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**Procurement preferences favoring domestic firms and industries: a comparison between  
American and Brazilian policies**

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# Procurement preferences favoring domestic firms and industries: a comparison between American and Brazilian models

**Abstract:** The use of public procurement to achieve socioeconomic outcomes became a recent tendency in Brazilian law. After having a fairly open market for quite some time, Brazilian procurement began to imitate the American model of preferences and set-asides in the last decade, which has generated criticism from lawyers and economists worldwide. This paper aims to demonstrate the incoherence between the protectionist bias of the procurement law in force and prevailing economic thinking in the United States, as well as describe the aforementioned process of imitation.

Keywords: Public procurement; Socioeconomics objectives; Guidance of public procurement; Procurement preferences and set-asides; Government Contracts.

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## **I. INTRODUCTION**

Despite the long history of developmentalism and being distinguished worldwide for the practices of exchange rate and tariff protectionism, Brazilian legislation on public procurement has been unconcerned about preference systems for decades. In this sense, a procurement system based entirely on the idea of getting the best deal for the public's money became a classic saying of Brazilian Administrative Law for many years, (i.e., state purchasing was not used as a tool of the traditional economic policies of interventionism that characterizes the modern history of the country).

On the other hand, in spite of the historic commitment of the United States of America (“U.S.” or “United States”) to open markets, and the pursuit of value for money, the U.S. became a model for using public procurement to achieve social and economic outcomes. An example of this is the controversial procurement preferences established by certain laws, such as the Buy American Act of 1933, in favor of domestic firms and industries.

Somehow, the distinction between both Brazil and the US on this subject began to fade with the election of Luiz Inácio Lula da Silva in 2002. From that moment on, Brazil started to experience new forms of state activism, including the redesign of public procurement. Interestingly, the US procurement preference system was the primary inspiration for the Brazilian Congress to pass and amend some of the Acts with the intention of allowing the government to increasingly intervene in the economy through public purchases.

Based on this scenario, where the Brazilian government has explained the rising of procurement preferences as a mirror of other legal systems, particularly that of the US, this paper aims to compare the growth of discriminatory procurement policies in both countries. In addition, the analysis intends to highlight whether it is possible to predict some success on the preference system in Brazil, based on the American experience.

## **II. LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT: BRIEF DISTINCTIONS**

In spite of the fact that Brazil and the United States of America are nations that are organized under a federal system of government, it is necessary to briefly illustrate some of the distinctions about the legal framework for public procurement in each country.

## II.I. LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT IN BRAZIL

Brazil has been a federation since its proclamation of the republic in 1889, and throughout this period, the degree of centralization of power around the central government varied. With the promulgation of the Federal Constitution of 1988, the autonomy of the states and municipalities compared to the previous constitutional scenario increased, but yet they were not as strong as the United States’.

According to Article 22, XXVII of the Federal Constitution, the Union has the exclusive power to legislate on general rules for all types of bidding and contracting for governmental entities, associate government agencies, and foundations of the Union, the States, the Federal District, and the Municipalities. Also, Article 173, Paragraph 1, III, establishes that a Federal Law shall regulate the bidding and contracting of works, services, purchases, and disposal by public companies, joint-stock companies and their subsidiary companies engaged in economic activities.

In Brazilian constitutional law, general rules are those issued by the Congress for the purpose of expressing the essential guidelines on certain matters nationwide, thus linking all the political entities of the Federation (Union, States, Federal District and Municipalities). Within each one of these entities, the regulation of the field should be fulfilled (supplemented) through special regulations issued by the local legislature with a view to adapt the treatment of the theme to their peculiarities. The intention of the Brazilian constituent in this kind of legislative technique is to make the junction between general rules and special rules to form a system that is integrated and harmonious.<sup>2</sup>

The Constitution also imposed to the public entities a duty to make use of public procurement in all cases, except when the law permits the direct hiring of the private sector. This duty is assigned in the Article 37, XXI, which is expressed in the following terms:

XXI – with the exception of the cases specified in law, public works, services, purchases and disposals shall be contracted by public bidding

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<sup>2</sup> Kildare Gonçalves de Carvalho, *Direito Constitucional*, 14th. ed. (Belo Horizonte: Del Rey, 2008), 870-871.

proceedings that ensure equal conditions to all bidders, with clauses that establish payment obligations, maintaining the effective conditions of the bid, as the law provides, which shall only allow the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations.

Finally, Article 175 of the Constitution further provides that every concession or permission to provide public utility services shall always be preceded by public bidding.

For more than two decades, Brazilian Congress has enacted several laws to fulfill the constitutional provisions about the general rules for tendering procedures.

The Federal Law no. 8,666 of June 21st, 1993, is the main statute regulating government procurement in Brazil; it established the general rules for all types of bidding and contracting for governmental entities, associate government agencies, and foundations of the Union, the States, the Federal District, and the Municipalities.<sup>3</sup>

It occurs that the Law no. 8666/93 not only contains general rules on bidding process; it also provides special rules in the field for the Federal Public Administration, at which such provisions must be strictly observed only within the Union. In practice, the existing problem lies in the fact that the law does not define perfectly what are the general rules (national) and the special rules related only to the Union, which causes doubts at times.

In fact, regarding legislative power to supplement the field, most of the political entities almost literally reproduced the provisions of Law no. 8,666/93, both general and special rules. However, in situations of scarce originality of local legislation, there were cases in which the power to supplement national legislation exceeded the limits of what is meant by issuing special rules, judged unconstitutional by the Supreme Federal Court (STF).<sup>4</sup>

Next to the Law no. 8,666/93, there are other federal laws related to more specific bidding procedures, such as the following ones: Law no. 8,987/95 for public services provided through concessions or permissions; Law no. 10,520/02, which provides for a specific public procurement modality, the Reverse Auction (*Pregão*); Law no. 11,079/04 for services provided through public-private partnerships; Law no. 12,462/11, which provides for a different public

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<sup>3</sup> The Law 8,666/93 not only binds the executive branch, but also the legislative and judiciary. In this sense, the article 117 of the law provides that "the works, services, purchases and disposals made by organs of the Legislative and Judiciary and the Court of Accounts shall be governed by the rules of this Act, as applicable, in the three administrative levels".

<sup>4</sup> For instance, see ADI 927-MC (2011) and ADI 3.059-MC (2004).

procurement procedure for purchases related to specific works and events, such as the FIFA World Cup of 2014 and the Olympic Games of 2016.

Finally, it is important to note that Brazilian public procurement has low constraints placed by international agreements. About this subject, the country is a member of the Common Market of the South (MERCOSUR), a sub-regional bloc comprising also Argentina, Paraguay, Uruguay and Venezuela. Within the framework of the MERCOSUR, Brazil signed a Public Contracting Protocol (an international treaty) that aims to apply the principle of national treatment and the most favored nation clause on the public purchasing of those countries. Notwithstanding, the protocol is not in force to this day.

On the other hand, it is important to highlight the fact that Brazil did not sign the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO), the world's most significant plurilateral agreement that regulates the public procurement based on the principles of openness, transparency and non-discrimination between the parties.

## II.II. LEGAL FRAMEWORK FOR PUBLIC PROCUREMENT IN UNITED STATES

Unlike the prolixity that characterizes the Brazilian Constitution, the U.S. Constitution contains no express provision regarding the power to contract, which does not mean that the subject cannot have a constitutional reading. On the contrary, following the common law tradition, the theme was built by the jurisprudence of the courts, where the first case under the jurisdiction of the Supreme Court occurred nearly two hundred years ago.

In *United States v. Tingey* (1831), the Supreme Court recognized that the power to contract is inherent to the sovereignty,<sup>5</sup> so that, as long as exercised without violating the limits imposed by the laws and the constitution, it is permissible for government officers to sign the necessary contracts to implement the powers that are granted to them by law.

The following excerpt from the syllabus of *United States v. Tingey* demonstrates this principle:

A bond, voluntarily given to the United States and not prescribed by law, is a valid instrument upon the parties to it in point of law. The United States has in its political capacity a right to enter into a contract or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty, and the United States, being

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<sup>5</sup> See Giulio Napolitano, *Diritto amministrativo comparato* (Milano: Giuffrè, 2007), 190-191.

a body politic, may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this Court as ever having been sanctioned by any judicial tribunal.

A voluntary bond taken by authority of the proper officers of the Treasury Department to whom the disbursement of public money is entrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department, and the United States being authorized in a political capacity to take it, there is no objection to its validity in a moral or a legal sense.

As noted, the power to contract follows the reasoning contained in the so-called necessary and proper clause, a provision included in section 8 of Article One of the US Constitution, whereby Congress incorporates an institutional power to make all the necessary laws to assert the charges incurred by the Constitution and accomplish its ends.

Nevertheless, it is worth taking into consideration that, despite the absence of express provision in the Constitution, there are some clauses of a general nature that affect the rules of public procurement in the United States, such as the Due Process Clause of the Fourteenth Amendment to the Constitution.

Notwithstanding that a national uniform regulation could be made applicable to state and local procurement, given that this is an allocation of sovereignty, it is not the current reality in the United States. In practice, only a fraction of the national procurement law also applies beyond federal government biddings, in a way that states and municipalities have few constraints to maintain their own procurement law regimes.<sup>6</sup> This limitation, apart from making more complicated the understanding of the public procurement system in the United States, has a significant impact for those interested in contracting with the government, once the public

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<sup>6</sup> Joshua Schwartz, “États-Unis/United States of America”, in Rozen Noguellou and Ulrich Stelkens, ed., *Droit Comparé des contrats publics/comparative law on public contracts* (Bruylant, Bruxelles, 2010), 616.

biddings promoted by the other entities accounts for about half of the amounts involved in public procurements.<sup>7</sup>

The public procurement system in United States has the Office of Federal Procurement Policy (OFPP), established by the Congress in 1974, as the public agency responsible to provide overall guidance and direction of procurement policy and to prescribe policies, regulations, procedures, and forms which shall be followed by executive agencies of the federal government. On the other hand, the States and Municipalities government procurement are generally regulated by their own laws, but federal laws shall be applied when bidding is financed by resources from the federal budget.

The Office of Federal Procurement Policy Act of 1974 also established the Federal Acquisition Regulation (FAR), whose initial purpose was to codify and standardize the policies and procedures for acquisition by all executive agencies. Today, the FAR is the primary document that regulates agency acquisition rules, which implement or supplement the federal procurement system. It is maintained through the coordinated action of the Defense Acquisition Regulations Council (which represents the US Department of Defense) and the Civilian Agency Acquisition Council (which represents non-defence US government agencies).<sup>8</sup>

The FAR is one of the 50 titles contained in the Code of Federal Regulations (CFR), the codification of the general rules and regulations by the executive departments and agencies of the federal government. Even though FAR serves as an extensive compendium of the procurement process – even considering many rules derived from specific laws containing socioeconomic programs, such as Buy American Act, Drug-Free Workplace Act, and Small Business Act – some agencies also have additional policies, procedures, solicitation provisions, or contract clauses that supplement the FAR to satisfy their specific needs (FAR 1.302(b)).

Finally, it is important to emphasize that the United States became a party to the WTO GPA and other Free Trade Agreements (FTA), as well to the North American Free Trade Agreement (NAFTA). In this way, there is a specific subpart in the FAR that compiles rules and exceptions that all trade agreements impose to the American public purchases (FAR 25.4).

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<sup>7</sup> Ibid.

<sup>8</sup> FAR 1.202

### III. THE OBJECTIVES OF PROCUREMENT POLICY

With little variation among scholars, it can be stated that the public procurement is an administrative procedure by which the government aims to perform a contest accessible to all interested parties of the private sector who fulfill some objective requirements previously determined in the contract award procedure, in order to choose the offer that best serves the public interest.

Until the first half of the last decade, one of the most entrenched assumptions in the Brazilian Administrative Law resided in the general understanding that public procurement shall be delineated according to a formula that guarantees both the achievement of a competition opened widely to the private sector and to find the most advantageous offer to the government. In other words, when it came to the objectives of procurement policy, the scholars used to refer only to the protection of the public financial concerns, as well as the assurance of public and private interests in an equal competition.<sup>9</sup>

This narrower view, which adopts a perspective that the governments can only regulate public procurement to achieve an efficient allocation of resources, remained strongly ingrained in Brazilian law. In this sense, as a rule, other socioeconomic considerations were not included among the criteria for awarding public contracts for many years, and a few legal measures that escaped that standard not even raised a major debate among lawyers in Brazil.

In some way, such understanding had the support of the main statute that regulates the procurement in the Brazil. In Article 3, *caput*, of Law no. 8,666/93 was originally established only a dual purpose for bidding procedures: a) to allow the government to select the most advantageous offer for its financial resources (cost benefit principle); b) to give the entrepreneur who has the ability to execute the object of tender the opportunity to offer its services to the public entity through access to a competition which assures equal footing with other interested parties.

Nevertheless, public procurement is more than that, as stated by Christopher Bovis:

Public procurement is a powerful exercise. It carries the aptitude of acquisition; it epitomizes economic freedom; it depicts the nexus of

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<sup>9</sup> From simply reading of the manuals of traditional Brazilian Administrative Law it is possible to reach at this conclusion, see generally, José dos Santos Carvalho Filho, *Manual de direito administrativo*, 17th ed. (Rio de Janeiro: Lumen Juris, 2007), 219; Hely Lopes Meirelles. *Direito Administrativo Brasileiro*, 32nd. ed. (São Paulo: Malheiros, 2006), 407; Odete Medauar. *Direito administrativo moderno*, 9th. ed. (São Paulo: Revista dos Tribunais, 2005), 267.

trade relations amongst economic operators; it represents the necessary process to deliver public services; it demonstrates strategic policy options.<sup>10</sup>

Thereby, the inflexible characteristic of the Brazilian procurement law has been modified in recent years based on the idea described above, (i.e., in the last years what we saw was an attempt to transform the government purchases in a tool to achieve the socioeconomic objectives established by the State).

Despite the various criticism mainly made by the defenders of widespread opening of national markets, Brazilian procurement law has absorbed a broader view about the possible ends of the public purchases, which is already consolidated in several countries. However, it should be made clear that this statement is true from the perspective of comparative law and does not necessarily mean that the legislative choice of the Brazilian Parliament is correct under certain economic and political standpoints.

Generally, many of the rules applied to procurement around the world are superficially very similar, reflecting a process of standardization of regulatory systems, despite differences in legal culture between the countries.<sup>11</sup> As highlighted by Peter Trepte, few legal systems seek to reinvent the wheel and all of them tend to borrow heavily from other ones where experience has shown their provisions to be successful in achieving the proposed objectives.<sup>12</sup>

Let's examine each of these objectives separately.

### III.I. VALUE FOR MONEY

The immediate objective of the procurement process is to get the most advantageous proposal for the Administration from a cost-benefit and a cost-effectiveness analysis that take into account the scarcity of resources available to the public treasury. In other words, the goal is to achieve the best possible “value for money” – that is, to successfully acquire the goods, works or services needed by the government on the best available terms”.<sup>13</sup>

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<sup>10</sup> *EU public procurement law*, 2. ed. (Cheltenham: Edward Elgar Publishing, 2012), 1.

<sup>11</sup> *Regulating procurement: understanding the ends and means of public procurement regulation* (Oxford: Oxford University Press, 2004), 1.

<sup>12</sup> *Ibid.*, 388.

<sup>13</sup> Susan L. Arrowsmith, John Linarelli and Don Wallace, Jr. *Regulating public procurement: national and international perspectives* (The Hague, Kluwer Law International, 2000), 28.

Value for money does not necessarily mean that the government should buy goods and services from companies that offer the lowest prices. More than that, it is about striking the best combination between economy, efficiency and effectiveness.<sup>14</sup> Then, at the same time, the government procurement shall seek to reduce the cost of resources used for an acquisition, to increase output for a given input, or minimizing input for a given output, and to achieve the outcome with the desired quality standards.

As pointed by Peter Trepte:

The assessment of 'value for money' is often complicated when the purchaser is faced with a choice between differentiated products and services. The assessment will need to take account not only of the purchaser's initial preferences but also of the existence of substitutable products, which offer alternative solutions for achieving the purchaser's preferences. The cost/benefit analysis will need to take into account a variety of factors, which balance the features of the products on offer with the cost of purchasing them.<sup>15</sup>

The idea underlying this question concerns the rational behavior of the government as a consumer in a utility-maximizing process, that because consumers seek to maximize their own welfare (utility) under budget constraints and a given consumption set (idea of economic efficiency or allocative efficiency).<sup>16</sup> But the comparison is not that simple: While an average consumer makes decisions subjectively according to his particular tastes, the preferences of the government purchaser objectively reflect guidelines of a certain political line.

Hence, value for money is not synonymous with economic efficiency, because it demands taking into account the manifestation of secondary non-economic policies, which often cause the government to pay more for particular products in order to promote some chosen socioeconomic outcomes. Consequently, the concept of value for money is contingent, as explained by Peter Trepte:

As a concept, 'value for money' is thus heavily contingent. It is contingent on individual preferences, on the availability of differentiated products and services and on the political and social value judgments of governments, which reflect the collective will and

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<sup>14</sup> Penny Jackson. *Value for money and international development: Deconstructing myths to promote a more constructive discussion*, <http://www.oecd.org/dac/effectiveness/49652541.pdf>. (Nov. 02, 2014).

<sup>15</sup> Ibid. 390.

<sup>16</sup> Nicholas Gregory Mankiw, *Principles of microeconomics*, 7th ed. (Stamford: Cengage learning, 2014), 444.

preferences of the majority. It does not have meaning independent of the person or entity whose value judgments are at issue.<sup>17</sup>

In such a way, the realization of other values relevant to the nation, besides economic efficiency, affects the evaluation of the offers in a bidding process.<sup>18</sup> Unequivocally it has to do with the concept of public interest, handled by laws in order to prevail democratic values, such as environmental protection, at the expense of a pure economic analysis of bids.

Still concerning the “value for money” objective, it is important to ensure that the public authorities “do not over specify (‘goldplate’) their requirements: It can be tempting to seek out the best available product, rather than to maintain a judicious balance between cost and other concerns.”<sup>19</sup> It must be remembered that the government has limited resources to fund its activities and carrying out investments, such that the value for money of a contract shall not be seen from the point of view of excellent quality of a contractual object, but of the greatest benefits for the application of its economic and financial resources in a viewpoint of the collective interest of the society<sup>20</sup>.

### III.II. EQUAL TREATMENT BY CONTRACTORS

The magnum precept of equality is a principle enshrined in most constitutions governing the various legal systems around the world. It establishes a guideline that all individuals are equal and shall be treated as such by the laws. Therefore, this principle is a precept geared for both law enforcer and for the legislature itself.<sup>21</sup>

As a consequence, the equality principle is adopted in the public procurement systems, mainly to shape the design of procurement procedures in a way that makes them accessible to all interested parties who fulfill the objective requirements previously determined in

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<sup>17</sup> Ibid., 390.

<sup>18</sup> In the sense, it is important to transcribe the following remark: “[w]ilst value for money is probably seen as the primary goal of most procurement systems, there is always a trade-off between value for money and considerations of efficiency in conducting the actual procurement process. Further, the attainment of best value for money is often sacrificed to some extent in order to pursue other goals, including probity, social and industrial objectives, and the development of international free trade” (Arrowsmith, Linarelli and Wallace, Jr., 31).

<sup>19</sup> Arrowsmith, Linarelli and Wallace, Jr., 29.

<sup>20</sup> Marçal Justen Filho, *Comentários à lei de licitações e contratos administrativos*, 16th. ed. (São Paulo: Revista dos Tribunais, 2004), 72.

<sup>21</sup> Celso Antônio Bandeira de Mello, *O conteúdo jurídico do princípio da igualdade*, 3rd. ed. (São Paulo: Malheiros, 2010), 9.

the call for tenders. By constitutional law, shall be given to all citizens the chance to take advantage of the potential benefits arising from the contracts signed by public entities.

Nevertheless, the equality principle cannot be interpreted as the impossibility to establish differential treatment towards people. When the Constitutions prescribe that, “all persons are equal before the law,”<sup>22</sup> it does not mean that the laws cannot make distinctions among individuals. On the contrary, it is precisely the laws that differentiate people and situations according to their peculiarities, putting into practice Aristotle’s conception that equals shall be treated equally and unequals unequally in proportion to the inequality (formal equality).<sup>23</sup>

In this sense, Article 37, XXI, of the Brazilian Constitution provides that it is the essence of the bidding procedures to ensure equal conditions for all competitors, so that only the requirements of technical and economic qualifications indispensable to guarantee the fulfilling of the obligations are allowed. Obviously, it is forbidden not to make restrictions itself, but to make it in a disproportionate way or by unnecessary restriction to the desired end.

Along with this classical notion, the equality principle can also be directed to the equalization of the parties involved in the process by reducing or eliminating factual inequality (substantive equality).<sup>24</sup> This “concept is used to rationalise those efforts of government undertaken to redress the social inequalities which result from the efficient operation of the market and may well involve policies which promote positive discrimination which is, by definition, unequal treatment.”<sup>25</sup>

One application of this understanding is laid down in the controversial Article 42, paragraph 4, of Law no. 8.666/93, which states that “for purposes of the bidding award, proposals submitted by foreign bidders will be increased charges imposed by the taxes levied exclusively of Brazilians bidders on the final sale transaction.”

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<sup>22</sup> Laid down in Article 5, *caput*, of the Brazilian Constitution. In the United States, the Equal Protection Clause is part of the Fourteenth Amendment, originally directed only to state Governments. However, the Supreme Court ruled that it also applies to the federal government through the Due Process Clause of the Fifth Amendment (*Bolling v. Sharpe*, 1954)

<sup>23</sup> Ashok Acharya and Rajeev Bhagava, *Political Theory: An Introduction* (New Delhi: Pearson, 2008), 61.

<sup>24</sup> In economics, the division between formal equality and substantive equality is paralleled by the dichotomy between horizontal equity and vertical equity. According to Danny Myers, horizontal equality means treating people identically in a way that a government policy would support and promote equal opportunities between people of identical qualifications and experience”; on the other hand, the vertical equity is as concept concerned with being fair, involving “governments providing targeted support to specific categories of people” in order to reduce some gap. See Danny Myers. *Economics & property*, 3rd. ed. (New York: Routledge, 2011), 23.

<sup>25</sup> Trepte, 391.

In summary, the differentiation of individuals by the law is not admissible in the use of discriminatory criteria based on prejudiced or arbitrary elements. In contrast, if the parameter used to assess the difference is objective, reasonable, proportional and complies with constitutional purposes, the distinction will be considered valid and can be applied.

Upon this premise, both the law and the call for tenders can validly predict requirements and conditions for participation in the contest, since they are related to the purposes of bidding. It is therefore important to mention a valuable synthesis made by Marçal Justen Filho:

The call for bids violates the equality principle when: a) it establishes a distinction of persons unlinked with the subject of the bid; b) it establishes unnecessary requirements and involves no advantage to the Administration; c) it imposes unreasonable requirements on future hiring needs; d) it adopts offensive discrimination to constitutional or legal values. (loosely translated)<sup>26</sup>

One final remark about the equality of potential bidders corresponds to the fact that it can be visualized from many angles in the bidding process, given its widespread incidence in various laws. This characteristic results in some of its perspectives being regarded as autonomous principles of public procurement, such as the principle of competitiveness, the principle of impersonality, and the principle of objective judgment of the bids.

In this regard, Arrowsmith et. al. give us some examples:

The concept of the equality of potential contractors is also an influential concern in designing many public procurement procedures. Again concern with equality can be explained to a large extent as one aspect of other procurement goals. For example, procedures designed to secure value for money will normally require that all participants in an award procedure should be treated in an equal manner in relation to matters such as the criteria used to evaluate bids and any right of firms to make amendments to their bids. Similarly, the provision of an equal opportunity for all interested firms to bid on a contract may be justified by reference to the need for maximum competition to obtain value for money<sup>27</sup>.

The objective of equal treatment of bidders also involves some weighting factors when bidding occurs between domestic and foreign firms. In an international context, it is

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<sup>26</sup> Ibid., 70.

<sup>27</sup> Arrowsmith, Linarelli and Wallace, Jr., 62.

common to find discriminatory practices in procurement systems of many countries, especially when governments decide to use their purchasing power on behalf of policies that aim to protect domestic firms from foreign competition.

Due to this tendency to protect domestic markets, the advocates of free trade in the global market have viewed organizations, such as the European Union and the World Trade Organization, as a way out of the culture of protectionism. This issue will be further detailed below.

### III.III. TRANSPARENCY

The notion of transparency is undeniably vague and depends on a certain context to be delineated more precisely regarding its function. In any case, it is possible to recognize a common core in the sense that transparency is the quality of “being clear, obvious and understandable without doubt or ambiguity, thereby contributing to increased understanding of the actions of the government”.<sup>28</sup>

Searching the origin of the notion of transparency, Onno Heitling summarizes:

The term transparency originates from the economic literature, where, according to Michener and Bersch, Danish economist Svendsen was the first to coin the expression in 1962. The term has been used in association with market functioning and is closely linked to the notion of the rational agent who makes well-informed decisions based on complete information. Transparency can help to close information asymmetry gaps which are detrimental to these well-informed decisions. After its development in the economic field, transparency has also been incorporated within good governance, linking it not only to companies, but also to national and international governments<sup>29</sup>.

In the public sector, one of the perspectives of transparency is to ensure access to society for all information related to public administration. That is, to enable society to know where and how public money is being spent, as well as to contribute to the strengthening of control systems.

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<sup>28</sup> See, European Court Of Justice, *Opinion of Avocate General Ruiz-Jarabo Colomer in C-110/03 Belgium v. Commission*, 2005, ECR I-2801, point 44.

<sup>29</sup> *The principle of transparency in public procurement*, [www.maastrichtuniversity.nl/web/file?uuid=b7f48c87-33af-4d1c-ae64-641ac1fe63c3&owner=56637b04-0eaa-40f5-93ad-913ae64722ec](http://www.maastrichtuniversity.nl/web/file?uuid=b7f48c87-33af-4d1c-ae64-641ac1fe63c3&owner=56637b04-0eaa-40f5-93ad-913ae64722ec). (Nov. 02, 2014)

In Brazil, this aspect of transparency is identified as the principle of publicity. As pointed by Lucia Valle Figueiredo, "every guarantee mechanisms assigned to citizens, whether individual or collective, rely on extensive publicity."<sup>30</sup> In other words, publicity is a constitutional principle that guides the management activity as a whole, (i.e., in a democratic state would be inconceivable that the government take decisions in the dark, away from social control).

In fact, a competitive procurement process blends with transparency in favor of probity in public service. In this way, it is certainly more difficult to make an award to a contractor who was given a bribe under a system of open competitive bidding, in which award criteria must be stated in advance and reasons given for the decisions, than under a system in which contracts are simply negotiated with one or more firms selected privately."<sup>31</sup>

As a result of this understanding, Article 4 of Law no. 8.666/93 provides that any citizen can follow the development of the bidding process, since he does not interfere in order to disturb or prevent the realization of the procurement.

The publicity of public procurement, besides serving to survey the acts practiced in the course of the procurement process, also plays an important role in ensuring wide access to disputes, assuring the existence of competitiveness in the public tendering. In this sense, the Brazilian Superior Court of Justice understood that the absence of publicity in the bidding process causes damage to the treasury *in re ipsa*, (i.e., when it is assumed the harmfulness of the failing). The Court judged that the government could not reach the goal of contracting the best offer due to the restriction imposed on social knowledge.<sup>32</sup>

As a direct consequence of the duty of transparency combined with pursuit value for money, public managers must try to enlarge the maximum number of people interested in participating in the bidding process. In Brazil, this understanding is linked to the so-called principle of competitiveness, or principle of opposition,<sup>33</sup> by which the requirements should be limited to the minimum necessary for compliance with the bid object, concerning to avoid the restriction of the competitive nature of the event.<sup>34</sup>

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<sup>30</sup> *Curso de direito administrativo*, 5th. ed. (São Paulo: Malheiros, 2001), 60.

<sup>31</sup> Arrowsmith, Linarelli and Wallace, Jr., 30.

<sup>32</sup> REsp 1190189/SP, DJe (2010).

<sup>33</sup> Toshio Mukai, *Licitações e contratos públicos*, 8th ed. (São Paulo: Saraiva, 2008), 32.

<sup>34</sup> Judgment no. 110/2007 of Plenary

In order to ensure the competitiveness of the dispute, Article 3, Paragraph 1, I, of Law 8,666/93 prohibits the admission, forecasting, inclusion or tolerance requirements that jeopardize, restrict or frustrate the competitive nature of the contest. Thus, requirements that establish preferences or distinctions motivated by impertinent or irrelevant for the specific purpose of the agreement factors are considered illegal.

The application of this standard can be well seen in the following statement of the Federal Court Of Accounts:

Are illegal and detrimental to the public interest demands that restrict the broad participation of bidders, constituting advantages absolutely incompatible with the common sense, the purpose of the legislation and the object of the service, such as the stipulation of providing vip-rooms, in airports, to employees of a public company who undertake trips for the service, when the object of the contract is intended only to support the displacement of these servants with the supply of airline tickets, hotel reservation and other related services. (loosely translated)<sup>35</sup>

About this subject, transparency can serve as an important weapon in the fight against corruption, considering that the publicity of the acts eventually helps to reduce the chances that a corrupted decision remains covered up. That is, “transparency helps to ensure that only relevant considerations are taken into account, by making it difficult to conceal corruption or other improper influences on the procurement process.”<sup>36</sup>

On this point, transparency is connected to the probity principle, which has constitutional seat in the Article 37 of the Brazilian Constitution. Thus, the legitimacy and the validity of state acts are linked to its compatibility with the ethics and morality, (i.e., with the probity principle). In public procurement, probity corresponds to a duty to act with loyalty and good faith that binds not only the public administrator to respect it, but also potential bidders.

In the criminal sphere, Brazilian Law criminalizes the conduct of frustrate or defraud, by adjusting, combination or any other expedient, the competitive nature of the bidding process, with the purpose of obtaining for oneself or for others, advantage resulting from the object of the tender adjudication. This criminal offense is punishable by imprisonment of two to four years, plus a fine (Article 90 of Law no. 8666/93).

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<sup>35</sup> Judgment no. 6198/2009 of First Chamber.

<sup>36</sup> Arrowsmith, Linarelli and Wallace, Jr., 30.

Also noteworthy is that the competitive nature of the bidding process can be hindered not only by capricious establishment, but also by artful, technical and/or economic baseless requirements. Before that, there was no way to precisely establish such conditions when the government cannot even describe clearly what it wants to contract, nor did it properly make available to bidders the essential information to accurately prepare their proposals. In situations like these, it is not uncommon that potential bidders are incorrectly cut off from the dispute or simply desist from offering proposals.<sup>37</sup>

Sometimes, these situations may arise from informational asymmetries that inevitably will always exist between the government and its suppliers. Hereupon, transparency becomes an important mechanism to counterbalance the deficit of information that leans to the disadvantage of the government.

transparency in the bidding process is invariably the basic mechanism employed by most systems of regulation. This enables the principal (or bidders) to control the procedures adopted by the agents. This is done essentially by requiring contracts to be publicised in order to notify all potential bidders and to clearly define the parameters of the bid. This is often coupled with the obligation to disclose the bids publicly by way of a public bid opening which will further increase the principal's (and bidders') ability to supervise the selection process. Transparency is further required in the selection and award process so that the criteria applied are known to all participants in advance and objectively verifiable.<sup>38</sup>

In the same direction of guaranteeing the transparency of acts practiced during the bidding process, Article 3, paragraph 3, of Law no. 8,666/93 provides that, "the bidding shall not be confidential, being available and accessible to the public the acts of its procedure, except for the content of the offers until the opening of tenders." The caveat concerning the temporary confidentiality of proposals aims to avoid the practice of collusion among bidders in order to raise the prices offered. However, it is worth emphasizing that this secret lasts just until the act of opening of the proposals by the contracting officer, which always occurs "in previously designated public act"<sup>39</sup> (Article 43, paragraph 1).

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<sup>37</sup> In this sense, see the Judgments no. 434/2005, no. 1556/2007 and no. 732/2008, all of them from the Plenary of the Federal Court of Accounts.

<sup>38</sup> Trepte, 93-94.

<sup>39</sup> Loosely translated.

Besides, the question concerning to the maintenance of secrecy of tenders is considered so relevant by Brazilian legal system that Article 94 of Law no. 8.666/93 prescribes it as a crime that may result in imprisonment of two to three years and subject to a fine, if trespassing the confidentiality of the proposal presented in the bidding process, or providing it to third parties who have the opportunity to violate it, is conducted.

#### III.IV. INDUSTRIAL, SOCIAL AND ENVIRONMENTAL OBJECTIVES

The combination of the goals mentioned so far can be considered together the essential core of the public procurement, which, in a pure design of the process, would seek primarily to obtain goods and services at a lower cost through an isonomic and democratic competition between individuals interested in profiting from doing business with the government agencies.

However, the public procurement process does not always occur through this pure procedure in the real world. Occasionally, the set of objective values such as economy, efficiency, effectiveness, and equity are eventually shaken by secondary goals that end up differentiating the behavior of the government purchases of the one guiding the conduct of a regular consumer self-interested.

This phenomenon can be called conditionality<sup>40</sup> of public procurement or guidance of government purchasing power,<sup>41</sup> which is intended to use public contracts to induce socioeconomic outcomes through the imposition of side conditions of access to bidding processes or contract compliance. The reasons for using this mechanism are quite obvious when governments realize the amount of financial resources handled in these operations.

The public purchases are intended to supply the effective demand for the majority of goods and common services for management and operation of the daily activities of a

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<sup>40</sup> The term is often used in political economy and international relations, referring to conditions attached to the provision of benefits such as a loan granted by international financial institutions, which require the recipient country requirements to Enhance aid effectiveness, such as anti-corruption measures in order to maximize the chances of repayment. See generally, Olave Stokke. *Aid and Political Conditionality* (Oxford: Frank Cass & Co., 1995), 277.

<sup>41</sup> Christopher McCrudden uses an interesting own denomination, preferring the term 'linkage' to describe this phenomenon in procurement. See "Using public procurement to achieve social outcomes", *Natural Resources Forum: a United Nations Sustainable Development Journal* 28 (2004), 257.

government. It is a routine that translates into business that involves trillions of dollars worldwide.

On a global basis, according to the Organization for Economic Co-operation and Development (OECD), public procurement generates cash flow ranging from 10 to 15 percent of gross domestic product (GDP) of developed nations, and up to much to the 20 percent of GDP for developing countries. In all the European Union, for example, official publications indicate that government purchases account for about 17 percent of the gross domestic product of the entire community.<sup>42</sup>

In Brazil, conforming to information disclosed in the Procurement Portal of the Federal Government on the Internet (*Comprasnet*), the federal government spent about 70 billion *reais* in public purchasing.<sup>43</sup> The total amount of expenditure in the national market of public procurement is estimated to exceed about 350 billion *reais*, (i.e., almost fifteen percent of the gross domestic product of seventh largest economy in the world, calculated on 2.5 trillion dollars).<sup>44</sup>

Meanwhile, in the world's largest economy, the United States, the amounts involved are obviously huge. To get a sense of the magnitude of the values, the U.S. federal government alone is the single largest buyer in the world, spending more than 500 billion dollars per year.<sup>45</sup>

Indeed, given the enormity of the money involved, the modulation of the contracting processes with a view to targeting the purchasing power of government in favor of some public policies considered relevant for each country turns out to be a very attractive alternative and, in fact, it is adopted in many countries:

Economic concerns and consideration for contractors are not the only matters which influence public procurement: governments have also traditionally used their procurement to promote wider concerns of industrial, social and environmental policy, and these concerns also impact on procurement award procedures. For example, governments may use their procurement to promote domestic industry by limiting participation in government contracts to national

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<sup>42</sup> European Commission, *Buying Social - A guide to taking account of social considerations in public procurement*. (Luxembourg, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2010), 51.

<sup>43</sup> Statistics available at <http://www.comprasgovernamentais.gov.br/cidadao/informacoes-gerenciais/relatorios>.

<sup>44</sup> According the World Bank data available at <http://data.worldbank.org>.

<sup>45</sup> Organization for Economic Co-operation and Development, *Progress Made in Implementing The OECD Recommendation on Enhancing Integrity in Public Procurement*, [www.oecd.org/gov/ethics/combined%20files.pdf](http://www.oecd.org/gov/ethics/combined%20files.pdf) (Nov. 13, 2014).

firms, or may engage in the strategic placement of contracts in backward regions of the state in order to enhance the development of those regions. So far as social objectives are concerned they may, for example, give preferences to certain disadvantaged ethnic groups.<sup>46</sup>

In this regard, Brazil and the United States of America are not different, both of them have made use of public procurement as a mechanism to achieve certain values that guide sectorial policies, such as environmental protection, establishment of parameters related to fair labor conditions, as well as promoting the development of specific economy sectors considered relevant. Further details about this application will be presented ahead.

#### **IV. GUIDANCE OF PUBLIC PURCHASING IN THE US AND BRAZIL**

Historically, since the mid-nineteenth century, one can observe some examples of the use of government purchases as a tool for social regulation in the United States and some Western European countries that exert strong influence over Brazilian legal system. At that time, the first initiatives aimed to solve issues of labor standards and unemployment.<sup>47</sup>

Considering the objectives of this paper, the following topics will focus only the cases of the United States and Brazil.

##### **IV.I. GUIDANCE OF PUBLIC PURCHASING IN THE US**

The United States is perhaps the country that produced the most alternatives for directing the purchasing power of the government in order to achieve socially relevant targets. From this point of view, three have been the primary focus of US law: a) enforce labor law; b) to stimulate to entrepreneurial activity from disadvantaged groups, local business groups and the military industry; and, c) to enforce health legislation and environment law.

In this regard, there are currently over a dozen goals (*preferences*) that determine the guidance of the procurement procedures in the United States, ranging from the favored treatment

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<sup>46</sup> Arrowsmith, Linarelli and Wallace, Jr., 63.

<sup>47</sup> McCrudden, 257.

granted to companies controlled by racial minorities or women to restricting procurement in favor of Service-Disabled Veteran-Owned Small Business.<sup>48</sup>

The following preferences strongly impact business activity from a historical perspective.

*a) Early initiatives: concerns about labor standard and unemployment*

In the United States of America, the milestone for the use of public contracts in order to put into effect social policies occurred on March 31st, 1840, when President Martin Van Buren issued a Executive Order limiting the working hours of employees engaged in work for the federal government:

The President of the United States, finding that different rules prevail at different places as well in respect to the hours of labor by persons employed on the public works under the immediate authority of himself and the Departments as also in relation to the different classes of workmen, and believing that much inconvenience and dissatisfaction would be removed by adopting a uniform course, hereby directs that all such persons, whether laborers or mechanics, be required to work only the number of hours prescribed by the ten-hour system.<sup>49</sup>

Following the example of the federal government, several States passed laws adopting the ten-hour day regime on government works.<sup>50</sup> Almost three decades after, on June 25th, 1868, the U.S. Congress enacted a law declaring that “eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the government of the United States”. Once more, various States passed laws in the same direction, benefiting men employed on public works.<sup>51</sup>

In the subsequent years, local governments have ceded the pressures of trade unions and began to enact laws in order to protect the members of the unions and restrict the competitiveness of public procurement:

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<sup>48</sup> Glen Cummings, et al. “State And Local Procurement Preferences: A Survey”, *Journal of Public Procurement* 9 (2009), 387.

<sup>49</sup> Martin van Buren, “*Executive Order, March 31, 1840*”, <http://www.presidency.ucsb.edu/ws/?pid=67312>. (Nov. 12, 2014).

<sup>50</sup> Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change*, (Oxford: Oxford University Press. 2007), 38.

<sup>51</sup> Ibid.

In several states, trade unions also succeeded in persuading legislatures to pass legislation requiring that only union labour could be employed on public works, as in Illinois, Nebraska, Michigan, and Montana, but these too were struck down as unconstitutional by the state courts. Several states went further in limiting competition in various ways. A Louisiana statute limited employment on public works to those who had paid poll tax. Oregon and California laws prohibited the employment of Chinese labourers on public works projects. A New York law prohibited the employment of aliens on such projects, followed by Illinois.<sup>52</sup>

*b) The Great Depression: expanding procurement as a mechanism for enforcing public policies and protecting national economy*

During the 20th century, the guidance of public purchases has been expanded as a mechanism for enforcing public policies and protecting national economy, especially after the crisis of 1929. Indeed, from the Great Depression on, the US procurement law clearly embraced the belief that socioeconomic long-term benefits arising from preference programs would compensate the increased costs resulting from limitations on competitive bidding processes.<sup>53</sup>

Still respecting to labor issues, the federal government resisted adopting prevailing wage legislation until the end of the first three decades of the 20th century. At that time, several States had passed laws requiring that contractors on public works projects had to pay the wage that prevailed locally. Notwithstanding, this type of law did not cover federal government contracts, regardless of local regulations.<sup>54</sup>

However, that resistance was broken in the midst of the Great Depression, on March 3, 1931, when, after some attempts, the federal government passed its own prevailing wage law, known as Davis-Bacon Act (DCA). Since then, the DCA has been amended several times and was suspended by some US Presidents in the wake of national emergencies. The law remains in force to this day, despite permanent repeal efforts made by republican politicians<sup>55</sup>.

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<sup>52</sup> Ibid.

<sup>53</sup> Cummings et al., 387.

<sup>54</sup> See *United States v. Driscoll* 96 US Rep 421 (1877). <https://supreme.justia.com/cases/federal/us/96/421/case.html> (Nov. 13, 2014)

<sup>55</sup> Charles Derber, *The Wilding of America: money, mayhem and the New American Dream*, 5th ed. (New York: Worth Publishers, 2011), 125.

In short, the DCA requires all contractors and subcontractors performing on federal contracts (and contractors or subcontractors performing on federally assisted contracts under the related Acts) in excess of \$2,000 pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor, for corresponding classes of laborers and mechanics employed on similar projects in the area (40 U.S.C. chapter 31, Subchapter IV).

In the same context of economic crisis, the Buy American Act of 1933 (BAA) went into effect in the United States in order to protect U.S. domestic production of and promote the creation of jobs during a time of severe economic depression. Initially temporary, the program continued until today and became a symbol of nationalist protectionism often pointed out by other countries to justify similar policies adopted by them.

Signed on the last day of the term of President Herbert Hoover, the BAA was one in a series of protectionist policies adopted in his tenure. The law followed the same reasoning of Smoot-Hawley Tariff Act, which raised tariffs on imported goods with the intention of discouraging the purchase of foreign products and replace them by domestic products. However, contrary to what was expected, the results of the Smoot-Hawley Tariff Act were disastrous:

Measured in terms of dollar values, both U.S. exports and imports were in the process of falling less than half of the levels that had been recorded in 1929. Though the burden of shrinking foreign markets was widely distributed, it fell with particular weight on American farmers. Wheat producers, for example (who, as recently as 1926, had exported more than a quarter of their total production) found foreign buyers for only about one-ninth of a larger aggregate output in 1931, despite a sharp drop in wheat prices. Meanwhile the sales of exporters of finished manufactured goods in 1931 were only 40 percent of what they had been in 1929.<sup>56</sup>

One cannot state that the BAA showed immediate bad results, as the Smoot-Hawley Tariff Act did. Actually the BAA was ineffective in its early years, largely as a result of the tariff policies that had severely compromised the ability of foreigners to earn dollars.<sup>57</sup> Dana Frank summarizes the situation described:

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<sup>56</sup> William J. Barber. *From New Era to New Deal: Herbert Hoover, the Economists, and American Economic Policy, 1921-1933*, (Cambridge: Cambridge University Press, 1988), 114-115.

<sup>57</sup> *Ibid.*, 115.

The Buy American Act of 1933, it turns out, was never actually enforced until after World War II. Foreign competition was too weak during the Depression to necessitate its invocation; during World War II, the government suspended it. By the early fifties the Buy American Act was an awkward embarrassment, still on the books. In 1953, Frank E. Smith, Democratic congressman from Mississippi, introduced a bill repealing it. “It was the offspring of world-depression psychology”, he wrote to the *New York Times*. “Today, quite incredibly, we have retained this anachronism.” In Smith’s view, the Buy American Act was not only inflationary but sapped Europe’s access to necessary dollars, while U.S. access to raw materials.<sup>58</sup>

The Buy American Act remains in force to this day (currently on 41 U.S.C. §§ 8301–8305). It has been amended several times and was followed by many “Little Buy American” acts that grant additional preferences to particular products, some of which are absolute, “forbidding the purchase of foreign products no matter what they cost”.<sup>59</sup>

In general, BAA restricts the purchase of supplies that are not considered domestic end products for use within the United States. In this case, to be considered a manufactured end product, the article must be manufactured in the United States and the cost of domestic components must exceed 50 percent of the cost of all the components (FAR. 25.101).

In practice, products that comply with the national content rules enjoy a preference margin of 6 percent in relation to the foreign product offered in a public procurement occurred in the country. This percentage will be increased to 12 percent if the lowest domestic offer is from a small business concern.<sup>60</sup> If the domestic offer still exceed the evaluated price of the low offer after addition of the abovementioned percentages, it will be considered unreasonable, allowing the contracting officer to purchase the foreign end product (FAR 25.105).

On the other hand, the BAA is somewhat more restrictive to contracts for the construction, alteration, or repair of any public building or public work in the country, requiring the use of only domestic construction materials. However, this preference is not absolute, existing containing some exceptions<sup>61</sup> that allow the contractor to acquire foreign construction materials, such as in situations where a particular construction material is not mined, produced,

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<sup>58</sup> Dana Frank, *Buy American: The Untold Story of Economic Nationalism*, (Boston: Beacon Press, 1999), 113.

<sup>59</sup> U.S. Congress, *Office of Technology Assessment, Competing Economies: America, Europe, and the Pacific Rim, OTA-ITE-498*, (Washington, DC: U.S. Government Printing Office, October 1991), 159.

<sup>60</sup> Nevertheless, it is worth noting that the head of the agency can make a written determination that the use of higher factors is more appropriate (FAR 25.105 (1)).

<sup>61</sup> FAR 25.202.

or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or it is impracticable or would be inconsistent with the public interest as determined by the head of the agency.

Likewise, the contracting officer must also add to the offered price 6 percent of the cost of any foreign construction material proposed in the case of contracts for construction in the United States, unless the head of the agency had not specified a higher percentage. In case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material.<sup>62</sup>

It is important to highlight that, despite the many criticisms that accuse the program to be protectionist, the restrictions in the BAA are not applicable in acquisitions subject to certain trade agreements. In these situations, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Notwithstanding, there are exceptions even in relation to these agreements, such as acquisitions set aside for small businesses and purchases indispensable for national security or for national defense purposes.<sup>63</sup>

Finally, it is worth mentioning that the Department of Defense (DoD) has additional policies, procedures, solicitation provisions and contract clauses that supplement the FAR in order to satisfy the specific needs: the Defense Federal Acquisition Regulation Supplement (DFARS). Basically, the foreign products from countries that do not have special agreements with the United States are subject to a 50 percent price preference in DoD procurements.<sup>64</sup>

*c) Small Business Act and the explosion of rights years<sup>65</sup>: boosting procurement as a tool of regulatory enforcement*

In the United States, as in many other countries, there is a widespread belief that small and medium-sized enterprises (SME) are fundamental to promoting economic growth, generate income and improve the living conditions of the population. Although there are some

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<sup>62</sup> FAR 25.204 (b).

<sup>63</sup> See FAR 25.401.

<sup>64</sup> DFARS 225.105 (b).

<sup>65</sup> From 1954 to 1970s the explosion of rights-based social movements and their attendant changed the political culture and increased government responsibilities. See Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, (New York: Norton & Company, 1999), 136.

controversies<sup>66</sup>, this idea still represents a truism that is repeated and shared even by the International Labour Organization (ILO)<sup>67</sup> and the European Union.<sup>68</sup>

The United States of America was the first country to define and support small business, initially as one of the consequences of the process of economic recovery after the Great Depression.<sup>69</sup> In fact, the public interest about this subject increased during the World War II, “when large industries beefed up production to accommodate wartime defense contracts and smaller businesses were left unable to compete”.<sup>70</sup>

At that time, US Congress created the Smaller War Plants Corporation (SWPC) in order to, among other competences, encouraged large financial institutions to make credit available to small enterprises. The agency advocated small business interests to federal procurement agencies and big businesses, being an embryo of what would be the Small Business Administration (SBA), later created by the Small Business Act of 1953. Among other agency’s powers, a major task of the SBA, since its origin, is to facilitate the awarding of government contracts for small businesses.

The title 15 U.S. Code, § 631, expressly says:

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

Relying on a political predilection, the SBA expanded its operations during the 1960s focusing on socially and economically disadvantage small business.

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<sup>66</sup> See generally, John Dearie and Courtney Geduldig, *Where the Jobs Are: Entrepreneurship and the Soul of the American Economy* (New Jersey: John Willey & Sons, 2013), 4.

<sup>67</sup> International Labour Organization, *Is Small Still Beautiful? Literature Review of Recent Empirical Evidence on the Contribution of SMEs to Employment Creation*. (Bonn: Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2013).

<sup>68</sup> European Commission, “*Think Small First*”: a “*Small Business Act*” for Europe, (Brussels: European Commission, 2008).

<sup>69</sup> Louis Jacques Fillion, “Free Trade: a need for a definition of small business”, *Journal of Small Business and Entrepreneurship*, (Jan-Mar. 1990): 33-34.

<sup>70</sup> Small Business Administration, *History*, [http://www.sba.gov/about-sba/what\\_we\\_do/history](http://www.sba.gov/about-sba/what_we_do/history) (Nov. 14, 2014).

At this point, it is remarkable the alignment of public procurement policy with the movement to end discrimination of African American (civil rights movement). For instance, since June 25th, 1941, when President Franklin D. Roosevelt signed the Executive Order 8,802, which established rules of non-discrimination in federal procurement,<sup>71</sup> successive US presidents edited similar executive orders until the approval of the Civil Rights Act in 1964.

More than align the small business policy with affirmative action on behalf of racial equality, the SBA followed the 1967 Report of the Commission on Civil Disorders (Kerner Commission) and adopted regulations requiring that federal contracts should be set-aside for firms owned by socially and economically disadvantaged persons. Namely, African Americans, Hispanics, Asians, and Native Americans.

During the 1970s, SBA has continued to raise its efforts as well as the US Congress took over the commitment to favor small business in public procurement:

A 1978 amendment to the Small Business Act (P.L. 95-507) provided a statutory basis for the SBA program in Section 8(a), which allowed contracts of any size to be awarded on a sole-source basis to eligible firms. The amendment also required all federal agencies to establish goals for awarding contracts to small minority-owned businesses and to explain to Congress when the goals were not met. It reserved all awards under \$25,000 for small businesses (unless no qualified small businesses were available to bid) and required agencies to establish goals for larger businesses to subcontract to small businesses. To carry out these provisions, the amendment established a Small and Disadvantaged Business Utilization Office at each federal agency that engaged in contracting<sup>72</sup>.

In this way, President Carter issued the Executive Order 12,138 in 1979, which created the National Women's Business Enterprise Policy and prescribed arrangements for developing, coordinating and implementing a national program for women's business enterprise. That executive order charged all agencies to assist women-owned businesses in federal contracting.

Another categories of small businesses received preferential treatment in public procurement in the following years. Thus, in 1998, US Congress passed the HUBZone

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<sup>71</sup> The text declared: "There shall be no discrimination in the employment of workers in defense industries and in Government, because of race, creed, color, or national origin."

<sup>72</sup> National Research Council, *Analyzing Information On Woman-Owned Small Business in Federal Contracting*, (Washington: National Academy Press, 2005), 14-15

Empowerment Act, creating a program for small business that operate and employ people in Historically Underutilized Business Zones. In this case, the goal was to increase employment opportunities, investment, and economic development in those areas (FAR 19.1301).

In the subsequent year, the Veterans Entrepreneurship and Small Business Development Act of 1999 was enacted, establishing an annual government-wide goal of not less than 3 percent of the total value of all prime contract and subcontract awards for participation by small business concerns owned and controlled by service-disabled veterans (FAR 19.1401).

Generally, the Small Business Act requires that each agency with contracting authority have to establish an Office of Small and Disadvantaged Business Utilization, that every year shall proceed annual reviews to assess the extent to which small businesses “are receiving a fair share of Federal procurements”, including contract opportunities under the related programs administered.

In this way, there is a general guideline establishing that the contracting officer shall divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement. Likewise, the officer has the obligation to encourage prime contractors to subcontract with small business concerns (FAR. 19.202).

An issue to be highlighted concerns to small business set-asides, i.e., reserving of an acquisition exclusively for participation by small business concerns. This type of preference is absolute, it is a discriminatory policy that is not subject to waive set by commercial agreements that could make eligible products from other countries.

In general, each acquisition of supplies or services that has an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions), but not over \$150,000 (\$300,000 for acquisitions), is automatically reserved exclusively for small business concerns and shall be set aside for small business, unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery (FAR 19.502-2).

Furthermore, the contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that award will be made at fair market prices and the offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns.

*d) The Great Recession: American Recovery and Reinvestment Act of 2009 as a response*

To respond the Great Recession of the end of the first decade of the 21st century, the United States issued an economic stimulus package called the American Recovery and Reinvestment Act of 2009 (ARRA). The program was intended to stimulate the U.S. economy by injecting \$787 billion in spending and tax cuts, a amount that was later revised to \$831 billion between 2009 and 2019.

According to ARRA (FAR 25.001 (4)), when a public procurement uses funds appropriated under that stimulus package, the definition of “domestic manufactured construction material” requires manufacture in the United States but does not include a requirement with regard to the origin of the components. However, if the construction material consists “wholly or predominantly of iron or steel, the iron or steel must be produced in the United States.”

Thus, the ARRA established another preference for the use of U.S. domestic products in any federal, state and municipal bidding process funded by it. Nevertheless, it is important to highlight that this version of Buy American applies only for the construction, alteration, maintenance, or repair of a public building or public work located in the United States.

Specifically, in projects funded by ARRA, all of the iron, steel, and manufactured goods used as construction material in the project shall be produced or manufactured in the United States (FAR 25.002-1). In turn, if a trade agreements shall be applied in the acquisition, the manufactured construction material shall either be produced or manufactured in the United States, or be wholly the product of or be substantially transformed in a Recovery Act designated country.

It may be pertinent to note that the ARRA exceptions are similar to those relating to BAA, so discriminatory rules should not be applied when in situations of nonavailability of a product, its unreasonable cost, as well as when the discriminatory rules are considered inconsistent with the public interest in a certain acquisition (FAR 25.003).

Finally, it should be emphasized that the rules of ARRA have temporary effectiveness, that is, they shall be applied until the program ends completely.

#### IV.II. CONDICIONALITY OF PUBLIC PURCHASING IN BRAZIL

*a) A very open Federal Constitution*

It is noteworthy that the objectives of the public procurement in Brazil can only be modulated to promote socioeconomic policies if these goals have explicit protection in the Brazilian Constitution. As is known, Brazil has an analytical and directive Constitution, that, besides setting rights and guarantees to citizens, establishes government goals and guides the actions of the government.

Thereby, as Article 37 of the Constitution provides that the government, in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of impersonality, publicity and efficiency, the goals of value for money, transparency and equality in any bidding process. Thus, any law seeking to promote socioeconomic objectives that are not contemplated in the Constitution must be considered unconstitutional.

But, in practice, this is unusual in Brazil due to the diversity of values and principles enshrined in the Constitution. Certainly, they are extremely varied and many of which even opposite.

The reason is that, in Brazil, political pluralism is on the basis of the Federative Republic of Brazil (Article 1, V), meaning not only the guarantee of a partisan political pluralism, but the promise of coexistence of multiple cultural, religious, artistic, economic values, sexual, among others, that are designed for a variety of existing heterogeneous groups in society. Most of these values are guaranteed in the Brazilian Constitution, which is one of the most extensive in the world.

In Brazilian law prevails the understanding that the existence of such a plural society and its multiple values leads to a large occurrence of collisions of principles guaranteed in the Constitution.<sup>73</sup> In turn, the principles expressed in the legal system as optimization commands must be fulfilled to the extent possible, according to the factual and legal possibilities of each case<sup>74</sup>.

In this regard, no principle has absolute predominance, so that the “practical agreement” of the varied constitutional values leads to the inevitable use of weighting techniques

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<sup>73</sup> It is used the idea that values and principles are two sides of the same coin, i.e., any collision between principles can be expressed as a collision of values and vice versa. Robert Alexy, “Sistema jurídico, principios jurídicos y razón práctica,” *Doxa: cuadernos de filosofía del derecho* 5 (1988): 145.

<sup>74</sup> *Ibid.*, 143.

to resolve conflicts eventually arose.<sup>75</sup> In this way, it is up to Brazilian Congress always weigh whether a constitutional value can motivate the imbalance of the traditional junction among “value for money, transparency and equality” in order to favor any socioeconomic objective in a public procurement.

*b) The recent past of an almost open procurement market*

As stated before, despite the long tradition of developmentalism backed by currency and tariff protectionism,<sup>76</sup> the Brazilian rules of public procurement, with a few exceptions, were mostly silent as to the possibilities of shaping public procurement in order to promote certain public policies (of economic nature or not).<sup>77</sup> Proof of this is that, in situations where different legal systems of the world allow contracting without providing for full and open competition, such as those intended to protect disabled people and foster social rehabilitation the prisoner's were only incorporated into Brazilian procurement law from the enactment of Law no. 8,883/1994.

Note that, in its original text, the Brazilian constitution stipulated in Article 171, paragraph 2, “that the acquisition of goods and services, the Government shall give preferential treatment under the law, to the Brazilian company of national capital”.

That Constitutional provision in Article 171 based two legal discriminatory provisions passed by the Brazilian Congress: a) the preferential treatment for the Brazilian companies of national capital in the acquisition of information technology (IT) goods and services and automation (Law no. 8,248/91); b) in case of a tie during the bidding process, the original wording of Article 3, I, of Law 8,666/93 established that the contracting officer should give preference to first companies of national capital in the acquisition of any goods and services.

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<sup>75</sup> Luís Virgílio Afonso da Silva. “O proporcional e o razoável”, *Revista dos Tribunais* 798, (2002), 38.

<sup>76</sup> Flávio Rabelo Versiani, “As Longas Raízes do Protecionismo: 1930 e as Relações entre Indústria e Governo”, *Revista Economia* 13 (Set. - Dez. 2012): 868–870.

<sup>77</sup> But there are some incidental examples of the use of purchasing power as a tool of government intervention in the economic domain. A situation criticized by many scholars was the mechanism known as “valuation” (*valorização*) whereby the government “removed from the market, by buying, some amount of coffee considered sufficient to maintain an adequate price for the consequent normalization of supply and demand”, in Alberto Venâncio Filho, *Intervenção do Estado no domínio econômico: O Direito Público Econômico no Brasil*, (Rio de Janeiro: Renovar, 1998), 93.

On January 1st, 1995, Fernando Henrique Cardoso was inaugurated as President of Brazil, whose economic policies led people on the left to identify his government with neoliberalism and right-wing politics. During that year, the sixth Amendment to the Constitution was promulgated, revoking Article 171 and establishing “preferential treatment for small enterprises organized under Brazilian laws and having their head-office and management in Brazil” (Article 170, IX).

After the change in the Constitution, those legal provisions seemed to have become unconstitutional, given the repeal of Article 171, paragraph 2, but it was common to claim that they were still valid because the support of Article 170, I, which provided that the economic order shall comply, among other principles, with the national sovereignty<sup>78</sup>.

Anyhow, these preferences – only applied in case of a tie – can be considered pale compared to the level of protectionism that already existed in the procurement policy of the United States of America. Regarding the preferential treatment provided for in Article 170, I, Congress never regulated it during the years that Fernando Henrique Cardoso was president.

However, with the election of Luiz Inácio Lula da Silva in 2002, Brazil started to adopt new forms of state activism. From his tenure on, the Congress started to issue laws providing assimilated rules to the American model of public procurement. As a result, recent legal provisions have allowed increasing government interventions in the economy through a protective design of public purchases.

*c) First set-aside and preference program: National Statute of Micro and Small Businesses*

After eleven years of legislative delay, the Supplementary Law no. 123/2006 was enacted, establishing the National Statute of Micro and Small Businesses, clearly inspired by the Small Business Act. The law reserved an entire chapter to public procurement provisions.

Apart from some facilities to fulfill the requirements to participate in the bidding process, the Supplementary Law no. 123/2006 created a kind of fictitious tie procedure<sup>79</sup>, which will take place when the bids submitted by microenterprises and small businesses (SME) are

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<sup>78</sup> Celso Antônio Bandeira de Mello, “Preferências em licitação para bens e serviços fabricados no Brasil e para empresas brasileiras de capital nacional”, *Revista Eletrônica de Direito Administrativo Econômico* 15 (2008).

<sup>79</sup> See Article 44 and 45 of the Supplementary Law no. 123/2006.

equal to or up to ten percent higher than the best offer classified, if this one wasn't made by another SME.

When this occurs, the contracting officer shall give to the highest ranked SME a opportunity to submit a new offer for a price lower than that deemed the winner of the contest, on which occasion the SME will be awarded the contract. If the SME highest ranked does not want to lower its price, the contracting office must call the remnant SME that have offered a price within ten percent above the winner of the contest, and shall have the same opportunity to lower the price offered initially.

The most important part, however, is the provision of Article 48. Similar to FAR 19.502-2(a), that Article "sets aside" contracts exclusively for micro and small business participation. Thus, according to the law, each acquisition of supplies or services that has an anticipated dollar value not over 80,000 *reais* is automatically reserved exclusively for SME dispute and shall be set aside for small business.

The SME set-aside only won't happen if the contracting officer determines that there is not a reasonable expectation of obtaining proposals from three or more SME able to fulfill the requirements established in the call for bids. Another exception occurs when differentiated and simplified treatment for SME is not considered advantageous to the government or it can cause financial loss to the total purchases to be acquired (Article 49).

Another important provision of the Supplementary Law 123/2006 establishes that, in bidding procedures to acquire works and services, the contracting officer can require the bidders to subcontract SME during the contract execution.

#### *d) One step further: the Buy Brazilian*

On the way to resemble the procurement policies between Brazil and the United States, the major step was taken in 2010, when the Provisional Measure no. 495<sup>80</sup>, later converted with amendments in the Law 12,349 (known worldwide as *Buy Brazilian*), advanced to establish similar rules to the Buy American Act. In that case, Brazilian government explicitly

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<sup>80</sup> The Provisional Measure 495 preceded the launch of the Greater Brazil Plan, a package of incentives for industry to increase national content and innovation worth about 60 billion *reais* (US\$35 billion according to the exchange rate of the time, 1.5% of Brazilian GDP).

mentioned the American model to justify the need of adopting measures to protect and promote economic development and strengthening of the domestic goods and services.

Also citing similar policies adopted by China, Argentina and Colombia, the presidential explanatory memorandum to that provisional measure made recorded the need to adopt actions in order to add clear guidelines for the demand profile of the public sector. These guidelines should correspond exactly to the role of government to promote economic development and the guarantee the strengthening of production chains of domestic goods and services.

An excerpt from the presidential explanatory memorandum follows:

Are illustrative in this regard, the guidelines adopted in the United States, embodied in the "Buy American Act" in force since 1933, which established preference to goods manufactured in the country, since it combines satisfactory quality, supply in sufficient quantity and commercial availability on a reasonable basis.

In the recent period, deserve record the actions contained in the so-called "American Recovery and Reinvestment Act," implemented in 2009. China has a similar rule, accordance with the provisions of Law No. 68 of June 29, 2002, which stipulated guidelines for the granting of preference to goods and services in Chinese government procurement, except in the event of unavailability in the country.

In Latin America, it is worth noting the policy adopted by Colombia, which established pursuant to Law No. 816 of 2003, a margin of preference of 10% and 20% for domestic goods or services in order to support the domestic industry through public procurement. Argentina also granted through Law No. 25,551 of November 28, 2001, preference for providers of goods and services of domestic origin, when prices are equal or lower to foreigners increased from 7% in offers made by micro and small businesses and 5% for other companies. (loosely translated)

It is interesting to note that to this day, from the point of view of the criterion of nationality, Article 3, paragraph 1, II, of Law no. 8.666/93 continues forbidding the contracting officer to establish “differential treatment of commercial, legal, labor, social security or otherwise, between Brazilian and foreign companies, including with respect to currency, mode and place of payment, even when involved funds from international agencies except as provided in the following paragraph and in Article 3 of Law no. 8,248, of October 23, 1991” (acquisition of information technology (IT) goods and services and automation).

However, Article 3, paragraph 5, of Law 8,666/93, went on to allow the executive branch to establish preference margins above the price of foreign manufactured goods and services that fulfill Brazilian national technical standards. According to the new rules, this margin of preference shall be established based on studies reviewed periodically, within a period not exceeding five years, taking into account the generation of employment and income; the collection of federal, state and local taxes; the development and technological innovation made in the country; the additional cost of goods and services; and, in their reviews, the retrospective analysis of results.

The Law no. 12,349/2010 amended Law no. 8.666/93 also to predict that an additional margin of preference can be established for domestic manufactured goods and services resulting from development and technological innovation made in the country. Under the new law, these preference margins by product, service, product group or service group will be set by the federal executive branch. The sum of factors may not exceed the amount of twenty-five percent on the price of manufactured goods and foreign service (Article 3, paragraph 8, of Law 8,666/93).

The rules relating to the preference margins do not only apply to acquisitions of goods and services whose production capacity or supply in the country is less than the amount to be acquired.

Based on these new rules of discrimination on grounds of nationality, the Brazilian government has edited fifteen decrees, extending preferences to government purchases of medicines, pharmaceuticals, biopharmaceuticals, and bulldozers produced domestically, among other products<sup>81</sup>.

## **V. BUY AMERICAN AND BUY BRAZILIAN: CRITICISM**

Some countries have seen the design of the procurement procedures with a view to target the government's purchasing power in favor of promoting the internal market as a fundamental alternative to their economic development, especially since the first decade of the 21st century.

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<sup>81</sup> A complete list of goods and services benefited from the policy of preferences can be found at <http://www.mdic.gov.br/sitio/interna/interna.php?area=2&menu=3944>. (Nov. 16, 2014)

Throughout the last century, Brazil has adopted a strong model of infant industry protection, which, for some scholars, helped the country go on to have a robust industrial park in some sectors of the economy in the early 1980s.<sup>82</sup> It is certain, however, that this option proved wrong in some cases, condemning the country to lag in some important areas, such as information technology.

However, in terms of protectionism, public procurement was certainly not a major tool to protect the domestic industry.

Regardless of the economic line defended (i.e., protectionist or not), the fact is that in the real world the excessive use of this logic led to the formation of industries with entrenched cultures of inefficiency, but with great lobby power in influencing the decisions of the government.

For some critics, the Buy Brazilian Act may be a return to the protectionist policies of the past, especially when it is feared that it will benefit industry sectors with history inefficiency and lobbying. As previously stated, the circle is vicious: “the more protection, the less productive and competitive an industry becomes, which in turn calls for more protection.”<sup>83</sup>

Given this history, there are always some fears and doubts about the correctness and even the honesty of some procurement policies such as those provided in the Buy Brazilian: Could the policy implemented by the Greater Brazil Plan for government procurement have been appropriated by lobbyists? Can preference margins favor some sectors of the business with a history of inefficiency? Will the choices for protecting some industry sectors be made in a transparent manner? Will there be an unbalanced reduction of imports in order to reflect a cartelization of the national market?

Similarly, the perpetuation of economic development policies for government procurement undertaken in the United States, such as established in the Buy American Act and ARRA, are not unanimities domestically. On the contrary, they are widely criticized by lawyers,<sup>84</sup> economists,<sup>85</sup> and organizations that bring together professionals working in the area.

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<sup>82</sup> Usually performed through import substitution models nailed to developmentalist economic schools, see generally, Fábio Giambiagi, *As vacas sagradas (IX): o protecionismo. In: Brasil: raízes do atraso: paternalismo versus produtividade*, 4th ed. (Rio de Janeiro: Elsevier, 2007), 182.

<sup>83</sup> Claudio Accioli, “Made in Brazil”, *The Brazilian Economy*, April, 2012, 14.

<sup>84</sup> See generally, Steven L. Schooner and Christopher R. Yukins, “Public procurement: focus on people, value for money and systemic integrity, no protectionism” in Richard Baldwin and Simon J. Evenett, ed., *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20*, (London: Centre for economic policy research, 2009) 87-92.

An example is the opposition of the National Institute of Governmental Purchasing, Inc. (NIGP) against all forms of preferences, seeing them as “impediments to obtaining effective cost for purchases of goods, services and construction in a free-market model.”<sup>86</sup> The National Association of State Procurement Officials (NASPO) has a similar position regarding the Buy American and other preference programs created statewide. According to research done by the organization, such policies, before achieving its social goals, foster ever-increasing political pressure for more protectionism.<sup>87</sup>

Despite the criticism, the US government has been increasing the political preference for domestic products, to the dissatisfaction of the advocates of an open world market. In this sense, there were many complaints made by other countries soon after the release of the American Recovery and Reinvestment Act of 2009, provoking retaliation from the Canadian government, for example.<sup>88</sup>

In the early twenty-first century, during the crisis of neoliberal policies, the growth of discriminatory practices on grounds of nationality has been causing reactions of pressure groups in some countries for the incorporation of increasing protectionist provisions in public procurement.<sup>89</sup> Thus, since the middle of last decade, we are witnessing a race to the implementation of economic policies in different national bidding statutes, as noted in the presidential explanatory memorandum of the provisional measure no. 495/2010, which besides the United States, also cited China, Argentina and Colombia in order to justify the position of the Brazilian government.

The oddest thing is that some countries that have adopted similar policies have been protesting against the others when they do the same. An example of this situation occurred when Brazil enacted the provisional measure no. 495/2010, making room for the establishment of preferential margins favoring domestic industry. Due to the measure, the country was subject to

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<sup>85</sup> See generally, Gary Clyde Hufbauer and Jeffrey J. Schott, “Buy American: Bad for Jobs, Worse for Reputation”, *Policy Brief* 09-2, (Washington: Peterson Institute for International Economics, 2009).

<sup>86</sup> National Institute of Governmental Purchasing, *Resolution 1016*, [http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=abt-res\\_1016](http://www.nigp.org/eweb/StartPage.aspx?Site=NIGP&webcode=abt-res_1016) (Jul. 14, 2013).

<sup>87</sup> National Association of State Procurement Officials, *In-state Preferences Briefing paper*, (August 2012), [http://www.naspo.org/content.cfm/id/briefs\\_and\\_whitepapers](http://www.naspo.org/content.cfm/id/briefs_and_whitepapers), (Jul. 14, 2013).

<sup>88</sup> Anthony Faiola and Lori Montgomery, “Trade Wars Brewing In Economic Malaise”, *The Washington Post*, (Jul. 14 2013).

<sup>89</sup> In England, generally, see Martin McKervey, “Procurement strategy in the public interest”, *National Manufacturing Debate 2013* (Cranfield: Cranfield University, 2013), 9. In Canada, generally, Canadian Manufacturers & Exporters, *Strategic government procurement: driving business investment and innovation through strategic government procurement*, [www.cme-mec.ca/download.php?file=h8tlkaeo.pdf](http://www.cme-mec.ca/download.php?file=h8tlkaeo.pdf), (Jul. 24, 2013).

at least fifteen complaints at the World Trade Organization for allegedly not respecting international standards of free trade.<sup>90</sup> It is a sort of “do as I say, not as I do”.

In India, for example, the National Manufacturing Policy of 2011 excluded from public procurement all products that did not meet the minimum domestic content, causing several negative reactions. Among the countries that complained about the measure was, paradoxically, the United States. Referring to the requirements of solar energy producers to use Indian-manufactured solar cells and modules, the American Ambassador Kirk, emphasizing that “the Obama Administration” is committed to preserving the millions of jobs that the American clean energy sector supports, said:

Let me be clear: the United States strongly supports the rapid deployment of solar energy around the world, including with India. Unfortunately, India’s discriminatory policies in its national solar program detract from that successful cooperation, raise the cost of clean energy, and undermine progress toward our shared objective.”<sup>91</sup>

In some countries, the issue is not a matter of dispute related to international trade, but a legal question. This is because their own legal systems often attribute a constitutional status to rules establishing the principle of non-discrimination on grounds of nationality as a corollary of the adoption of the capitalist system. Given this type of constitutional provision, it is difficult to validly establish an imbalance in the goals of public procurement to end up benefiting socioeconomic objectives if they are not also placed on a constitutional level.

In summary, the theme has a clear intersection between law and economics, generating complex discussions on both sides. In a increasingly unstable world economy, the current trend of using public funds and public procurement to boost national economies is a brake on the principles of openness, transparency and non-discrimination that guided the process of globalization and increasing global competition in the end of the last century.

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<sup>91</sup> See Office of the U.S. Trade Representative (USTR), *United States Challenges India’s Restrictions on U.S. Solar Exports*, www.ustr.gov/about-us/press-office/press-releases/2013/february/us-challenges-india-restrictions-solar, (Jul. 16, 2013).

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