession to the Agreement, represent an alternative and more practical approach to the developing countries participation to the GPA. These new provisions have been negotiated with the purpose “*to maintain an appropriate balance of opportunities under this Agreement*”, trying to invalidate the critics interpreting the GPA exclusively as an instrument for developed countries, as opposed to the UNCITRAL Model Law.

Another significant part of the negotiating package annexed to the Ministerial Declaration of December 2011, unfortunately disregarded in the commentaries, is represented by the “*Future Work Programmes of the Committee on Government Procurement*”. The Future Work Programme represents an innovative solution emerged during the GPA negotiations, particularly interesting for its legal status and its content in light of the discussion over the value of hard law and soft law mechanisms in the procurement regulation.

Formally included in Appendix 2 to the Decision on the outcome of the Negotiation under article XXIV:7 of the Agreement on Government Procurement, the Work Programme is composed of seven Annexes (from A to G), each of them including a decision from the Committee on Government Procurement concerning specific procurement issues, setting the future negotiating agenda for each of them. The Future Work Programme, negotiated together and in parallel with the approval of the GPA Revised Text and the Parties’ market access commitments, is a crucial part of the negotiating package approved during the latest Ministerial Conference, reflecting the major interests and the socio-economic concerns of the Parties for the future development of the WTO procurement discipline. However, due to the peculiarities of the plurilateral status of the Agreement, the Work Programme raises a number of concerns on its precise legal nature and on the effective enforceability of these Annexes to the Agreement, as the ambiguity and the lack of bindingness typical of soft law instrument is now inside the negotiated package.

The Future Work Programme represents an interesting innovative solution inside the WTO framework not only for its peculiar legal position itself, but also in relation to its innovative contribution to the development of the continuing procurement negotiations. The Work Programme has, in fact, the main objective of improving the future administration of the Agreement and for this purpose it establishes a framework for future discussion between the Signatory Parties to facilitate and share perspectives on issues of continuing interest, such as important socio-political concerns like the inclusion of safety standards. In particular, the Work Programme asks the Signatory Parties to “*consider best practices with respect to measures and policies*” regarding the possible approaches to sustainability and the treatment of small and medium-

sized enterprises (“SMEs”) under the Agreement⁵⁸. The potential of soft law in the contribution to the evolution of the Agreement and to its administration is fully recognized in the Future Work Programme. Best Practices, with their nature of soft law regulatory mechanisms, are clearly identified by the GPA Parties in the Future Work Programme as the best negotiating approach for the future evolution of the GPA Agreement.

3. The Reform of the UNCITRAL Model Law and the Harmonization with Other International Instruments of Public Procurement Regulation

Parallel to the progress reached in the WTO negotiation on government procurement, in 2011 the UNCITRAL Working Group on Procurement successfully finalised the reform and update of the Model Law, based on the 2004 mandate to reflect new emerging procurement practices and include the experiences gained from the adoption of the 1994 text. The 2011 UNCITRAL Model Law introduced significant reforms oriented to the inclusion of e-procurement mechanisms, a more structured choice of procurement methods and a strengthening of the review systems, establishing itself as “*a successful benchmark for legal reform in procurement... with considerable impact in the short and medium term*”⁵⁹.

One of the key areas of reform is the relation of the UNCITRAL Model Law with other international binding norms of procurement regulation. Since the start of the renegotiating process, it has been clear that some sort of coordination with the other international free trade regulation would have been desirable⁶⁰. The possibility of conflicting instructions in the award procedures, even with different legal relevance between hard and soft law regulations, was particularly high in the allocation of preference for domestic industrial development, admissible for the UNCITRAL Model Law but contrary to the GPA and EU approach.

The process of reform of the Model Law, run parallel to the revision of the GPA, has been strongly influenced by the object of harmonisation of international procurement rules, as clearly specified in the Guide to Enactment of the Reformed Text of the 2011 UNCITRAL Model Law. The improvement

⁵⁸ Together with the question of sustainable procurement and the protection of SMEs, the other issues specified inside the Future Work Programme at the centre of further actions by the Signatory Parties are the collection of statistical data, the exclusion on the Parties’ coverage commitments, the safety standards and the legal framework of public private partnership. Anderson, “The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy.”

⁵⁹ Caroline Nicholas, “A Critical Evaluation of the Revised Uncitral Model Law Provisions on Regulating Framework Agreements,” *Public Procurement Law Review* 2 (2012).

⁶⁰ Arrowsmith, “Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard,” 22–23.

of the text of the UNCITRAL Model Law, in fact, has been conducted taking in full consideration the international context of the procurement regulations in order to increase the participation and the harmonisation of the international rules applicable to public procurement, with a specific reference to the United Nations Convention against Corruption (par. 63) and the WTO GPA (par. 64). As stated in par. 62. “*A key concern of UNCITRAL is to allow the widest possible use of the Model Law. In this regard, it has sought to enhance its usefulness by harmonizing the text to the extent possible, with other international texts on procurement, so that it can be used by parties to them without major amendment*”. The compliance with the other international instruments is assured through the provision of Article 3 of the 2011 Model Law, giving deference to the international obligations of the enacting state at the multilateral and bilateral level in case of conflict with the rules included in the Model Law.

The harmonisation efforts included in the reform of the UNCITRAL Model Law have been widely confirmed in the comparative examination of specific procedural guarantees and transparency requirements in the procurement process⁶¹. In the parallel efforts of the revision of the wording and the definitions in both WTO and UNCITRAL procurement regulatory instruments, the harmonisation’s results are particularly relevant. For example, the reference to a successful bidder as “*lowest evaluated tender*” in the 1994 Model Law has been substituted with the “*most advantageous tender*”, in conformity with the GPA in both 1994 (Article XIII.4b) and Revised 2011 texts (Article XV.5a).

Moreover, the introduction of the regulation of the e-procurement in both revised texts of the major instrument of international procurement regulation – the GPA and the Model Law – represents the most advanced innovation and a tangible result of the convergence in the parallel evolution of hard and soft law instruments of procurement regulation. Not only the GPA but also the Model Law seems to adopt a functional approach to the many means of communication used in the procurement activities. The main concern in both instruments is represented by the need for non-discrimination in the means of communication used in the procurement process⁶². As stated in the GPA in Article IV.3, the main responsibility of the procuring authority in the use of

⁶¹ Caroline Nicholas, “Work of Uncitral on Government Procurement: Purpose, Objectives and Complementary with the Work of the Wto,” in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Arrowsmith Sue and Anderson Robert (Cambridge: Cambridge University Press, 2011), 770–71.

⁶² The Preamble of the Revised Recommendation states that “*Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalization rapidly.*” Revised Recommendation of the Council on Combating Bribery in International Business Transactions, approved by the Council at its 901st session on 23 May 1997 [C/M(97)12/PROV].

e-procurement mechanisms consists in guaranteeing “*the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access*”. The Model Law, even if offering a more elaborated regulation of the communications in procurement, clearly prescribes at Article 7.5 that “*the procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned*”.

4. Complementarity of Hard Law and Soft Law in addressing Corruption in Public Procurement

The liberalising impact of non-discriminatory international public procurement regulations is deeply undermined by corrupt procurement practices. Unfortunately, the development of a legal framework targeting the issues of collusion and corruption has been traditionally accompanied by significant difficulties. Even if integrity represents a crucial procurement objective in many national and international systems, addressing corruption in public procurement is a complex problem extremely problematic to address⁶³. Corruption, constituting a significant barrier to trade in public procurement, occurs in different procurement practices and at various stages of the process. To be efficaciously tackled, it usually not only requires basic standards of competition and transparency, but also a wide range of more systemic measures, like criminal and disciplinary sanctions and structural reforms⁶⁴. For these reasons, anti-corruption initiatives and procurement regulatory efforts have been traditionally addressed in different institutions and with different instruments. However, also in respect to this delicate regulatory aspect of procurement regulation, complementary synergies between hard and soft law mechanisms have been experienced, proving to be particularly successful and mutually supportive, also in the light of the recent reforms in the procurement field.

The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is probably the most significant international agreement of binding nature to legally address the problem of transnational corruption⁶⁵. The Convention, in fact, establishes a set of

⁶³ Robert Anderson, William Kovacic, and Anna Caroline Muller, "Ensuring Integrity and Competition in Public Procurement Market: A Dual Challenge for Good Governance," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011).

⁶⁴ Susan Rose Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 1999).

⁶⁵ Sue Arrowsmith, John Linarelli, and Don Wallace, *Regulating Public Procurement: National and International Perspective* (The Hague: Kluwer Law International, 2000).

binding commitments and “standards” as references to specific anticompetitive practices⁶⁶, even if there is no specific provision on government procurement.

However, a series of soft law instruments have supported first the development and then the implementation of the OECD Convention. In preparation of the conclusion of the Convention, the OECD Council promoted various voluntary initiatives in order to create the consensus between the Parties in order to facilitate the adoption of the final agreement, like in the case of the 1994 and 1996 Recommendation followed by the Revised Recommendation⁶⁷. It is remarkable that in one of these soft law instruments, namely the Revised Recommendation, the question of the legal status of the final agreement was raised, reaffirming that an hard law international convention would have been the most appropriate and effective regulatory approach to the problem of transnational corruption compared to a soft law model code⁶⁸.

Moreover, to clarify the intended meanings in the Convention’s provisions they have been issued the Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Commentaries, even if not legally binding, constitute important references in case of divergent interpretation, like in the case of the construction of a reasonable definition of terms like “other improper advantages”⁶⁹. Furthermore, the enforcement of the Convention relies exclusively on soft law mechanisms: inside the OECD framework of the Anti-Bribery Convention there is no judicial body and the compliance with the agreements relies essentially on non-binding reports of peer review processes⁷⁰.

The Convention’s binding commitments are focused on the enforcement in the criminal law of “the supply side of corruption”: in the OECD Convention a specific reference to procurement is still missing, apart from the general

⁶⁶ For more information <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/oecdconventiononcombatingbriberyofforeignpublicofficialsininternationalbusinesstransactions.htm>

⁶⁷ Susan Brown-Shafi, *Promoting Good Governance, Development and Accountability. Implementation and the Wto* (London: Palgrave MacMillan, 2001), 83-85.

⁶⁸ In the preamble of the Revised Recommendation it is stated, “*Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly*”. Revised Recommendation of the Council on Combating Bribery in International Business Transactions, adopted by the Council at its 901st session on 23 May 1997, C/M(97)12/PROV.

⁶⁹ Sue Arrowsmith et al. “Public Procurement Regulation: An Introduction.” ed Sue Arrowsmith. (Place Published: The EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 2010).

⁷⁰ Pagani, “Peer Review: A Tool for Cooperation and Change. An Analysis of an Oecd Working Methods.” Available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/1955285.pdf>

request to the Members to implement a national legislation that can efficiently target the crime of 'bribery of a foreign public official'. The OECD Conventions and its supporting non-binding instruments to tackle international corruption have deeply influenced the trade law negotiations on corruption and procurement inside the WTO system, not only in the renegotiating process of the Revised Text of the GPA but also in negotiating documents on the multilateral initiative of the WTO Working Group on Transparency⁷¹.

In developing a legal definition of the phenomenon of corruption in international procurement, the most remarkable result has been recently reached inside the WTO framework, at the WTO Ministerial Conference of December 2011. For the first time a specific provision addressing corruption has been included in an instrument of public procurement regulation: in particular, a clear commitment of avoiding corruption in procurement practices has been introduced in a binding agreement on trade regulation of public procurement markets.

In the revised text of the GPA, conflicts of interests and corruption have been approached not only in the recital of the agreement but also in a new substantive provision in the text. In a broader perspective, it is relevant to underline that for the first time the specific aim of addressing corruption has been included in a trade agreement regulating public procurement, as an object *per se* of the agreement, not as a consequence of the regulation of trade liberalization or market access concerns. The inclusion in the preamble of the new text of the GPA makes a clear reference to the UN Convention against Corruption (with clear remand to Article 9(1) of the Convention⁷²), especially interesting in terms of legal interpretation and membership: still a considerable number of the GPA Parties have not joined the Convention yet (only 31 out of the 41 members of the GPA have ratified the Convention)⁷³.

Moreover, a new substantive provision (Article V.4) provides that procurement practices should be conducted in a transparent manner in order to “*avoid conflict of interest and prevent corrupt practices*”. The inclusion of this provision inside the GPA has a particular value. The prohibition of corrupt procurement practice has been included for the first time in a trade agreement regulating public procurement. As the previous version of the GPA

⁷¹ Krista Nadakavukaren Schefer, "Corruption and the Wto Legal System " *NCCR Working Paper* No 2008/15, no. June 2008 (2008).

⁷² Article 9(1) of the UN Convention clearly recommend that each state party to take the “*necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption*”.

⁷³ Arie Reich, "The New Text of the Agreement on Government Procurement," *Journal of International Economic Law* 12, no. 4 (2009): 999-1000.

shows, the crucial regulatory objective of the agreement was limited to the liberalization of procurement markets and the reduction of corruption was interpreted simply as a guarantee of promoting market access. This provision represents an important development in the international procurement regulation: the explicit reference to integrity in the objectives of the GPA constitutes new legal ground for the interpretation of the transparency provisions set in the Agreement⁷⁴.

If representing a great advancement in the international legal efforts of addressing corruption, the inclusion of this provision in the text of the GPA raises a series of doubts and legal uncertainties⁷⁵. On the one hand, broad concerns regard the significant expansion of the WTO's role, not only sanctioning discriminatory and protectionist practices but also establishing itself as reference for good governance in international trading systems. On the other hand, the vague drafting of the provision text raises doubts on the legal enforceability of the provision, especially under the WTO Dispute Settlement Mechanism. No further specifications or reference to possible wording of the definition of "corruption and conflict of interest" are included in the text, implying a broad range of discretion for the GPA Parties. The immediate practical effect of this new provision on the Signatory Parties of the Agreement seems very unclear.

Unfortunately, the parallel negotiating process in UNCITRAL did not result in a comparable legal reference and the problem of addressing corruption has not been specifically addressed yet in the new text of the Model Law. However, the more detailed provisions on the conduct of the procurement practices set in the UNCITRAL Model Law oriented to achieve transparency in procurement practices are a necessary complementary instrument to the concrete implementation of the provision included in Article V:4 GPA. As stressed by Yukins⁷⁶, the UNCITRAL Model Procurement Law offers exactly the legal framework to develop the regulations required by the Convention to guarantee the correct and coherent concretization of the anti-corruption efforts in the procurement field.

⁷⁴ Sue Arrowsmith, "The Revised Agreement on Government Procurement: Changes to Procedural Rules and Other Transparency Provisions," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011), 289–90.

⁷⁵ ———, "The Revised Agreement on Government Procurement: Changes to Procedural Rules and Other Transparency Provisions," in *The Wto Regime on Government Procurement: Challenge and Reform*, ed. Sue Arrowsmith and Robert Anderson (Cambridge: Cambridge University Press, 2011), 291.

⁷⁶ Christopher Yukins, "Integrating Integrity and Procurement: The United Nations Convention against Corruption and the Uncitral Model Procurement Law," *Public Contract Law Journal* 36, no. 3 (2007). Available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995244

CONCLUSION

The recent advances in the international procurement regulatory instruments represent a crucial challenge for the possibility of a recommendable harmonisation of the different systems of public procurement regulation inside the multilateral and regional trading system. In this perspective the mutual and complementary interactions of hard law and soft law regulatory instrument offer a crucial contribution.

Having discussed the traditional regulatory value that soft law represented in the fragmented framework of the international regulatory systems of public procurement, this research aims at showing how hard law and soft law instruments have gradually and progressively established mutual complementary dynamics. The parallel processes of reform completed in both the major hard and soft law mechanisms of procurement regulations, in fact, have showed a mutual convergence on the harmonisation of the most important international regulatory standard for the conduct of public procurement activities.

Moreover, in order to combine a theoretical approach with a more practical research focus, the perspective of the complementary dynamics of hard and soft law has been further tested on the problematic question of addressing corruption in procurement regulations. The regulatory challenges of limiting and sanctioning corrupt practices has been traditionally one of the most difficult and controversial aspects in the development of the major international instrument of procurement regulation. Even addressing this complex regulatory challenge, the interactions between hard and soft law instrument have proven to work in a complementary manner, mutually advancing the development of the hard law discipline and strengthening the enforcement of the soft law regulation.

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