COSMOPOLITAN DEMOCRACY OR ADMINISTRATIVE RIGHTS? INTERNATIONAL ORGANISATIONS AS PUBLIC CONTRACTORS

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Abstract

International organisations contract with other subjects, private and public, in order to procure goods, services and works and perform their institutional functions. In 2012, the organisations belonging to the United Nations system spent more than USD15.4 billion in procuring goods, services and works. From 2000 to 2012 the value of purchases made by the UN alone went from over USD687 million to almost USD3 billion. This significant growth trend has been gradually emerging since the founding of these organisations, reaching a peak in the past decade. The expenditure for international organisations has a significant impact on governmental budgets and contributors and is a business opportunity for companies and individuals. To manage these resources and balance the interests connected to them, it has been gradually developed a body of rules aimed at regulating the relationships between international administrations and private parties, both in the vendors' selection phase and in contract execution. Despite the economic importance of the issue and this emerging regulatory framework, the legal aspects of procurement activity of international organisations has never undergone an in-depth analysis. The paper should then try to answer the following questions: does this body of procurement rules allow observers to argue in favour of a global public law, which is produced by international institutions and has a direct impact of individuals irrespective of their location, nationality and culture? Does this harmonized codification process, if any, create new rights for individuals vis-à-vis international organisations? What are the main features and principles that characterize this body of rules and does the content of such rules go beyond and differ from the states' legal frameworks? Do these rules fill legitimization and accountability gap of international organisations?

Keywords

International organisations, procurement

1 Introduction

To fulfil their institutional mission, international organisations turn to other subjects, both private and public, to procure goods, services and works. Moreover,

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some international organisations have financed projects and programmes on the condition that the financial resources bestowed by the international organisation to the recipient states are spent through procurement processes that are compatible with those of the international organisation, are regulated by the international organisation and/or are supervised by the international organisation.

Direct (the former) or indirect procurement (the latter) is essential to allow the functioning of the organisations and the fulfilment of their institutional goals. Indeed, there is a strict link between the functions performed by the international organisations, their administrative structure and procurement. The volume of procurement activity has steadily increased together with the size and functions of the international organisations. In 2012 the organisations belonging to the United Nations system spent more than USD15.4 billion in procuring goods, services and works. From 2000 to 2012, the value of purchases made by the UN alone went from over USD687 million to almost USD3 billion. This significant growth trend has been gradually emerging since the foundation of the organisations, reaching a peak in the past decade (USD3.5 billion in 2009) and with a slight drop after 2009 due to the economic crisis.¹ It is made possible by member state contributions, which in many cases—like in those of the United States, Japan, Germany, and Great Britain—amount to considerable sums. Thus, on one hand the increased volume of international organisations' procurement has a significant impact on governmental budgets and taxpayers, on the other hand it is a good business opportunity for companies.

From a legal point of view, the rise of international organisations' institutional complexity and procurement volumes had several implications. International organisations' chances to directly or indirectly affect individuals either as contractual counterparts, final beneficiaries of international organisations' procurement or taxpayers have multiplied. Consequently, conflicting interests belonging to the international organisations, the donor states, the recipient states and individuals have emerged. With the objective of setting priorities among those interests, international organisations have gradually developed and codified a body of rules regulating their procurement activity and the relationship between their bureaucratic bodies and private parties both in the vendors' selection phase and in contract execution.

Despite the economic importance of the issue and this emerging regulatory

¹ Data concerning all the organisations of the UN family are collected by the United Nations Procurement Division: <<http://www.un.org/depts/ptd/statistics.htm>> [accessed 26 September 2014].

framework, the phenomenon as well as its consequences on the exercise of international public authority and on international organisations' legitimation and accountability were largely neglected by the literature and have not yet undergone an in-depth legal analysis.²

When focusing on international organisations, for instance, the debate on cosmopolitanism evolved around their democratisation through political tools such as the adoption of the majority principle.³ Within this line some scholars have made proposals of reforms aimed at achieving greater democratisation of in-

² Indeed, very few and sectional have been the studies on international organisations' procurement, see generally B R Killmann, 'Procurement Activities of International organisations: An Attempt of a First Insight in Evolving Legal Principles' (2003) 8 *Austrian RIEL* 277; Y Renouf, 'When Legal Certainty Matters Less Than a Deal: Procurement in International Administrations' (*IIJL*, 19 March 2009) <<http://www.iiij.org/gal/documents/GALch.Renouf.pdf>> [accessed 26 September 2014]; T Sakane, 'Public Procurement in the United Nations System', in K V Thai (ed), *International Handbook of Public Procurement* (2009) 233. With a special focus on development aid, some aspects of international organisations' procurement have been analysed in A La Chimia, *Tied Aid and Development in the Framework of EU and WTO Law* (2013). Between the 1960s and the 1970s some works were published on the contracts concluded by international organisations, which focused, however, mainly on the contractual phase and related issues such as the law applicable to contracts: see C W Jenks, *The Proper Law of International Organisations* (1962); F A Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 *BYIL* 34; H Batifol, 'Problèmes des Contrats Privés Internationaux' (1962) *Association des Études Internationales* 54; G R Delaume, 'The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast' (1962) 56 *AJIL* 63; G R Delaume, 'Issues of Applicable Law in the Context of the World Bank Operations', in N Horn & C M Schmitthof (eds), *The Transnational Law of International Commercial Transactions* (1982); P Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privées* (1990) 183–236; N Valticos, 'Les Contrats Conclues par les Organisations Internationales avec des Personnes Privées' (1977) 57 *Ann d'Inst* 38; G van Hecke, 'Contracts between International Organisations and Private Law Persons', in *Encyclopedia of Public International Law*, vol 1 (1992) 812; V M E Schneider, 'International organisations and Private Persons: The Case for a Direct Application of International Law', in C Dominicé, R Patry & C Reymond (eds), *Études de Droit International en l'Honneur de Pierre Lalive* (1993); M H Sinkondo, 'Le Rôle de la Volonté de l'Organisation Internationale dans la Détermination du Droit Applicable aux Contrats Conclues avec les Personnes Privées' (1997) 4 *RDIDC* 367; F Seyersted, *Common Law of International Organisations* (2008); M Audit, 'Les Marchés de Travaux, de Fournitures et de Services Passés par les Organisations Internationales' (2008) 4 *JDI* 941; B Heuninckx, 'Applicable Law to the Procurement of International Organisations in the European Union' (2011) 20 *Public Procurement LR* 103. More attention has instead been devoted to procurement by EU institutions. However, these studies have often focused on single aspects of the procurement procedure or on single judicial cases: see, *inter alia*, J B Auby, 'Accountability and Contracting Out by Global Administrative Bodies: The Case of Externalization Contracts made by European Community Institutions' (Paper presented at the Global Administrative Law Workshop, New York University, 18 October 2006).

³ D Archibugi, 'Cosmopolitan Democracy and Its Critics: A Review' (2004) 10 *EJIR* 437, 448.

ternational organisations' political institutions; such as establishing a parliamentary assembly within the United Nations liable to directly represent citizens instead of governments,⁴ reforming the Security Council and the veto power mechanism and requiring the compulsory jurisdiction of the International Court of Justice.⁵ The theoretical premises of these proposals lie in juridical pacifism and the idea that by globally granting stakeholders' participation, democracy within international organisations favours peace and enhances their decision-making capacity on issues that supersede states' borders.

Taking an opposite stand, other scholars have argued that democratic mechanisms cannot be transposed into international organisations: 'an international organisation is not and probably cannot be a democracy'.⁶ It can be interpreted instead as a *bureaucratic bargaining system* where 'leaders cannot indefinitely ignore the limits set by the opinions and desires of the governed'.⁷

Following the sceptic views on international organisations' democratisation through political tools and building up on the definition of international organisations mainly as bureaucratic systems, this paper explores the rising phenomenon of international organisations' procurement regulation and its implications on the relationship between international public authority and individuals. In particular, it aims at tackling four main research questions.

First, does the development of international organisations' procurement regulation amount to a body of rules which is produced by international organisations and has a direct impact on individuals irrespective of their location, nationality and culture; that is, hence, administrative and *global* in nature?

Second, has this harmonised codification process created new rights for individuals *vis-à-vis* international organisations?⁸ And more specifically, what are the main features and principles that characterise this body of rules?

⁴ R Falk & A Strauss, 'Toward Global Parliament' (2001) 80 *Foreign Affairs* 212.

⁵ D Archibugi, 'The Reform of the United Nations and Cosmopolitan Democracy' (1993) 30 *Journal of Peace Research* 301.

⁶ R A Dahl, 'Can International Organisations Be Democratic?: A Skeptic's View', in I Shapiro & C Hacker-Cordón (eds), *Democracy's Edges* (1999) 19. With reference to the EU alone, see P Schmitter, 'Is it Really Possible to Democratise the Euro-Polity?', in *European Consortium for Political Research* (1996). On global democracy, see R Dahrendorf, *Dopo la Democrazia* (2001).

⁷ Dahl, above n 6, 34.

⁸ The term 'right' is here used in a wide meaning that is to be entitled by hard or soft rules to *expect* a certain conduct from a subject, e.g. an international organisation whose activity affects my interests. For an analysis of hard and soft rules as *modus operandi* of international administrations see D Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (IILJ Working Paper No 6, 2004).

Third, in terms of the interplay of interests, how do we explain the specific features of the governance and implementation of the procurement process? Does the image of the *bargaining system* apply also to this piece of law?

Finally, can the actual and future development of such administrative rules fill the legitimization and accountability deficit that proposals for a cosmopolitan democracy and international organisations' democratisation tend to address?⁹

2 A Historical Overview

In 1962, Jenks envisaged the development of an international administrative law that would go beyond governing relationships between the organisation and its officials to apply to relationships between international administrations and third parties:

As international organisation develops certain matters cease to be governed by the conflict of laws and become subject to international administrative law. Within a generation, this process has been virtually completed in respect of the legal relations of international organisations with their officials and employees and has been significant in respect of their relations with other agents. The law applicable to their relations with third parties continues for the most part to be governed by the conflict of laws [...] At a later stage some of the legal relations and transactions of international organisations

⁹ Whether and to what extent administrative rules can foster legitimization and accountability of global governance institutions has been widely discussed in the literature. To mention but a few see S Cassese, 'Is There a Global Administrative Law?', in A von Bogdandy & J Bast (eds), *The Exercise of Public Authority by International Institutions* (2010); S Chesterman, 'Globalization Rules: Accountability, Power and the Prospects for Global Administrative Law' (2008) 14 *Global Governance* 39; D C Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale LJ* 1490; B Kingbury, N Krisch & R B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *L & Contemp Probs* 15; A D Mitchell & J Farnik, 'Global Administrative Law: Can It Bring Global Governance to Account?' (2009) 37 *Federal LR* 237; L B de Chazournes, 'Concluding Remarks: Changing Roles of International Organisations: Global Administrative Law and the Interplay of Legitimacies' (2009) 6 *Int'l Org LR* 655; J Delbruck, 'Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies' (2003) 10 *Ind J Glob Leg Stud* 29; P L Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99 *Columbia LR* 628; R Wolfrum, 'Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organisation (IMO) and International Fisheries organisations' (2008) 9 *German LJ* 2039.

with third parties may become subject to international administrative law. At each successive stage of development difficulties may arise in determining whether the balance of advantage lies in applying the normal rules of conflict and substantive law [...] or in evolving special rules which may progressively develop into a body of international administrative law.¹⁰

The traditional concept of national administrative law was centred on the dualism of systems by virtue of which there is a domestic law of the state and an international law among states. The subjects of domestic law were individuals; the subjects of international law were states and only states. Thus, it was felt that on one hand international law could not directly affect the legal rights of the citizens of a state, and on the other hand that administrative law, as such, would govern and define *only* these rights, that is the rights emerging from the relationship with governmental public power.

Based on these premises two subsequent formulations of the concept of administrative law were developed. As the first international administrative unions arose, the body of laws produced by these organisations was denoted as international administrative law. It was above all organisational in nature; it governed primarily the structure of the unions and the decision-making mechanisms within the unions. It was a law produced by 'an association of states'—¹¹in this sense international—and its content was administrative.¹²

With the creation of the League of Nations this first concept was joined by another. The League of Nations had its own Secretariat comprised of officials, international civil servants, who according to the Drummond model did not represent states but were bound solely to the organisation they served. Appearing for the first time was the idea of a direct relationship between international administrations and private subjects and an international administrative law, which unlike administrative international law, was a body of rules, produced by the organisation that governed an internal relationship between the organisation and private parties (its officials). With the establishment of the United Nations the alleged violation of the rights recognised by these rules became actionable in an *ad hoc* court: the United Nations Administrative Tribunal. This administrative law has, hence, three characteristics. First of all, it is an internal law as it refers to

¹⁰ Jenks, above n 2, xxxviii–xxxix.

¹¹ D Anzilotti, 'Gli Organi Comuni nelle Società di Stati' (1914) 8 *Rivista di Diritto Internazionale* 156.

¹² U Borsi, 'Carattere ed Oggetto del Diritto Amministrativo Internazionale' (1912) *Rivista di Diritto Internazionale* 365; Jenks, above n 2; S Battini, *Amministrazioni senza Stato* (2003).

a relationship between the organisation and its officials.¹³ In addition, although the private party is not subject to this law through the ties of citizenship, he/she is subject to it by virtue of a working relationship: the official is part of the organisation.¹⁴ Finally, this administrative law governs both the selection of the official and the service relationship.

Achieving what Jenks had predicted decades ago, contemporary organisations have developed a third line of administrative rules related to the procurement designed to carry out their institutional mission. Since the origins of the organisations, there has been a gradual shift from procurement carried out in informal ways according to a loose set of internal administrative circulars mainly through direct contracting, to procurement performed according to a much better developed body of hard and soft rules found in financial regulations, procurement manuals and guidelines,¹⁵ following a pre-defined procedure and, to some extent, granting competition among vendors, publicity and transparency of the operations. Furthermore, this body of regulations in the last decade is undergoing a process of harmonisation, at least among international organisations belonging to the United Nations system.

The historical reasons for this gradual shift are to be found in the political pressure for administrative reform exerted by the major donors to international organisations' budgets, such as the United States. Historical changes in the life of the organisations led those states to ask for administrative reforms including procurement reform. The end of the Cold War, the decolonisation process and the emergence of new cross-border problems brought about on one hand an increase of size and activities of the organisations, on the other hand the participation of new states in the management of international organisations' re-

¹³ S Battini, 'International Organisations and Private Subjects: A Move Towards Global Administrative Law?' (IILJ Working Paper No 3, 2005).

¹⁴ Ibid.

¹⁵ See e.g. FAO, *Procurement Manual* (2003); FAO, *Financial Regulations* (2008); United Nations, *Procurement Manual* (2013); United Nations, *Financial Regulations and Rules of the United Nations*, UN Doc ST/SGB/2003/7 (9 May 2003); United Nations, *UN Procurement Practitioner's Handbook* (2006); UNDP, *Financial Regulations and Rules* (2000); UNDP, *Guidelines for Direct Execution* (2001); UNDP, *Procurement Manual* (2005); UNDP, *United Nations Development Programme Procurement Manual (User Guide)* (2006); UNOPS, *Procurement Manual* (2007); UNOPS, *Procurement Manual* (2010); WFP, *Non-Food Procurement Manual* (1999). For financial institutions see African Development Bank, *Financial Regulations of the African Development Bank* (2002); African Development Bank, *Rules and Procedures for Procurement of Goods and Works* (2008); African Development Bank, *Rules and Procedures for the Use of Consultants* (2008); Asian Development Bank, *Procurement Guidelines* (2010); International Fund for Agricultural Development, *Project Procurement Guidelines* (2010).

sources. Procurement was affected under both respects as the volumes of goods, services and works to be procured grew. At the same time, though, the array of vendors to whom tenders could be awarded became more diversified, including not only companies incorporated in the major donor states, but also companies from developing countries. As the potential diversification of contractors would not guarantee financing states a return in terms of contracts awarded to their companies—which previously was a common practice—those states were also the main promoters of an administrative reform that pursued publicity, transparency and international competition in international organisations' procurement procedures. International competition, in particular, tended to favour big companies (or companies legally incorporated in the major donor states whose production took place in a developing country) as those were able to make the most competitive offers.¹⁶

3 Principles Guiding Administrative Action and New Rights for Individuals

Against Jenks' anticipations, such international organisations' administrative rules are built on a more complex relationship than the simple one between an international organisation and a private subject. Procurement rules and regulations allow to identify two basic types of procurement that international organisations can carry out: direct and indirect procurement. In the former international organisations' officials identify the needs of the organisation, prepare a contract, launch a public tender if the circumstances require it, evaluate the offers, award the contract. The final contract is signed between the international organisation and a private (or public) counterpart. The overall procedure as well as the rights and duties within it are regulated by the international organisation's financial rules and regulations and their procurement manuals. Direct procurement can serve internal or external purposes. An example of the former is the acquisition of office supplies for international organisations' headquarters. Examples of the latter include the acquisition of aircrafts for peace-keeping operations or the construction of shelters to house refugees. International organisations' indirect procurement consists in procurement procedures whose regulation is set by the international organisations but whose concrete implementation is left to the states. Indeed, to

¹⁶ For an historical overview see E Morlino, *Il Contratti delle Organizzazioni Internazionali* (2012) 37–78.

fulfil their institutional mission some organisations finance development projects or programmes that are then carried out by the states, subject to the condition that the procurement procedures within such a project are implemented according to the rules set by the international organisation or national rules as long as these are compatible with the procurement guidelines set by the international organisation.

Both direct and indirect procurement consist of a multi-phase process codified in the relevant rules; registration of vendors, solicitation of offers, evaluation and award. The regulation of such phases is guided by five basic principles—most of the time expressly mentioned in the procurement manuals as the promotion of institutional objectives—competition through fairness, integrity and transparency, economy and effectiveness, best value for money, accountability. The same principles usually guide national government procurements. However, when applied to international organisations' procurement, competition and accountability show several peculiarities compared to government procurement procedures.

4 Competition

Competition is usually the leading principle guiding government procurement. The Government Procurement Agreement¹⁷ as well as the European procurement directives require national administrations to comply with a whole set of publicity, transparency and accountability requirements designed to ensure competition and non-discrimination. Both the WTO and the EU have, indeed, as institutional mission the creation free market economies. Rules governing international organisations' procurement give, on the contrary, less emphasis to competition. Some examples may be worth mentioning.

1. *Advertisement.* In the very first phase, the general rule on vendors' selection is that potential vendors are identified by placing an advertisement.

¹⁷ Marrakesh Agreement Establishing the World Trade organisation, 15 April 1994, 1867 UNTS 3, Annex 4B (Agreement on Government Procurement) (*GPA*). On the WTO, procurement and competition see, *inter alia*, S J Evenett & B M Hoekman, 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules' (2005) 21 *EJ Pol Econ* 163 (2005); R Hunja, 'Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines' (1997) 6 *Public Procurement LR* 216; T Tucker, 'A Critical Analysis of the Procurement Procedures of the World Bank', in S Arrowsmith & A Davies (eds), *Public Procurement: Global Revolution* (1999) 139; S Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organisation' (2003) 37 *JWT* 293.

However, in direct procurement this rule has exceptions which are widely used. Procurement manuals allow procurement officers to decide not to post an Expression of Interest (*EOI*) because circumstances of the case do not warrant doing so. No specific justification is required for such a decision. In practice, especially for some organisations such as WFP or FAO this exception is widely used.

2. *Solicitation.* Whereas in government procurement there are usually three tendering methods (open tendering, restricted tendering, negotiated procedures; in the EU directives there is also competitive dialogue), in international organisations' direct procurement the system does not provide for open procedure as a basic procedure, but only for selective tendering procedures: the vendors who can take part to the selection are only those who receive the solicitation documents sent by the procurement officer. Again, the giving of no reason is required to motivate the exclusion.

Furthermore, the Procurement Manuals generally *suggest* to invite all the vendors registered for a certain sector of activity but at the same time allow to limit the number of potential vendors to be invited. This can be done *inter alia* in virtue of the 'interest of the organisation', or if the list of potential recipients of solicitation documents is 'unduly long', or more generally 'whenever the particular circumstances of the case render it impractical or not feasible', and in all other circumstances that the competent administrative bodies deem to be exceptional. A significant room for discretionary evaluation is, hence, left to the procuring entity.

It is not usually so for indirect procurement where, instead, the organisation requires the national administration to adopt open tendering procedures as basic procedures. Limited international bidding, national international bidding or direct contracting are also allowed but only in the cases listed by the organisation. Furthermore, the possibility of putting direct contracting procedures in place is subordinated to the authorisation of the international organisation. In some cases international organisations grant the national procuring entity the possibility of giving a preference margin to local companies in the evaluation of bids (domestic preference). Such an option has to be approved, however, by the international organisation. Finally, international organisations usually require the national procuring entity to explain to the affected parties the reasons of its award decision. Reason giving is also bolstered by a mechanism of subsidiarity according to which if the national procuring entity fails to comply with this duty

either because the reasons given are insufficient or because no reason was given, the affected parties can turn to the international organisation to seek further explanations.

4.1 Accountability

Accountability of procuring entities is crucial to ensure that the provisions set up in the rules and regulations are observed by the competent administration. Under this respect direct and indirect procurement differ.¹⁸ Four main types of accountability can be identified:

1. *Hierarchical Administrative Accountability (direct procurement)*. In direct procurement international organisations usually provide for the opportunity to complain against procurement decisions (e.g. disqualification from registration or award) in front of the same administrative authority which took the decision or in front of higher level administrative authorities. In some organisations, as for instance the European Space Agency (ESA), the review procedure is highly formalised and proceduralised and foresees three incremental steps (Head of the Procurement Department, the Ombudsman for ESA, the Independent Procurement Review Board). In some other organisations as the UN and UNDP, a formalised debriefing process is granted. In many others as the WFP, FAO and UNICEF the complaint remains informal.
2. *Institutional Accountability (direct and indirect procurement)*. Some international organisations, e.g. EU institutions and ESA set up third, impartial bodies such as the ombudsman, which can be activated on request of private parties. Such bodies have jurisdiction over the administrative activity of the international organisation and are vested with investigative powers. An interesting variant of this kind of accountability may be found in

¹⁸ On accountability of international institutions see *inter alia* L Casini & B Kingsbury, 'Global Administrative Law Dimensions of International organisations Law'(2009) 6 *Int'l Org LR* 319, which suggests that the adoption of a GAL approach would foster international organisations' accountability; Kingbury, Krisch & Stewart, above n 9; R W Grant & R Keohane, 'Accountability and Abuses of Power in World Politics' (IILJ Working Paper No 7, 2004); A Reinisch, 'Securing Accountability of International Organisations'(2001) 7 *Global Governance* 131; A M Slaughter 'The Accountability of Government Networks' (2000) 8 *Ind J Glob Leg Stud* 347; K Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in Closing the Gap' (2004) 25 *Mich JIL* 1.

indirect procurement. Procurement guidelines of the World Bank, for instance, provide for *ex-ante* and *ex-post* mechanisms to make national administrations accountable to the World Bank.¹⁹ *Ex-ante* mechanisms include the World Bank's review of the state's procurement procedures, documents, bid evaluations, award recommendations and contracts to ensure that the procurement process is carried out in accordance with the World Bank guidelines. *Ex-post* mechanisms consist of complaints filed from the bidders in front of the World Bank's authorities. The World Bank may then take action and ask the national administration to provide all the relevant documentation for the Bank's review and comments. At the end of the process, the World Bank may recommend to the national administration that further steps be taken.

3. *Legal accountability (direct procurement)*. Only the EU has set a third, impartial judicial body to decide on complaints against procurement decisions of EU institutions and this is the European Court of Justice.
4. *'International' accountability (direct and indirect procurement)*. Assuming an extensive definition of accountability, this concept may also include the possibility for private parties to file an informal complaint in front of state representatives in international organisations. These may, at their will, exercise a political pressure on the competent administrative authorities in order to obtain a review of the decision.

5 Multipolarity in International Organisations' Procurement as a Source of Global Administrative Law and Its Limits

Direct and indirect procurement differ in one fundamental way: the relationship between public power and private subjects. In direct procurement, the relationship is bilateral, it is tied between a private subject and the international administration. In indirect procurement, the relationship is trilateral, it is tied between a private subject, a national administration and an international administration, with the second one accountable to the third by virtue of the initiative of the first. However, in international organisations' procurement even when the relationship is formally bilateral, states as members of organisations play a fundamental

¹⁹ World Bank, *Procurement Guidelines*, Appendix 3, para 15.

role in both determining the rules for the pre-contractual and contractual phases, and in the concrete implementation of the procurement contract.

The rules that govern international organisations' procurement are thus constructed around a multipolarity of actors—international organisations, financing states, recipient states and individuals either as vendors, taxpayers or final beneficiaries of procurement—and a relative multipolarity of interests.²⁰ The rules are then *global* because they are produced by supranational entities, encompass and govern the interactions of different levels of governance and affect individuals irrespective of their location, nationality and culture.

They are built around a notion of public interest that not only goes beyond the monolithic concept of unitary public interest—long abandoned with theories of pluralism in administrative law—but has expanded beyond the purely governmental dimension: not one public interest but several public interests are not only attributable to the domestic sphere, but contemporaneously belong to a number of domestic spheres and to the supranational sphere.

It is this multipolarity and the tensions between different interests that have brought about the development of international organisations' procurement regulation but also have set the limits to this development.

As seen above, the proceduralisation of procurement activity circumscribes the power of international organisations' by setting the boundaries of their legitimate action. At the same time, it gives private parties parallel rights *vis-à-vis* international organisations. This proceduralisation has some peculiarities. The development of a procedure and the configuration of rights for private parties has historically been achieved through a particular interplay of the economic and political interests held by states who have been members of the organisations. Democratic proceduralisation, if it can be so defined, is not—or is not merely—the goal and the result of a shifting concept of the relationship between the international administration and private parties, but is primarily the instrument required to fulfil states' interests. Institutions' need for legitimacy, which has often been referred to as one of the reasons for proceduralisation, does not fully encompass the deeper reasons for the phenomenon.

²⁰ The link between self-interests (of states or of supranational institutions) and the development of constitutional and administrative rules has been suggested by several authors (intergovernmentalism and neo-functional approaches). See, *inter alia*, A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998); A S Sweet & T L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *A Pol Sci R* 63.

Moreover, proceduralisation and the recognition of new rights to individuals are modelled upon public procurement regulations adopted by states, for instance the European procurement directives. Nevertheless, the adoption of principles similar to those which govern public procurement of states is not a simple legal transplant of rules. In international organisations' procurement, these principles have a substance, a mutual equilibrium, and a concrete application that differ from those detectable in public procurement by states. These principles are indeed tied to the peculiar institutional context and to the various interests at play in the global arena. Apart from general statements, the examination of rules that govern relationships between the international administrations that award contracts and private subjects, the relative practice, and the guarantees of implementation that surround these relationships are the result of different priorities among principles compared to what occurs in the national sphere.

In national public procurement, according to for instance the European Procurement Directive and the Government Procurement Agreement (*GPA*), the principles of cost effectiveness and impartiality serve the primary objective of competition with the consequent multiplication and strengthening of the rights of individuals before the administration.

This does not occur in *direct procurement* of international organisations. When scrutinised through a comparative analysis, the three principal elements that characterise the relationship between the administration and private parties in procurement, i.e. competition, transparency (intended primarily as advertisement and reason giving) and accountability prove to have limited implementation, although they represent a significant innovation in the history of international organisations. While the relationship between the administration and private parties has been proceduralised, it remains still characterised by the predominance of public powers' determinations over that of private parties, as demonstrated by the limited forms of competition, scanty advertising content, scarce reason giving requirements and appeals of a primarily administrative nature. Thus, the need for cost effectiveness and impartiality—with the latter intended as the administration's defence against itself, e.g. corruption of its officials—prevails over the need for competition and impartiality, intended as equal treatment of private subjects in their relationships with the administration. That is, the interplay of interests produces the opposite result from national procurement: competition and impartiality for purposes of cost effectiveness, and not, as in national procurement, impartiality for purposes of competition. A single exception to this structure is direct procurement of European institutions, which follows a more protective approach towards private parties' rights.

As mentioned above, the different order of priority among guiding principles can be explained by a peculiar interplay of interests of the international organisations, financing states and their citizens, and of recipient states and their citizens.

In direct procurement the interests of international organisations are based on four circumstances. The first is that the very existence of the organisation depends on financing from certain states. The second is that due to the international organisations' budget rules the international administration has no sufficient incentives to engage in virtuous management.²¹ The third is that the system of internal controls, while more developed and detailed than accountability to private parties, has certain weaknesses that inhibit its full effectiveness. The fourth is that none of these organisations, except for the European Union, include competition among its institutional objectives.

The interests of financing states are based on two other needs. One is that the resources granted are not wasted or poorly managed. An additional objective is to use those resources to create business opportunities for companies (private subjects) which are incorporated in their jurisdiction. In other words, it is to guarantee an internal economic return from the financing disbursed to international organisations, which can also take the express form of conditional financing. Finally, the interests of recipient states include not only the obvious one of being able to enjoy the final result of the procurement, but also to see contracts awarded to companies incorporated in their territory.

The interaction and balancing of these three categories of interests have determined the emergence of private parties' rights *vis-à-vis* international administrations, but also circumscribe their scope by creating a group of administrative rules still characterised by the predominance of public power. In fact, the interests of financing states combined with the financing needs of international organisations and, indirectly, of financed states have contributed to a recognition of rights that extends only as far as necessary to achieve these interests or to achieve certain political objectives. Moreover, this interpretation also explains why the gradual process of proceduralising international organisations' administrative activity began when various political motivations began to arise in financing countries and the interests of recipient countries began to emerge after decolonisation.

Some different considerations apply for *indirect procurement*. Here, the pro-

²¹ In most organisations the budget for the following year is calculated on the basis of the resources spent in the previous year. This implies that the administrative official has no interest in spending less in a certain year because this would cause less resources to be allocated for the following year.

cedure performed by national administrations but based on the guidelines of international organisations is modelled upon the procedure for governmental public procurement subject to national, European or supranational law. The stated principles are again those of competition, impartiality and cost effectiveness, but unlike direct procurement, their relative weight is more favourable to the recognition of full rights to individuals. Open competition, indicated as the primary manner of selecting contractors, the requirement of advertising and its detailed contents, the requirement of reason giving bolstered by the mechanism of subsidiarity among levels of government, the ability to file complaints against the actions of national administrations by directly petitioning international organisations, and the right to file fraud and corruption charges against national administrations directly before the international organisation are justified by a framework of interests that is more nuanced and less clear than what emerges in direct procurement, and where the main players are the three actors already noted: international administrations, financing states and their citizens, and recipient states and their citizens.

The international organisations' primary objective is to ensure that the state uses the financing for the purpose for which it was granted—i.e. for the implementation of the project or program—and that the resources are not wasted through bad management by national administrations. This is granted by the application of the principles of competition (intended as equal treatment of vendors and impartiality of state authorities), transparency of the administrative action and accountability of institutions to each other and to the vendors that participate in the tender procedures. By giving private parties these instruments to hold national administrations accountable, international organisations cannot only do an inter-institutional check over national administrations, but also an indirect check that is multiplied by all private subjects who enter into a relationship with the national administration and can report violations to the organisation. Thus, in pursuing its own institutional interest, the international administration achieves another objective: broadening the legal rights of private parties.

Financing states encourage this dynamic through market considerations that in part replicate those involved in direct procurement. The primary interest is to ensure that contracts are awarded to companies incorporated in their jurisdiction and competition is the best way to achieve this if we consider that the large multinationals incorporated in these states are favoured in market transactions.

Diversely, recipient states have strong opposing interests. In addition to the goal of obtaining the financing, which is a political aspect of the operation

and does not directly regard procurement, there is the goal of ensuring that contracts are awarded to their companies. In these cases, however, unlike direct procurement, financing states can invoke the institutional objectives of the international organisations and concrete advantages on the market. This consists, in particular, of the territorial proximity of national companies to the recipients of the services, goods and works provided and savings that can follow in terms of operating costs, transport and labour. This advantage becomes even greater because it coincides with the international administrations' interest in cost effectiveness and with their institutional objectives. Under these specific circumstances, this can create a balancing of interests that favours the recipient states and translates into the possibility of allowing domestic preference, notwithstanding the principle of competition.

6 Cosmopolitanism Revisited: Administrative Procedure in Lieu of Political Democratisation

Democratisation through political tools and proceduralisation of administrative activity that creates new rights for individuals differ in many respects.

First, in the former case the community affected is wide and indefinite—a global *demos* which should take part in the political life of the international organisations— in the latter case the community is made of natural or legal persons identified because part of an administrative procedure and of selected communities which benefit from the outcomes of international organisations' procurement, e.g. humanitarian assistance.

Second, proposals for cosmopolitanism aim at fostering popular control over international organisations' policies and decisions. Critics have, however, argued that size and complexity of international organisations and the scale and heterogeneity of the matters to be decided would abolish the opportunities for citizens to participate effectively in the decision of a world government.²² The delegation link seems too loose and not effective. On the contrary, although international organisations' administrative rules do not formally regulate the capacity of individuals to influence international organisations' decisions, they provide formal and informal methods of private parties' participation as well as mechanisms through which international organisations are held accountable. In direct procurement, besides bid protest tools, private parties can—and sometimes

²² Dahl, above n 6.

do—resort to their state representatives to bring their claims to the international administration. In indirect procurement, international organisations can be called upon by natural and legal persons to review the procurement activity carried out by the financed states. Thus, the link between the international organisations and individuals is tighter and more effective.

Third, as to the degree of implementation, while proposals for a greater democratisation of international organisations remains dead letter, the development of rules regulating international organisations' administrative activity is an ongoing process. In the last thirty years international organisations have created a body of rules which regulate a substantial part of their own activity—i.e. procurement—confer up to a certain point rights to individuals *vis-à-vis* international administration and set accountability mechanisms which foster international organisations' legitimation. These rules are fairly harmonised, at least among international organisations that belong to the UN system (which are also those who have the biggest procurement volumes). These rules are global as they strike a balance among interests pertaining to different levels of governance and to an array of individuals irrespective of their nationality. They are also administrative as they regulate the relationship between international administrations and private parties.

If one considers who is concretely affected by the activity of international organisations, it seems that, better than reforms of international organisations' political institutions, administrative reforms can open those institutions to citizens' participation and foster their accountability and legitimation as bureaucratic systems.

A multiplicity of actors—the international organisations, financing and recipient states, natural and legal persons—have thus given rise to a body of administrative rules by pursuing each their own interests. The content of these rules, however, shows also that the peculiar interplay of interests is the obstacle to fully meeting the standards of transparency, publicity and accountability that one finds in public procurement regulation at the state level. Following this observation, at least three different scenarios open up. The first is that new interests come into play and/or existing interests change, creating a new interplay of interests and favourable conditions for further developments towards greater international organisations' transparency and accountability. The second is that the current set of interests remains the same except for minor changes. If this is the case, however, one may ask if then reforms towards an alignment of international organisations' standards of accountability and transparency to state administrative ones are not suited to address the peculiar needs emerging in a

multipolar context which is different from the states' standard. But then the quest for legitimacy of international organisations would remain unanswered and would become more urgent given the foreseeable expansion of functions and tasks of international organisations.