

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

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ABSTRACT

Public procurement is a traditional powerful instrument for achieving legitimate policy objectives - from social and environmental to industrial policies, particularly in the context of the financial crisis. Nevertheless, the social and strategic use of public procurement remains highly controversial.

This paper, adopting the doctrine of the multilayered governance as theoretical framework and a comparative methodology, aims at identifying concrete procedural guarantees in the procurement process, contributing to the discussion on the international regulatory challenges to strike a balance between legitimate national policies and the international liberalization of public procurement.

The research develops a comparative study of the relevant provisions in the main international instruments of procurement regulations, from the UNCITRAL Procurement Model Law, to the World Bank procurement guidelines and the WTO Government Procurement Agreement, in order to show a common convergence toward the use of award criteria in the inclusion of labour standards in procurement practices.

I. INTRODUCTION

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

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

This paper is built around the study three abstract models of procurement regulations identified in the literature, extending the analysis from the national to the international level, conducting a comparative study of the three major international instruments of procurement regulation, each one representing a different abstract model of procurement regulation. The paper is essentially based on my PhD research structured as a comparative study of the relevant provisions included in the WTO Government Procurement Agreement, the World Bank Guidelines and the UNCITRAL Model Law thereby contributing to the discussion on the international regulatory challenges to strike a balance between legitimate national policies and the international liberalization of public procurement¹.

II. MULTILAYERED GOVERNANCE AS CONCEPTUAL FRAMEWORK FOR THE ANALYSIS

The doctrine of multilevel governance offers the theoretical background of the research, with a multidimensional perspective (Cottier, 2009). On one hand, it reflects the reality of interdependence in the different levels of governance of international economic law; on the other hand, it aims at achieving greater coherence among the distribution of regulatory powers between these layers of governance. The multilayered governance's theory, focusing on shared constitutional principles and

procedural guarantees, constitutes, at the same time, an analytical and normative framework for a comparative analysis of public procurement systems.

The adoption of this doctrine to the field of public procurement allows us to concentrate the study of the procurement fragmentation on the main regulation principles and procedural guarantee shared by the major international instruments regulating public procurement, contributing to their progressive harmonization in the different levels of the procurement governance. In this way, the research aims at illustrating that the political and legal problems of multilevel regulation of the social use of public procurement may be resolved more efficaciously with a closer attention to common structures and appropriate procedural guarantees, in order to strike a balance between conflicting values and principles, according to the analysis that will be conducted in the following chapters.

The adoption of this theoretical paradigm in the study of public procurement is an innovative approach with a great normative potential. The fragmentation of national, regional and international regimes of procurement regulation is strictly linked with the phenomenon of the “global revolution” of public procurement (Arrowsmith & Davies, 1998). In the last twenty years, in fact, an increasing number of states have radically changed the national procurement regulations. At the same time, international instrument regulating public procurement toward market liberalization have grown, together with the growing importance of formal and informal international coordination of public procurement practices. These developments at different levels of the regulatory framework of government procurement’s regulations raise a number of unresolved questions on the relation between the domestic and international regulations of public procurement, a field traditionally belonging to domestic affairs.

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

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

The doctrine of the multilayered governance represents an analytical and a normative approach to the problem of the constitutionalisation of international economic law, combining the attention of Jackson on the allocation of regulatory powers (Jackson, 2001) with the focus of Petersmann on constitutional normative values (Petersmann, 2006). The ultimate scope of the analytical description of the reality of multilevel governance consists, in fact, in the formulation of a possible

coherent architecture of multilayered governance, in the framework of the controversial debate on the constitutionalisation of international law.

Every constitutional system is, in fact, composed by a different set of rules and regulations on different levels of integration, deriving from different sources of law but linked by common structures and shared principles. To illustrate the idea of the complex structural organization of the multilevel governance, the image of a five-storey house is particularly useful, like in the case of Switzerland (Cottier, 2003). These layers, represented by local, sub-national (cantonal or sub-federal), national, and possibly regional, and global rules, are complementary and interact with each other, with a system of vertical checks and balances that assure the coherence between the layers. *“The crucial point is to conceive international, regional and domestic levels as a single and ideally coherent regulatory architecture of multilayered governance”*.

A crucial aspect of the doctrine of the multilayered governance is represented by the core set of common constitutional principles and regulatory structures, presented in all the different levels of governance and ensuring the overall coherence in the layers (Cottier, 2009). These common constitutional principles represent not only the common moral ground of all the layers of governance but they also consists in the principal mechanisms of vertical check and balance and the key pillars of the multilevel structure: they represent the major restriction to domestic legislative powers, being enforced, at the same time, at regional and international level. The respect of human rights and the rule of law, together with the principles of good faith and equal competitions should be the constant normative benchmarks for the improvement of fairness and coherence of the allocation of regulatory powers and for the development of the regulations in each level of governance (Cottier, 2011).

However, the sources of conflict and legal disagreement are, in fact, not just an abstract disagreement on principles: common values are universally embraced in their abstract terms but they are highly disputed in their concrete implementation (Norzick, 1973)². The evaluation of conflicting values has to produce justifiable solutions to normative problems, obtained with the recourse to clear and fair legal procedures (Koskenniemi, 2005). For this reason, the final realization of an appropriate compensation between conflicting values is strictly influenced by the procedures adopted. The function of appropriately balancing conflicting values thanks to stable and transparent procedures becomes nowadays of a crucial importance: striking a balance between economic interests and socio-environmental concerns is probably one of the major challenge experienced at the moment in international law, struggling with the legal systematization of the concept of sustainable development. For these reason, the focus on procedural guarantees, as distinctive characterization of the doctrine of multilayered governance, is a crucial aspect in this research. *“The prospects of multilayered governance therefore strongly depend upon the level of shared procedural avenues established at, and among, different layers of governance”* (Cottier, 2009).

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

The use of public procurement for social purposes is an interesting starting point to assess the theory of the multilayered governance: it represents the case of a concrete application of conflicting values in a complex legal field structured in different levels of governance, fragmented in both horizontal and vertical way. In particular, the

social use of public procurement represents a case of possible conflict between two sets of normative principles, not only a more abstract tension between the principle of non-discrimination and the protection of human rights in the broad framework of international economic law, but also a specific divergence between the objective of “value for money” and the achievement of social policies with public contracts, including the protection of labour rights. Moreover, it also represents the possible case of conflict between the models of procurement regulation built around diverging principles.

In order to strike a balance between the need of the realization of social objectives and the need of a fair liberalization of the procurement markets, it would be useful to start focusing the analysis on the common procurement objectives, shared by the major national and international regulations. The study of the goals as basic aspect of the public procurement rules has been subjected, in the academic literature, to different and conflicting efforts of systematization and classification until now (Schooner, 2002). Apart from the overarching principle of best value for money, it is possible to identify three main “*most readily identifiable policy objectives*” between the various procurement goals: economic efficiency, promotion of social and political objectives and trade liberalization objectives (Trepte, 2005). Procurement regulations, in fact, at local national and international levels, have been evolved in different contexts with different cultural and legal backgrounds but around a limited number of sets of principles, at the basis of the motivations and specific procedural contents in the various procurement systems. On the base of these objectives is possible to construct three different models of abstract procurement regulations: an economic, a social and an international model.

Around of the principle of efficiency, it is possible to construct an economic model of procurement regulation, interpreted as an instrument to achieve the objective of economic welfare, based around the idea of the “*Pareto-efficient allocation of society's scarce resources*” in the market (Trionfetti, 2000). Apart from the strict economic approach, it is also possible to orient procurement regulation to the support or the achievement of “non-economic” objectives. These types of industrial and social policies pursued in public procurement are generally referred as “secondary” policy³, in addition to the primary objective of best value for money in the mere acquisition of goods and services (Arrowsmith, 2009). These procurement practices are at the core of a social model of procurement: based on the importance of the government influence on the markets as dominant buyer for most goods and services, this type of procurement practices extends the concept of value for money also to the political priority of the maximization of the welfare in the society. Moreover, around the principle of non-discrimination, various international agreements regulating public procurement have been concluded (Arrowsmith & Davies, 1998). In the international model of procurement regulation, the principle of non-discrimination is generally supported by transparent procedural regulations in the award of the public contracts and rules against corruption and patronage, representing important barriers highly distortive for the international trade in public procurement⁴.

These models do not exist in pure isolation but, as academic abstractions, they serve the purpose of identify the major policies pursued and the procedural guarantees set in the different public procurement systems. Due to the complex nature of any public procurement activity, it is particularly difficult that a domestic or an international instrument regulating procurement is oriented to the simple realization of a unique

objective. Public procurement is essentially a complex activity that necessarily requires a multidimensional approach: it is primarily an economic relationship in which the identity of the purchaser is constituted by an entire government, operating through an articulated bureaucratic apparatus and bound by international commitments (Trepte, 2005).

For these reason, every national and international procurement system is naturally the result of different influences and elements belonging to different abstract models, but evolving and adapting to the specific national context. However, a closer analysis of the motivations behind the different procurement regulations represents an important starting point for the study of the implications of these differences in the regulations. The purpose of this research starts from the study of the principal procurement objectives behind the major international instruments of procurement regulation, in order to verify possible procedural convergences and margins of harmonization between them.

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

Clashes between different ethical legal rationales and diverging policy objectives, resulting in conflicting norms (Delimatsis, 2001) can be mirrored in the horizontal fragmentation of different legal regimes, widely observed also in the field of public procurement. The phenomenon of fragmentation in government procurement is essentially linked to the “global revolution” and the growth of international instruments of procurement regulations (Arrowsmith & Tybus, 2002).

In the last twenty years, international and regional agreements regulating procurement toward the principles of free trade have progressively required governments to liberalize their procurement markets on a non-discriminatory basis, taking clear commitments on procurement market access. The major instrument for the procurement liberalization on international basis is the Government Procurement Agreement (GPA), one of the plurilateral agreements in the WTO framework, perfectly respondent to the international model of procurement regulation. In the GPA, in fact, public procurement is interpreted and disciplined as a non-tariff barrier to free trade, focusing on the elimination of discriminatory and protectionist practices, enhancing transparency and fostering international competition in procurement (Hoekman & Mavroidis, 1997). Moreover, a number of procurement agreements oriented to free trade liberalization have been largely adopted also at regional level (Arrowsmith, Linarelli & Wallace, 2000), first and most significantly with the European Union (Bovis, 2008; Trepte, 2007) but also in the APEC Forum (Arrowsmith, 1996), in the NAFTA Chapter 10 (Greenwold, 1994), and the COMESA procurement directives (Karangiz & Ndahir, 2009). In addition to the international and regional level of trade instruments regulating procurement, a large number of bilateral agreements have been also concluded; increasing the level of complexity in the network of the market access obligations included in international procurement regulations (Woolcock, 2006).

The increased number of preferential trade agreements (PTAs) does not seem to produce serious risks of conflicts between the specific contents of these different sets of procurement norms, in a vertical interpretation of the idea of fragmentation of procurement norms. The specific government procurement obligations included in these bilateral and preferential trade agreements, in fact, broadly cover the same

legal principles of non-discrimination included in the GPA⁵. In the large majority of the cases, the provisions in PTAs are precisely based on the text of the 1994 WTO Government Procurement Agreement or on the negotiating offers of the main GPA's parties (Anderson et al., 2011). Preferential agreements with specific procurement commitments appear to be parallel and complement to the multilateral discipline, also preparing for a possible future accession to the GPA the countries that haven't ratified it yet. For this reason, the fragmentation induced with the development of PTAs consists mainly in a fragmentation of membership and possible jurisdiction of the different regimes, and not a fragmentation of concrete specific norms.

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

The UNCITRAL Model Law on Procurement of Goods, Construction and Services represents an international instrument, designed as a voluntary model of law, with the clear purpose of establishing good practices of public procurement regulations and of guiding national governments - particularly developing countries - in the reform of their procurement regulations (Hunja, 1998). Although it emphasise the important of the maximization of competition and efficiency in procurement, the UNCITRAL Model Law is assimilable to a social model of regulation: it recognises the use of procurement as a instrument to achieve secondary policies, allowing certain flexibilities in particular in the case of industrial policies. It is an international instrument based on the realization of domestic objectives, but external to the procurement process. The UNCITRAL Model Law not exclusively focuses on the promotion of trade thought the elimination of discriminatory practices but it aims at providing guidance to government in order to achieve the typical internal procurement objectives of the value for money, efficiency, integrity and equal treatment of the suppliers (Arrowsmith, Linarelli & Wallace, 2000).

Moreover, there is also another type of international instruments regulating public procurement with objectives diverging from trade liberalisation: the procurement guidelines of international aid institution, first of all the World Bank. Most of the international aid institutions, in fact, have strict procurement regulations aiming at assuring the effective spending in the aid-funded procurement process (Khoon Chan, 2008). The primary objective on these procurement regulations consists in the effectiveness of the aid, supported by mechanisms to supervise and monitor the entire procurement process; for this reason, the procurement regulations of multilateral development banks can be interpreted as responding to the economic model of procurement regulation, even if with significant differences from the abstract model.

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

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

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

The methodological and theoretical apparatus of this research finds its ultimate goal in the identification of the most appropriate public procurement practice for the enforcement of labour policies, without compromising the achievement of the primary objective of value for money in the procurement process. With this research focus in mind, the study of the various mechanisms of implementations of secondary policies represents a crucial step for the following analysis. From a procedural perspective, in fact, every stage of entire procurement process - from the definition of the technical specifications to the execution phase of the contract⁶ - offers different procedural solutions for the achievement of secondary policies. However, the specific choice of the implementation mechanism inevitably implies different consequences on the degree of competition in the procurement market, involving costs that have to be balanced with the benefits aimed (Arrowsmith, Linarelli, & Wallace, 2002). Based on the assumption that not all the mechanisms of implementations are suitable for the achievement of every secondary policy, the research focus of this paper has been restricted to the study of the inclusion of social policies and labour standards in public procurement practices.

One possible strategy for the implementation of secondary policies in public procurement is strictly linked to the packaging of the public orders on the market. Governments, in fact, have traditionally promoted industrial policies and in particular the participation of small and medium enterprises (SMEs) in public contracts, designing public contracts below the level of procurements thresholds defining the coverage of regional and international regulations. Through the administration of a larger number of smaller contracts with separate award procedures or raising the value of the threshold to the maximum allowed (like in the case of the implementation of the 2008 French stimulus plan), governments have frequently circumvented the non-discrimination commitments in the regional and international procurement agreements, increasing the space of manoeuvre in the promotion of secondary objectives below the thresholds. However, this type of procurement practices until now has been mainly oriented to the achievement of industrial development policy objectives and not purely for social purposes.

Another traditional mechanism for the implementation of secondary policies is represented by set-asides, one of the most traditional uses of social procurement. Set aside have been widely used, with the general purpose of restoring an equality status in the employment context between minority groups, not only in US but also in Canada to favour business controlled by Aboriginal people, in Malaysia in order to stimulate the growth of Malaysian Bumiputera companies, as well as in South Africa and in the Australian state of Queensland (McCrudden, 2007; McCrudden & Gross, 2006). Set-asides have the advantage of assuring rapid and visible and economic benefits to the targeted groups, guaranteeing the immediate allocation of the public contracts. However, this method of enforcement of social rights implies major limitations: the level of competition for the contracts is drastically reduced to favour uncompetitive favoured groups, with extra costs for the governments and losses in the efficiency of the whole procurement process (Watermeyer, 2004).

Technical specifications, in particular with the use of functional and performance specifications, is another interesting opportunity for the contracting authority to include a reference to social and labour considerations, in the definition of the requirements in which the suppliers produce and produce the deliverables subject of the public contract. The inclusion of labour criteria at the specification stage represents an interesting procedural solution, even if implying the risk of imposing excessively strict conditions to the competing bidders and involving the risk of discriminate against foreign competitors. However, a careful use of functional specifications can maximises competition and minimizes distortive effects on the procurement market, providing competitors with the freedom to offer innovative solutions meeting the minimum criteria in the specifications. The use of technical specifications is particularly common for the implementation of environmental objectives, giving margin of flexibilities to also address social and labour policies with this mechanism, even if it seems difficult to clearly link labour requirement to the ultimate performance or the use of the goods and services to procure, involving also high risks of intransparency in the whole procurement process.

Secondary policies can also be achieved at the qualification stage for the technical and financial capacity of the suppliers to perform the contract. Exclusion criteria offer an opportunity to effectively block the involvement in the procurement process of candidates in violation of not only of important national social legislations and international labour legislation. As exclusion criteria, the reference to convictions under labour law are sometimes misleading in the case of countries with poor enforcement of employment laws, where the reliance on legal process may not be sufficient to identify suppliers with poor standards. However, the use of international standard, like the main ILO Conventions, limit the margin of discretion and ambiguity in the procurement process (Arrowsmith, 2009), efficiently penalising past violations of labour rights. A recent and promising example of the inclusion of ILO Core Conventions as minimum standards for exclusion criteria is provided in the "Recommendations for the Federal Procurement Offices" that the Swiss Federal Procurement Commission⁷.

Another common mechanism to implement labour policies in public contracts is the inclusion of social considerations (other than price) in the criteria for awarding the contract, including the evaluation of more general social objectives not strictly related to the subject matter of the contract, for example fighting long-term unemployment. It is possible to allocate preferences in the contextual evaluation of the qualities of the bids, traditionally as a fixed price and percentages preference like

in the case of the Preferential Procurement Policy Framework Act 5 of 2000 in South Africa⁸ (Bolton, 2008). Selective labour criteria can also take the form of additional award criteria only in the case of equality of the most advantageous tenders. This approach has been recently adopted in the pilot project on long-term unemployment of the 2002 Public Procurement Policy in Northern Ireland⁹ and in the case of the 2007 Spanish procurement regulation¹⁰ highlighting the possibility to draw more transparent and reliable award methods, limiting the margin of discretion for the contracting authorities as well increasing transparency in the awarding phase of the procurement process.

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

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

From the analysis of the major international procurement regulations, it has to be felt apart the 1949 ILO Convention on Labour Clause on Public Contract (together with Recommendation n. 84); the only international agreement that specifically and comprehensively deals with the enforcement of labour rights in public contracts. ILO Convention n. 94 is not an instrument regulating public procurement but a international agreement focused on labour right protection, that specifically aims at assuring that the workers involved in a public contract enjoy at least the minimum standards in term of wages and labour conditions normally established by the same type of work at local level¹¹. Even if it highly influential, unfortunately the ratification and the implementation of the Convention n.94 have not been particularly extensive and consistent until now and these international instrument does not represent an influential instrument of regulation.

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

The conformity with the WTO Procurement provisions - initially with the GPA 1994 and then with the Revised Text of the GPA - of procurement policies aiming at enforcing social objectives is highly disputed in the academic literature. Perfectly respondent to the abstract model of "international" procurement system as identified by Trepte, the WTO Procurement regulation allows, in fact, the use of social

procurement practices only if in compliance with the principle of national treatment and MFN, and if they are covered under the derogations to the agreement or can be justified under the GPA exceptions of Art.III of the Revised Text¹².

Procurement practices implementing social policies - in particular labour and employment objectives - often imply a discrimination, *de jure* or *de facto*, against non-nationals (Arrowsmith, 2003). The linkage with social policies in procurement can very likely result in violation of the general principle of set in Art.IV.1.a, requiring suppliers of any of the contracting Parties to be treated no less favourably than to domestic products, services and suppliers. However, social and labour policies can also be implemented in a non-discriminatory way into public contracts, essentially avoiding that the favourable conditions set in the selection procedures exclusively apply to domestic suppliers only. From a broader legal perspective, it appears to be rarely in violation of the national treatment principle the linkage of procurement policies to the compliance with legal requirements and in particular with international legal standards, as in the case of the ILO Core Labour Rights. The reference to international standards, defined in Art.I as documents providing “...rules, guidelines or characteristics for goods or services, or related processes and production methods, with which compliance is not mandatory”, is particularly stressed in Art.X as base for the prescription of technical specifications. Moreover, the importance of the role of international standards is also reaffirmed in the initiation of Future Work Programme on Safety Standards in International Procurement, as agreed in the WTO Ministerial Conference of the 15 December 2012 and confirmed in Annex G to the Decision of the 30 March 2012 of the WTO Committee on Government Procurement (GPA/113).

In the architecture of the WTO legal system, the inclusion of labour right protection clauses in the regulation of the procedural steps of public procurement process - from technical specification, qualification conditions to award criteria - is at the core of the debate concerning the admissibility of discriminatory practices based on “*non-product related*” processes and production methods (non-PPM) in the GPA context¹³. However, it must to be also kept in mind that it is not completely possible to extend in the procurement field, the Appellate Body’s approach to the issue of “likeness” as interpreted in the GATT and GATS context, due to the fact that GPA prohibits discrimination simply on “*good, services and suppliers*” and not of “*like products*” (Arrowsmith, 2003).⁸

Nevertheless, discriminatory policies based on social considerations may be justified under the exceptions in GPA Article XXIII. Derogations to national treatment and rules on award procedures expressively apply to measures necessary to protect public morals or human, animal or plant life or health or produced by handicapped persons, prison labour or philanthropic institutions. Moreover, an extensive interpretation of the concept of “*public morals and order*” would easily cover exceptions based on human and labour rights justifications. However, it seems to be particularly controversial the legitimacy of procurement policies with clear extra-territorial effects (Arrowsmith, 2003).

Apart from the possibilities offered to the inclusion of labour and social considerations in the possible derogations from the coverage or in their justification under the general exceptions, the regulation of the procedural aspects of the procurement process inside the text of the GPA agreement does not allow great margins of flexibilities in its interpretation. One of the most acclaimed changes in the Revised Text of the GPA consists in the possibility to take into consideration a

“secondary consideration” into the formulation of technical specifications, but only in relation to environmental concerns. Art.X.6, in fact, allows the procuring entities of the Contracting Parties to specifically “*prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment*”. Even if there is no a specific reference to other secondary policies, like the protection to human and labour rights, Art.X.6 read in combination with the definition of “technical specification” set in Art.I seems to include the possibility to extend the coverage of the provision allowing also other “*processes and methods for their production or provision*”.

For what concerns the regulation of exclusion situations under the GPA, there is a considerable uncertainty on the extent of government authorities’ contracting power to influence or exclude suppliers that do not meet specific labour conditions (McCrudden, 2007). According to the wording of Art.VIII of the Revised Text, the conditions for participation in procurement should be limited to the essential considerations for the evaluation of the financial capacity and the commercial and technical ability of the firm to carry out the procurement activity. However, concerning the evaluation of the legal capacity of the firm, according to Art.VIII.4(e) it is possible to exclude a supplier on the ground of “*professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier*”, opening the possibility for an interpretation inclusive of violation of core labour standards. Moreover, the flexibilities offered by the GPA in the regulation of the award criteria appear to go beyond the consideration of strictly commercial criteria. The evaluation criteria that can be set for the identification of the “*most advantageous*” tender under Art. XV.5, seem to offer the possibility to also include also other considerations like for example social and labour benefits in particular in the performance of the contract (McCrudden, 1999). If appropriately included in the tender documentation, the procuring entities may include in the evaluation criteria “*among others, price and other cost factors, quality, technical merit, environmental characteristics*” as stated in Art.X.9, specifying “*the relative importance of such criteria*” as required in Art.7(c). For these reasons, it seems that the inclusion of labour right protection clauses in the award criteria, if appropriately specified in the tender documentation and imposed in a non-discriminatory and transparent way, is possible to be covered by an extensive interpretation of the regulation set in the Revised Text of the GPA.

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

The 1994 Model Public Procurement Law of the United Nations Commission on International Trade Law (UNCITRAL) is a particularly influential non-binding instrument, designed to serve as a guide fostering good governance, transparency and efficiency in overall public procurement (Linarelli, 2006). The 1994 Model Law has been subject to a long process of revision and reform, finalised in February 2011. One of the major changes consists in the strengthening the Model Law’s general principles and their translation into more detailed and transparent procedural rules in the provisions of Chapter I, to be applied to all procurement methods. The application of more defined rules on the general conduct of the procurement process is now finally extended to all the sectors of the national economies, also trying to accommodate security and defence concerns, before excluded (Nicholas, 2012).

From a broad perspective, the UNCITRAL Model Law can be defined as a social system of procurement regulation, clearly providing the possibilities to use

procurement as an instrument of industrial, environmental and social policies, simultaneously discouraging any form of discrimination in public contracts. Art.8 allows the possibility to restrict the access to procurement competition on the base of nationality, at the condition that the requirements are set in provisions of law and open to the possibility of a challenge to the decision. Moreover, the reformed text of the UNCITRAL Model Law seems to soften the distinction in the regulatory treatment between industrial policies on one hand and socio-environmental objectives on the other previously clearly marked in the Model Law (Arrowsmith, 2004).

Industrial, social and environmental policies, embraced under the term of “*socio-economic policies*”¹⁴, are clearly allowed as evaluation criteria, according to Art. 11, provided that these criteria are administrated in the national procurement law and they are in conformity with the transparency regulation of the procurement process set in the Model law. This clear preference for the inclusion of secondary policies as award criteria in the evaluation of the bids aims at ensuring, in fact, that the conduct of procurement practices for social and industrial policies is carried out in a transparent and predictable manner, in order to facilitate the analysis of the costs and the benefits of the procurement process by the government and the suppliers (Nicholas, 2012).

The inclusion of social and labour concerns seems precluded in the pre-qualification and pre-selection process: technical specifications shall be “*objective, functional and generic*” as required by Art. 10.4 in a way to not constitute an obstacle or an excessive restriction to the participation of firms in the procurement competition. However, the provision of the Model Law related to the qualification of suppliers and contractors (Art.9.2.a) extend the possibility to take into account also social considerations between the necessary “*professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and personnel to perform the procurement contract*”. In particular, it seems to be enough flexibility in the enforcement of labour right on the ground of the Model law’s regulation of the exclusion situations: the violation of the major labour rights and core ILO standards could be easily interpreted as a sufficient reason for the exclusion of the suppliers and contractors from the procurement process, because contrary to “*the ethical and other standards applicable in this State*” ex Art. 9.2.b.

From the brief analysis conducted, the reformed UNCITRAL Model law, with the attention for the “*socio-economic*” policy objectives of the contracting Parties openly suggest the possibility to include the consideration of some basic labour rights in the evaluation of bids, both in the step of the exclusion situation both as award criteria, and, at the same time, promote efficiency and transparency in the procurement process.

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

The procurement guidelines of international financial institutions, at international and regional level, have a decisive influence in the processes of reform and harmonization of national public procurement systems, providing strict procurement regulations mainly oriented to ensure the efficiency in the conduct of the procurement process and the effectiveness of the allocated aids. For this reason, the inclusion of labour and social standards in their guidelines for their procurement

operations is a delicate issue (Ebert & Posthuma, 2011). At the same time, the World Bank official documents on procurement apart from the Guidelines offer the possibility of including social and labour considerations in other policy instrument. The possibility to include social concerns in the different procurement methods in particular in the case of construction works was directly addressed like in the case of the Country Procurement Assessment Reports CPARs (Pallas & Wood, 2009). In the case of Ghana in 2003, a CPAR specifically referred to ILO Convention n.94, suggesting that *“procuring entities must ensure that clauses on labour standards (fair wages, health and safety measures and social security) are incorporated in works contracts and enforced by contract managers”*¹⁵.

From one side, one of the four major objectives of the World Bank procurement Guidelines consists, in fact, in the *“encouraging the development of domestic contracting and manufacturing industries in the Borrowing country”* (Article 1.2) together with the need for economy and efficiency, the guarantee of equal opportunities to all eligible bidders and transparency in the procurement process¹⁶. The inclusion of the protection of a national industry as a procurement objective represents, in fact, the main difference of the World Bank regulation, especially compared to the non-protectionist approach of the WTO, and it drastically changes the extent in which social policies are pursued in procurement projects financed by the Bank (De Castro Meireles, 2006).

On the other side, in the World Bank Guidelines, if there is no clear indication on the possibility to draft technical specifications based on certain production methods, apart from a general reference of the possibility of drafting specifications based on international standards, allowed according to section 2.19,.

Specifically concerning the exclusion criteria, the Procurement Guidelines reaffirm the importance of opening up the procurement markets regardless of the nationality of the competitors, providing for two possible exceptions. First, in Section 1.8, the Guidelines include some flexibility in the inclusion of concerns external to the procurement process, e.g. in the case of violation of human rights¹⁷. It would be possible to exclude firms since *“(i) as a matter of law or official regulation, the Borrower’s country prohibits commercial relations with that country... (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Borrower’s country prohibits any import of goods from, or payments to, a particular country, person, or entity”*. Firms from countries where are registered poor human rights records could be excluded from public contract, in case of a general trade restriction imposed at national level on their country of origin. In this case, it is also controversial the conformity of the Burma/Massachusetts case with the World Bank Guidelines. Second, the rules in Section 1.16 concerning the exclusion of contractors engaged in corruption even without a criminal conviction raise the question of the admissibility of imposing the same sanctions for the violation of core labour standards.

For this reason, the option of incorporating labour concerns in the evaluation of the financial and technical capacity of the contractors to perform the contract seems to be excluded from the interpretation of the Guidelines at the qualification stage. However, in the case of award criteria, it seems to be a clearer guidance about the evaluation of the proposals on the base on social criteria, eventually stated in the bidding documents. The World Bank Procurement Manual states that *“factors other than price to be used for determining the lowest evaluated bid shall, to the extent practicable, be expressed in monetary terms, or given a relative weight in the evaluation provisions in the*

bidding documents” (Section 19.3), therefore drastically restricting the options for the inclusion of social factors in the evaluation¹⁸.

V. CONCLUSIONS

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

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

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

From the comparative analysis of the key international instruments, it emerges a common preference for the inclusion of social and labour considerations in the tender assessment process. The social model of procurement regulation, embodied in the UNCITRAL Model Law, seems to offer a clear indication for the same procedural solution shared by the GPA International model and the World Bank guidelines oriented to the efficiency of the procurement process. For these reasons, exclusion situations and in particular careful use of award criteria seem to be the procedural guarantees that better ensure an effective enforcement of labour rights, assuring at the same time effectiveness and compliance with international obligations.

EXPLANATORY FOOTNOTES

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

² A significant example - particularly relevant for the social use of public procurement - is represented by the factual interpretation of the concept of distributive justice in international law. The idea of distributive justice, in fact, is a basic concept inspiring many constitutional

systems, but particularly controversial in the concretization at legislative and judicial level, especially when balanced with other social and economic values.

³ The term of secondary policy is mainly used in the EU context while according to US terminology it is more frequent to refer to them as “collateral” policies. However, a strong component of the procurement literature adopted the definition of “horizontal” for social and environmental policies in public procurement, in an alternative parallel position to the objectives of efficiency and value for money.

⁴ T. International, *Handbook For Curbing Corruption In Public Procurement*, In K. Kostyo (ed.), (Berlin 2006).

⁵ In the PTAs notified to the WTO Secretariat since 2000 to now, only 28% of them include specific detailed provisions on government procurement. 37% of the registered PTAs have no mention to government procurement and the 35% include only basic provisions on public procurement, referring in a broad sense to procurement liberalization as a general objective of the agreement.

⁶ In contradiction with all the methods previously analysed, it is also possible to enforce the respect of labour policies through procurement policies specifically relating to the execution phase of the contract. Contract performance conditions do not consist per se in non-discriminatory practices, setting parameters of compliance that have to be applied to all potential contractors, and they do not undermine “value for money” considerations. As openly supported in the European regulation of public procurement (Recital 33 of Directive 2004/18/EC) and in the official interpretation of the EU directives, interesting example of conformance with the core ILO conventions in the execution of a contract are frequently provided by the European countries, like in the case of the governmental regulation of timber procurement in Sweden, the UK public transport for London or in France for the municipality of the city of Paris.

⁷ Released on November 2011, available at www.bbl.admin.ch/bkb. If the contract is performed in Switzerland the bidders have to guarantee conformance with the applicable Swiss health and labour regulations. In the Swiss guidelines, different minimum labour standards are set depending on the place of performance of the procurement contract: in the case of a contract performed abroad, it is mandatory the compliance with at least the eight ILO Core Conventions in the main components of the bidders’ supply chain.

⁸ The implementation of the Preferential Procurement Policy Framework Act 5 of 2000 in South Africa represents the most famous case of percentage preferences allocated on the base of the extent of the benefit for disadvantaged and discriminated groups on the basis of race, gender, ethnicity and disability. To read more, see 2 R. B. Watermeyer, "The use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects" (2000) *Public Procurement Law Review* 226-250. 3 P. Bolton, "The Public Procurement System in South Africa: Main Characteristics" (2008) *Summer 2008 Public Contract Law Journal* 781 - 804. 4 J. D. Taylor and K. Raga, *Preferential Procurement: a case study of South Africa 4th International Public Procurement Conference , August 26-28, 2010*, (Seoul, South Korea 2010).

⁹ For selected contracts in the construction and services sectors, the Pilot Project required contractors to submit a Social Policy statement and Employment Plan, outlining proposals for recruiting and employing people from the target groups in Northern Ireland. See more in 5 A. Errige, "Public Procurement, Public Value and the Northern Ireland Unemployment Pilot Project " (2007) *85 Public Administration* 1023-1043.

¹⁰ The discipline of the additional award criteria is set in the Sixth Additional Provision of the Law on Public Sector Contracts 30/2007 under the heading “Contracting with firms that have disabled or socially excluded people among their employees and with non-profit-making

organisations". See more in 6 T. M. Arnaiz, "Social considerations in Spanish public procurement law" (2011) 2 Public Procurement Law Review 56-79.

¹¹ The approach used in the ILO Convention n. 94 "*Labour Clauses in Public Procurement*" is a clear application of the national treatment principle. Article 2(l) of the Convention provides, in fact, the inclusion of favourable working conditions to be "*not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on*" by collective machinery or other recognised negotiation method, arbitration award or national legislation". 7 International Labour Organization, International Labour Conference, In I. L. Office (ed.), *General Survey concerning the Labour Clauses (Public Contracts) Conventions, 1949 (No. 94) and Recommendation (No. 84)*, (Geneva 97th Session 2008).

¹² The analysis of the WTO procurement provisions will be conducted referring to the articles' numeration in the Revised Text as reported in the "Annex to the Protocol amending the Agreement on Government Procurement", operating specific remands to the 1994 GPA only in case of big discrepancy between the two legal texts.

¹³ It must to be kept in mind that it is not possible to easily extend in the procurement context, the Appellate Body's approach, due to the fact that the issue of "likeness" is excluded from the context of the GPA. GPA prohibits discrimination of "products" and not of "like products". 8 S. Arrowsmith, *Government Procurement in the WTO*, (The Hague 2003).

¹⁴ According to the definition set in Art. 2(o), under the term of "Socio-economic policies" are included "*environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings*".

¹⁵ World Bank: Ghana, CPAR – 2003, Main report, doc. No. 29055, Vol. 2, June 2003, p. 32.

¹⁶ *Guidelines Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by The World Bank Borrowers*, January 2011, Available at

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>

¹⁷ It would be possible to exclude firms since "*(i) as a matter of law or official regulation, the Borrower's country prohibits commercial relations with that country... (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Borrower's country prohibits any import of goods from, or payments to, a particular country, person, or entity*". Firms from countries where are registered poor human rights records can be excluded from public contract, in case of a general trade restriction imposed at national level on their country of origin. In this case, it is also controversial the conformity of the Burma/Massachusetts case with the World Bank Guidelines.

¹⁸ Bank-Financed Procurement Manual, Procurement Policy and Services Group, Operations Policy and Country Services, Edited January 29, 2003, available at

<http://siteresources.worldbank.org/PROCUREMENT/Resources/pm7-3-01.pdf>

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