A CRITICAL ANALYSIS OF PUBLIC PROCUREMENT LEGISLATION AND PRACTICES IN THE 2000S: COMPARING THE NORTH AND SOUTH THROUGH THE TURKISH CASE

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ABSTRACT

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This thesis analyses the neoliberal reforms in the public procurement field by comparing the Northern and Southern examples, with a particular focus on the enactment of the Turkish Public Procurement Law and the establishment of Turkish Public Procurement Agency in 2001. This thesis argues that despite the depoliticisation claims of neoliberal ideology the reforms in the public procurement field have gone through a highly politicised process in both North and South. The reforms launched in the procurement field have been constructed around different languages. The language of reform has intended to delegitimize any business-state cooperation. This type of language of reform in the South, particularly in Turkey, has turned into a strategy to open the state procurement market to the Western foreign firms on equal footing with the national ones. Coming under the pressure of different coalition groups of national and foreign capital owners, the Turkish government of has intervened in the decisions of the Public Procurement Authority, which has been formed as an independent regulatory agency and in the

Public Procurement Law, which was initially enacted to guarantee transparency. This thesis has reviewed the processes of the enactment and amendment of the Public Procurement. Eventually it states that the highly technical language of reform in the procurement field is highly political, and aims to redistribute resources between different capital groups.

Key Words: Public Procurement, Public Procurement Law, Neoliberal Reforms

ÖZ

2000'Lİ YILLARDA KAMU İHALE MEVZUATI VE UYGULAMALARININ KRİTİK ANALİZİ:TÜRKİYE ÖRNEKLEMİ İLE KUZEY-GÜNEY KARŞILAŞTIRMASI

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Bu tezde kamu ihalesi alanında gerçekleştirilen neoliberal reformlar Kuzey- Güney ülkelerindeki örneklerin karşılaştırması, özellikle Türkiye'de 2001 yılında kurulan Kamu İhale Kurumu ve yasalaşan Kamu İhale Kanunu'na odaklanılarak, analiz edilmektedir. Kamu ihalesi alanında gerçekleştirilen reformların temel söyleminin depolitikleşme olmasına rağmen bu tezde gerek Güney gerek Kuzey örneklerinde sürecin politik bir süreç olarak işlediği tespit edilmiştir. Sözü geçen alanda yapılan reformlar için Kuzey ve Güney'de farklı reform dilleri ile kullanılmaktadır. Bunların başlıcası devlet ve iş çevreleri arasında oluşabilecek herhangi bir işbirliğinin meşruiyetini bozmaktır. Güney'de kullanılan bu reform dili, özellikle Türkiye'de, devletlerin kamu ihale piyasalarını Batılı yabancı şirketlere ulusal şirketlerle eşit konumda açmalarını sağlayan bir stratejiye dönüşmektedir. Bu reform süresince ulusal ve yabancı sermaye gruplarınca oluşturulan farklı koalisyonların baskısı altında kalan hükümetler, bağımsız idari otorite olarak kurgulanmış olan Kamu İhale Kurumu'na ve kamu ihalelerinde şeffaflık mekanizmasının temeli olarak hazırlanmış Kamu İhale Kanununa sık sık müdahelelerde bulunmuşlardır. Bu tezde Kamu İhale Kanununun

yasalaştırılması ve daha sonar kanunda gerçekleşen değişiklikler incelenmiştir. Sonuç olarak, bu tezde ihale alanında kullanılan teknik dilin politik bir dil olduğu ve farklı sermaye grupları arasında kaynakların el değiştirme sürecinin bir parçası olduğu iddia edilmektedir.

Anahtar Kelimeler: Kamu İhale Kanunu, Kamu İhale Kurumu, Neoliberal Reformlar

To My Mother and Father

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LIST OF ABBREVIATIONS

AKP	Justice and Development Party
ANAP	Motherhood Party
BAA	Buy American Act
BDDK	Banking Regulation and Supervision Agency
BOTAŞ	Petroleum Pipeline Corporation
DSP	Democratic Left Party
DYP	True Path Party
EBUAŞ	Meat and Fish Products Company
EC	European Community
EEC	European Economic Community
ECJ	European Court of Justice
EPDK	Energy Market Regulatory Agency
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement

HKMO	Chamber of Map and Cadastral Engineers
IMF	International Monetary Fund
INTES	Turkish Employers Association of Construction Industries
IRA	Independent Regulatory Agencies
ISO	İstanbul Chamber of Industry
ITO	International Trade Organisation
LoI	Letter of Intent
MFN	Most Favoured Nation
MHP	Nationalist Movement Party
MNE	Multinational Enterprise
MoNE	Ministry of National Education
MÜSİAD	Independent Industrialists and Businessmen's Association
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PPA	Public Procurement Authority
PPB	Public Procurement Board
PPL	Public Procurement Law

PPP	Public-Private Partnership
SIGMA	Support for Improvement in Governance and Management
SME	Small and Medium Enterprises
SPO	State Planning Organisations
SSK	Organization of Social Insurance and Security
TCMB	Central Bank of Turkey
TEAŞ	Turkish Electricity Generation Company
TEDAŞ	Turkish Electricity Transmission Company
TGNA	Turkish Grant National Assembly
TISK	Turkish Employers Union Confederation
TL	Turkish Lira
TMMOB	Union of Chambers of Turkish Engineers and Architects
TOBB	Turkish Union of Chambers and Stock Markets
TOKİ	Housing Development Institution of Turkey
TÜİK	Turkish Statistical Institute
TÜSİAD	Turkish Industrialists and Businessmen Association
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
US	United States
WB	World Bank
WTO	World Trade Organisation
YASED	International Investors Association

CHAPTER 1

INTRODUCTION

The 1980s witnessed the rise in social sciences and public policy the principles of the neoliberalist theory that envisions international relations and political science in terms of free trade, reduces economics to finance and re-conceptualizes the notions of positive and negative rights and democracy. The neoliberal theory has called for the minimization of state role in the economic field through the privatization of state enterprises, the introduction of managerial rules in the public administration, and the strengthening of the rule of law, which is inherently constituted in neoliberal norms. Apart from its surge of influence in the field of social science theory, neoliberalism heightened its prominence in development policies through the promises of the "Washington Consensus."

Neoliberal reforms, which were packaged as the Washington Consensus after the 1990s, have been prescribed and held as preconditions for financial support to developing countries by the Washington-based institutions such as the IMF, the WB, and the US Treasury Department. These neoliberal reforms have called for the restructuring of states through the fiscal policy discipline, reduction in social expenses, curbing the role of trade unions and labour organisations, financialisation, freer markets, and deregulation. This restructuring in the economic and political spheres has been justified with reference to the norms of monetarism and in reaction to the economic bottleneck caused by Keynesianism.

The neoliberal policies have been justified on the basis of the need to increase efficiency and economic growth where the growth of economies and profit rates have been made as inversely proportional to state

intervention. Neoliberal policies proposed in the field of public procurement can be examined as model cases to analyse the internal and practical consistency of this neoliberal discourse. Hence, in line with the general neoliberal discourse, neoliberal public procurement proposals have been linked to good governance, combatting corruption and clientalism, prevention of political interventions in the market mechanism, and hence, ensuring professionalism and non-politicisation.[1]

As a result the neoliberal paradigm has established itself with the claim of the natural state of order with all its contradictions. As Harvey argues, fundamental concepts like individual liberty or freedom have become the conceptual tools of neoliberalism, and rhetorical debates around these concepts and the domination of the paradigm in the media, international organisations, and education channels have created a base for the hegemony of neoliberalism and the restoration of capitalist class power through it. [2]

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[1] Robert Denhardt Theories of Public Administration (Belmont: Thomson Wadsworth, 2004), 133-136.
Hood in Andrew Dunsire "Administrative Theory in the 1980s : a viewpoint" *Public Administration and International Quarterly*, no. 73 (Spring 1995): 28.;Yusuf Bangura and George Larbi, eds. Public Sector Reform in Developing Countries: Capacity Challenges to Improve Services (Hampshire: Palgrave Macmillan, 2006), 2.;
George Larbi, "Applying the New Public Management in Developing Countries." in *Public Sector Reform in Developing Countries: Capacity Challenges to Improve Service*, eds. Yusuf Bangura and George Larbi. (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2006), 32-34.; Vincent Ostrom (1973), Christopher Hood (1991), Osborne and Gaebler (1992) in Yılmaz Üstüner, Kamu Yönetimi Kuramı ve Kamu İşletmeciliği Okulu, *Amme İdaresi Dergisi*, no 33: (September 2000): 33.; George A. Larbi, The New Public Management Approach and Crisis States, UNRISD Discussion Paper No. 112, September 1999, http://www.pogar.org/publications/other/unrisd/dp112.pdf; Christopher Pollitt, " Convergence or Divergence: What has been Happening in Europe?" in *New Public Management in Europe*, eds Christopher Pollitt, Sandra Van Thiel and Vincent Homburg.(Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2007), 14-15.

[2] David Harvey, "Neoliberalism As Creative Destruction", *Geografiska Annaler: Series b, Human Geography*, no. 88 (2006): 149.

However, the implementation of neoliberalism, rather than increasing efficiency, production and welfare, has "created a landscape in [capital's] own image at one point only to have destroy it at some later point"[3]. Harvey argues that neoliberal capitalist accumulation is not a generative one for it ensures transfer of wealth[4] through fierce international competition between the dynamic centers of capital accumulation, and serious crisis of devaluation or geographical confrontation in the form of currency or trade wars.[5]

As Naim argues, these failures of neoliberalism have led also to transformations in the dominant discourse. For during the implementation of neoliberal 'reforms', the role of state and institutions as well as the incapacity of the debtor countries have arguably been discovered and accordingly the policies have been revised.

It is interesting to note that the economic orthodoxy of dismantling the protectionist and developmental state policies and other Washington Consensus prescriptions have been more effectively imposed on the 'failed states' of the periphery rather than upon the leading capitalist powers[6]. Hence, in these countries the argument that strong institutions

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[3] David Harvey, "The 'New' Imperialism: Accumulation by Dispossession" in *Socialist Register 2004 The Imperial Challenge*, eds. Leo Panitch and Colin Ley, (London: Merlin Press 2003), 66.

[4] Harvey exemplifies how the neoliberalism has reestablished the class relations in detail in his book, *A Brief History of Neoliberalism*. For instance, in the US in the late 1970s and late 1990s, top 1 per cent income earners more than doubled their share from the national income ; the ratio between salary workers and salaries of the upper group has been increased 15 times in US. Hence, the implementation of neoliberal policies ,in the developing countries in the spatial organisation and geographical expansion of the capital has not only fed the global crisis of overaccumulation but also restored the capitalist class power all over the world. Please see David Harvey, *A Brief History of Neoliberalism*. Oxford: Oxford University of Press, 2005, 16.

[5] Harvey, "Accumulation by Dispossession," 68.

[6] Moises Naim, "Feds and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?", *Third World Quarterly,* Vol:21 No:3 (2000):.511-

are needed for the realization of the neoliberal agenda can be easily proposed. Moreover, 'underdevelopment' and the lack of capacity to implement the reforms are also discovered as problems impeding the implementation of structural adjustment programs. To remedy the situation, new institutions have been designed with the arguable objectives of preventing corruption, and establishing good governance and transparency as means to realize the neoliberal agenda.[7] With this, the state has been defined as a conflicted entity threatening the operation of the market on the one hand, and a mechanism to protect the market from the people it is employing on the other.

Neoliberal's main approach to state-people relationship has been inspired from Hayek and based on the idea of depoliticisating the economy. As Hayek argues in relation to constitutional democracy, politicians have to be free from the electoral impact of the groups that are seeking their individual ends. State and politics have been correlated in this conceptualisation and the main norms that ensure the free market economy are proposed to be free from the decisions of the governments. On the other hand, Haggard and Kaufman underline the importance of political will in the actual implementation of neoliberal policies.[8] This is achieved through a technocratic government that is free from any particular interest, and can effectively implement the neoliberal agenda overcoming the problem of rent-seeking relations between the state and the dominant groups. One of the contradictions in this claim of neoliberal paradigm is that on the one hand it puts forward the state as the reason of the failure of the economy while aiming on the other hand the

513;Andrew Gamble, "Two Faces of Neo-Liberalism," in *The Neo-Liberal Revolution: Forging the Market State* ed. R. Robinson. (London: Palgrave-Macmillan, 2006), 6

[7] Moises Naim, 521-522.

[8] Haggard and Kaufman cited in Dag MacLeod, "Privatization and the Limits of State Autonomy in Mexico," *Latin American Perspectives*, Issue 143,Vol 32, No.4, (July 2005): 37.

establishment of new institutions and strengthening of the capacity of the state through methods applicable to the private sector. Similarly, while politicians are outrightly accused of being self-interested as they seek power with the support of trade unions or other political groups, the technocrats implementing the neoliberal agenda are not assessed as self-interested while they pursue their clientelist relations with multinational corporations.

Hence, the claim of neoliberalism to overcome corruption and patron-client relations through the injection of private practices to the state needs to be questioned for economics and politics are not indeed separate spheres as neoliberals have argued. Contrary, neoliberalism is itself a class project that aims to ensure advances in capital accumulation at the expense of labour. This is ensured through the insulation of the state and bureaucrats from the influences of large masses and anti-neoliberal interests. Hence, the classical definition of autonomy of state as being free from the dominant class in order to counterpart private entrepreneur groups and act in line with national interest for the future benefit of all capital and non-capital groups"[9] is reversed. The "autonomy" of state comes to mean the independence of state from any social pressures, as Hayek suggested.

To sum up, while the neoliberal policies were proposed to resolve the economic problems in the 1970s the solution was introduced as limiting the state and reducing state expenditures. The expenditures made by the state were associated with the individual interests of politicians and the electorates so that the overall project has been identified as the depoliticisation of economic management. However, as Burnham states the depoliticisation is not the removal of politics from social and economic spheres for

[9] As explained in Ralph Miliband, "State Power and Class Interest" in The State and its Critique, Volume II, An Elgar Reference ColLection, ed. Andrew Levine. (Edward Elgar Publishing Limited, 1992),58.

> depoliticisation is highly political[…] state managers retain arms-length control over crucial economic processes while benefitting from the distancing effect of depoliticisation […]depoliticisation strategies require the public rejigging of bureaucratic practices to achieve their primary aim which is to change expectations regarding the effectiveness and credibility of policy making.[10]

Hence, it can be argued that what lies behind these politicisation-depoliticisation debates is a concern to ensure enhanced control of capital over the state and particular state institutions on the basis of a new legitimacy ground acquired from the market. This thesis intends to substantiate this argument through a critical analysis of the neoliberal restructurings taking place in the field of public procurement. It will argue contrary to the dominant neoliberal claims that the 'reforms' in public procurement have been realised through highly politicized processes in the countries of both the North and the South. Indeed, the very practices of the imposition of public procurement reforms to the South by the leading financial organisations, such as the IMF, World Bank and regional organizations like the EU overtly display the politicized nature of the project. The question of why the neoliberal project of depoliticisation has failed is that state and business cooperation in different forms remains to be a common phenomenon in both the South and the North.

There is indeed a marked difference in the way neoliberalism treats depoliticisation in the Northern and Southern countries. In the North, de-politicisation is addressed to the question of economic efficiency whereas in the South, the discourse is addressed to what is normally called clientalism which is translated as corruption in the developing countries. Implicitly, it delegitimizes state and business cooperation in the South, a practice which still persists in the North though is not made part of the

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[10] Peter Burnham, "Globalisation, Depoliticisation and 'Modern' Economic Management" in *The Politics of Change : Globalisation, Ideology and Critique*, eds. W. Bonefeld and K Psychopedis, (London:Palgrave, 2000),22.

criticism. It can therefore be argued that this attempt to delegitimize all sort of business state cooperation in South, particularly in Turkey for the scope of this thesis, is simply a strategy to open the state procurement market, which used to be reserved for the domestic firms, to Western companies. Hence it is an attempt to create a new profit opportunity for the internationally mobile capital.

Depoliticisation in field of public procurement has turned out to be a process that requires the redefinition of relations between the government and domestic capital groups. For the Justice and Development Party (AKP) in Turkey came to power by securing the support of medium and small enterprises through the promotion of new profit opportunities to capital groups close to the party. This support from the local enterprises has however become problematic by the introduction of neoliberal reforms, which seek to open the procurement market to the multinational capital and their counterparts among the domestic capital groups. For ensuring free competition for the sake of depoliticisation in the field of public procurement would have practically meant the medium and small enterprises' inability to win public procurements from then on. In such a political context, the AKP has been forced to manage these two pressures concomitantly by redesigning the neoliberal agenda in line with the expectations of domestic capital groups on the one hand, and trying to be loyal at least formally to the norms of neoliberalism on the other. Some internal contradictions of the 'reform' process have helped AKP in managing this hard balance for interestingly, loyalty to the strict public procurement procedures set by international actors has generally provided Turkish public procurement authorities with ever more discretion due to the impossibility of the applicants' meeting the set criteria to win the procurements. On the basis of a detailed analysis of the restructuring of public procurement legislations and procedures in Turkey in the 2000s, this thesis will argue that politicization has persisted even after the adaptation of neoliberal 'reforms.' Neoliberal theory tries to explain the accompanying defects

such as corruption and economic crisis experienced by the Southern countries as a consequence of either bad state implementation or the inevitable but temporary strengthening of the executive for the sake of implementing reforms. It is also argued that state and politics are the sources of these problems. This same discourse on the politicisation, and the necessity to overcome this by good governance for the implementation of public procurement was employed and repeated within the context of the Turkish restructuring process. This research aims to challenge such explanations by arguing firstly that the public procurement reform process can be defined as a struggle between the government and the emerging autonomous bureaucracy groups. The reform process, which has purportedly aimed to decrease politicization in the public procurements, seems to pave the way for newer forms of political intervention in the market.

The main questions that I shall therefore tackle in this research are:

1. Did public procurement reforms result in depoliticisation as expected by the neoliberal theory?
2. Do the international documents employ for each and every country the same discourse or language for justifying the public procurement reforms?
3. Why do the international financial organisations heavily employ the corruption discourse or language for the promotion of reforms in the South?
4. To what extent and from whom is the state autonomous in this process?

The international reform process in the public procurement market has been framed by international entities that impose the neoliberal reforms on the Southern countries either through conditionality for support or through persuasion. Although the international organizations act with the participation of representatives from the Southern states, these

organisations are just venues for the internationalization and negotiation of policies that were derived from the Northern countries. The public procurement system and procedures were established during 1990s in their international meetings. The OECD, UN, GATT/WTO and EU circles' adopted norms and principles developed and liberalized the system further. Apart from these international and regional developments, the US procurement reforms and practices were also considered as relevant as the US has just established its own administrative reform and "reinvention of government" through a new public management system. In other words, the public procurement literature drew vastly from the documents produced and issued by these mentioned international organizations. As these documents were sourced from the Northern countries that are the frontrunners of these reforms, they argued from the language of 'competition' to justify the public procurement reforms. However, for the Southern countries the language of 'corruption' was heavily employed to justify the public procurement reforms. This study shall try to reveal the hypocrisy in the discourse through the examination of the Turkish case.

The public procurement reform process has resulted in a struggle between the bureaucratic elites of traditional ministries and the new bureaucrats of the autonomous agencies that are expected to be autonomous from any political pressure. The independent regulatory agencies were structured in line with demands of capital to institutionalize the neoliberal reforms.[11] In Turkey, the Public Procurement Law (PPL) was enacted in 2002, under the guidance of the international finance organisations. It required the establishment of an autonomous agency, the Public Procurement Authority (PPA) in order to guarantee the claimed depoliticisation of the procurement process and the appropriate implementation of the law.

[11] Sonay Bayramoğlu, Y*önetişim Zihniyeti: Türkiye'de Üst Kurullar ve Siyasal İktidarın Dönüşümü*, (İstanbul: İletişim Yayınları,2010), 323-324.

On the basis of the initial, early observations, the thesis will argue that rather than putting an end to politicization and abuse of the process, the neoliberal public procurement regulations seem to have created new forms of politicization in the public procurement market. This is similar to other neoliberal practices like privatization and scaling down of the state apparatus. This is due to the internal contradictions of the neoliberal agenda. One of these has been that while the neoliberal paradigm required depoliticisation and non-state interventionism, the implementation of the Washington Consensus and neoliberal transformation in the Southern states have required the functioning of a strong state for the realisation of the neoliberal agenda.

In particular, the neoliberal reforms have led to new forms of corruption and politicization in the public procurement market due to the complicated structure of public procurement regulations. Independent regulatory agencies are authorized on the basis of depoliticisation of public purchasing and state savings. However the complexity of the procedures only provided the grounds for differing interpretations of the laws and regulations and discretionary decisions.

The literature on public procurement in Turkey is greatly framed by the interest in the techniques that enable to better understand the character of the legal texts. In other words, the literature is guided by explanatory concerns. Hence, rather than discussing the legal documents themselves, this thesis will follow an exploratory path by emphasizing the political and the economic motives and the underlying suppositions of the various actors involved – the international organisations, the government, associations, and private business. This analysis on the Turkish public procurement reforms will largely dwell on the relationships developed between the government and the international organisations. This thesis will review the documents promulgated for these processes, such as letter of intent (LoI) to the IMF and structural reform requirements demanded by the IMF authorities, the EU Progress Reports and the

National Programme for Accession of Turkey, and lastly the newspapers. The following newspapers which are representing diverse political and economic interest groups and segments of the society shall be included in the review: *Hürriyet, Milliyet,* generally positioned in the center of the political spectrum, *Radikal* which is characterized as liberal, *Cumhuriyet* which appeals to the Kemalist stance, *Zaman* which is conservative, *Evrensel* as voice of the socialist left and *Dünya* which caters to the business sector. For the investigation, the thesis has applied purposive samplings since the public procurement is not an issue that is often placed in the public's agenda. In addition to these, face-to-face interviews with two public procurement experts made in March 2012 are also utilized. One of the experts has 3 to 5 years of experience at the PPA while, the other is a senior expert in the institution with 8 to 10 years of experience.

Even though the historical cornerstones that prepared the ground for the current legislation principles, such as the documents for the establishment of the GATT up to enactment of the EU Directives in the 1970s are examined, given the significance of these international developments for the focus of the thesis, the specific timeframe of the research is from 2002 to 2011. Additionally, the thesis also considers the changes in the political environment of Turkey from the 1980s up to the first decade of 2000. In this period, neoliberal reforms were continuously applied, starting from the establishment of a single party government after a long period of coalition governments, all sharing similar promises of the neoliberal agenda, i.e. the emphasis on combating corruption.

In contrast to the neoliberal argumentation, this research will refrain from recognising politics and economics as separate fields for politics is understood as a network of relations that goes beyond the state apparatus. The depoliticisation claims of the neoliberal reforms are therefore rejected on the grounds that depoliticisation is in itself a political act of the neoliberal reforms that aim at constructing new

perceptions about the neutrality and effectiveness of the state.[12] Furthermore, this thesis does not perceive the state as an autonomous and central entity with its own interests.

This thesis is organized along these lines. After the introduction part, Chapter 2 will attempt to overview the main characteristics of the international reform agenda in the public procurement field. A brief historical framework on the international developments in the field will be provided with a particular focus on the UN regulations in public procurement and the developments under the GATT and WTO umbrella. This part will establish the bases for understanding the main principles and problems on which the North and South states must negotiate.

In Chapter 3, the research will focus on the neoliberal reforms in public procurement in the developed capitalist countries with particular emphasis on the different practices of public procurement in the North. The development of public procurement legislations and the mainstream public procurement practices will be analysed with particular attention to those of the USA and the EU countries. This Chapter aims to understand to what extent a standardized system has been achieved among the Northern countries, to what extent the international norms are being employed, and if there are any deviations in their practices.

Chapter 4 will analyse the public procurement discourse produced in the Southern countries. The IMF, WB and the EU's discourses and conditionalities towards the South will be identified and the manner of how the reforms have been shaped and introduced will be examined. Moreover, the dominant neoliberal arguments in favour of independent regulatory agencies will be discussed. This part will also discuss why the problems in the public procurement system of the Southern countries persisted even after the execution of the neoliberal reforms and

[12] Burnham, 22.

structural adjustment programs. Then, the neoliberal explanations for the aforementioned problems will be evaluated from a critical perspective.

Chapter 5 will focus on the public procurement reform process in Turkey considering the pre-PPL period, the enactment of the law, the changing political context in Turkey together with the changes in governments, the debate over PPA and other independent regulatory agencies, the amendments in the law, the concerns of the actors in the process, and lastly, the problems encountered in the implementation of the law.

Chapter 6 will conclude with a summary of the main arguments and the evaluation of chapters.

CHAPTER 2

NORTHERN DEBATES: THE FORMATION OF INTERNATIONAL NORMS

2.1. Introduction

A neoliberal state is a form of social relationship that was prescribed as a cure for the economic ills of the 1970s. The neoliberal agenda emerged through the Mont Pelerin Society in the developmentalist period of Keynesian economy in the post-World War II. It gained momentum during the Thatcher and Reagan era with prescriptions of deregulation and the change of fields public spending which Reagan criticized as the "tax and spend" habit of "big government."

These neoliberal principles were summarized as the Washington Consensus and were used by the international organizations that enforce as a condition for the credit or aid to developing countries worldwide. Neoliberalism was further equated and associated with a series of concepts such as monetarist economy, globalization, privatization, tax reforms, trade liberalizations, deregulation especially of financial markets, tight monetary policy, and depoliticisation of the market. These concepts have both political and economic consequences.

The privatization process has the potential to give rise to public purchasing. First in the period, ownership of state enterprises producing for public are transferred to private entrepreneurs. As a result public entities in need of resources increased their purchasing from the private market. Second, since in the neoliberal economy, the state is expected to give up its producing and manufacturing capabilities, public services

were provided through the use of private enterprises. These then led to an increase in the Public Private Partnerships, which changed the concepts of “public service” and the “citizenship” and increased the need for the regulation of public spending especially by the public procurement sector.

Public Procurement has been the means for states to support industrial development. This being the case, the public procurement field has been largely protected from foreign competitors. Although attempts to break protectionism in this field started in the 1950s, it was in the 1990s when the debate for the opening of the public procurement market intensified in the international area. From the 1990s onwards, public procurement regimes started to be regulated in international context in order to secure free movement of capital and goods through the opening of new markets to the international companies.

The procurement regimes remained basically unregulated up to 1990s despite the establishment of bilateral concessions and weak formations at the regional level. The first attempts to include the government procurement within scope of the multilateral free trade agreements were made through the Bretton Woods’ system. However, a solid multilateral agreement was still not in place as the various states in one way or another kept the public procurement as a field subject entirely to their own political arrangement. But on the other hand, since the 1990s both at the regional and international level, the rules around public procurement have been clarified, the methods of procurement have been defined and the structures for monitoring compliance has been established

The most significant development in internationalization of public procurement market was the signing of the Government Procurement Agreement (GPA) as its main instrument. At the regional level, the EU was the most significant actor that enforced a systematic regime on both

member states and candidate countries and on those states that benefit from its structural funds. Apart from the use of GPA within the WTO structure and the EU procurement regime, the UN and OECD also produced discourse and practical information around the agenda of government procurement.

This chapter will examine the neoliberal reforms in the public procurement field by focusing particularly on the development of international procedures under the WTO, UN and OECD umbrella whose policies were shaped around the concerns of developed capitalist countries. In the coming sections, I will first depict how neoliberal reforms have been introduced in the public procurement field at the international level. This part will contain the historical process before 1990s and the process after 1990s that escalated into the enactment of international or intraregional laws. Then, in order to understand all the regulative acts in the field, I will present the first global regulations composed of UNCITRAL, the developments under GATT and WTO, and the OECD papers since these are constructed as reference points for neoliberal reforms of individual states.

2.2. Global Regulations in the Public Procurement Field

2.2.1.UNCITRAL

The UN Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement of Goods, Construction and services, together with the Guide to Enactment in 1994. The Model Law was lately revised in July 2011. The Model Law is a non-binding instrument composed of best practices[13] that assist particularly the

[13] Simon J. Evenett, "Is There A Case For New Multilateral Rules on Transperancy in Government Procurement?" in *The WTO and Government*

developing states in formulating a procurement law[14] as well as the industrialized countries in reforming their procurement procedures.[15] The 1994 version of the text also has a Guide for the enactment of the UNCIRAL Model Law on Procurement of Goods, Construction and Services" where the intention behind the establishment of the Model Law was expressed thus:

> The Model Law on Procurement of Goods and Construction is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists.[16]

The objectives of the Law are stated as maximizing efficiency, promoting international trade and fostering participation to tendering, promoting competition, providing equitable treatment, integrity, fairness and public confidence, and achieving transparency.[17] In line with these objectives,

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Procurement, ed. Simon Evenett and Bernard Hoekman. , (Cheltenham: An Elgar Reference Collection,2006), 194-198.

[14] Afghanistan, Albania, Armenia, Azerbaijan, Bangladesh ,Croatia ,Estonia , Gambia , Georgia, Ghana, Guyana, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi, Mauritius, Mongolia, Nepal, Nigeria, Poland , Republic of Moldova, Romania, Rwanda, Slovakia, Uganda, United Republic of Tanzania, Uzbekistan, Zambia are listed as the countries that has been adopted the 1994 - UNCITRAL Model Law on Procurement of Goods, Construction and Services. Please see: http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html

[15] Christopher Yukins, Don Wallace Jr., Jeffrey Marburg-Goodman, International Procurement," *International Lawyer*, Vol. 43, Issue 2 (Summer2009): 1-2.

[16]United Nations Commission On International Trade Law (UNCITRAL), *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, 51,* http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf, (Accessed on 15.01.2012).

[17] UNCITRAL Model Law on Public Procurement, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.,2011, http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf (Access date 15.01.2012)

the Model Law puts forward the rules for ensuring transparency in the pre-procurement process, during the evaluation process and the award of contract process. Apart from the publication and advertisement of conditions for each step of tendering, the UNCITRAL defines the methods of procurement, procedures on challenge proceedings and general remarks on evaluation of offer. The Working Group on the amendment of the Model Law, further intended a review series of issues in the Model Law such as: use of suppliers' lists; framework agreements; procurement of services; evaluation and comparison of tenders; the use of procurement to promote industrial, social and environmental policies; remedies; legalization of documents; alternative methods of procurement; community participation in procurement; the simplification and standardization of the Model Law; abnormally low tenders; and conflicts of interest. Later, comparatively new methods of procurement such as framework agreements, electronic auction and remedies were elaborately introduced.

The 2011 text is said to be designed in relation to other international documents established by WTO, the EU regulations, the UN Convention Against Corruption, the Procurement Guidelines and the Consultant Guidelines of the World Bank and the equivalent documents of other IFIs.[18] Previously, in comparison to WTO and EU procedures, UNCITRAL was stricter about the procedures and preferred models. Formalism and legalism are the leading factors in this model.[19] The UNCITRAL Model Law provides limited options in terms of procedures and establishes stringent transparency rules by suggesting the use of open procurement

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[18] 2011 UNCITRAL Model Law on Public Procurement, (Accessed on 15.01.2012), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

[19] John Linarelli, "The WTO Agreement on Government Procurement and the UNCITRAL Model Procurement Law: A View From Outside the Region", *AJWH*, Vol:1, (2006):320.

method primarily and establishing conditions for the use of other more flexible procedures.

According to Linarelli, this formalism of the UNCITRAL Model Law arises from the tendency to discipline the procurement by promoting transparency and efficiency over flexibility.[20] This is because according to Linarelli, the law corresponds to either one of the models of procurement governance that emerged in the last decade: the mature procurement systems or the emerging procurement systems. The mature procurement governance requires professionalized and already established civil service systems and a substantial level of monitoring. The existence of these effective institutions and bureaucratic structure creates a secure ground for a trade-off between transparency and flexibility. This is because the strength of the bureaucracy and institutional capacities are seen as the barriers to fraud and corruption. On the other hand, the emerging procurement model of governance system, according to Linarelli, requires stricter rules. This system prioritizes transparency over effective governance. The line of the argument is that the judicial, legislative, and bureaucratic capacities of the states are not mature enough such that these states are susceptible to corruption:

> The implementation of model 1 system would require the fundamental reform of judiciaries, legislatures and bureaucracies, something that cannot be forthcoming immediately in some countries, especially in developing countries and countries with transition economies. Enforcement institutions do not exist in model 2 system (*emerging procurement governance system*). Model 2 systems rely relatively more on transparency of procurement procedures to facilitate monitoring of procuring entities and contractors.[21]

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[20] Ibid.,325-326,330.

[21] Ibid, 332.

The writer underlines that bureaucracy in the developed Northern states is not solely public interest minded but the context prevents corruption in these states. These imply that the general view that the UN Model Law is being developed primarily for the developing states that are in need of structural reforms in order to prevent corruption; while for the developed states its purpose is achieving efficiency and flexibility. Hence, the objective of the Model Law is to ensure value-for money through the guaranteeing of competition in the procurement process.

The barriers to competition are conceptualized differently for the Northern and the Southern states. Politicization and corruption have been underlined as the source of the problem for the Southern states. On the other hand, it is difficult to argue that The Model Law makes a clear link between the abuses in the procurement market and clientalist relations in favour of the domestic suppliers. The Model Law does not openly call for the liberalization of the public procurement markets of the developing states. Instead, it calls for competition in reference to international procurement provisions. Moreover, the Model Law introduces flexible procedures on the use of preference systems for the domestic tenderers, which is allowed for developing states during the accession period to GPA. In accordance with this flexibility, the developing states were allowed to require a non-price criterion in the evaluation of tenders within the margins of preference in order to balance the objective of international participation in procurement proceedings and fostering national industrial capacities.[22]

Despite the Model Law's non-binding character on the UN member states, it turned into a basic text to be adopted by the states in the reform process . It provided, however, a transition period for the developing states by opening a realm them to establish preferential margins for the domestic suppliers against the foreign tenderers.

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[22] Simon J. Evenett, 197.

Basically, the rationale behind the law is that developing states are prone to fraud and corruption more than developed states and the only method of establishing value-for-money is ensuring introduction of neoliberal reforms which are supposed to prevent corruption, ensure depoliticisation and open the procurement markets to international competition by strengthening transparency provisions.

2.2.2. Enactment of Law Under GATT and WTO

Public procurement came to the international scene as early as with the ideas of liberalization of trade between states under the umbrella of the International Trade Organisation. The current regime is still far away from covering all the countries in forcing them to liberalize public procurement. The legislative efforts to liberalise the field started by 1960s and developed through a series of GATT rounds. The agreement achieved at the end of the first round, the Tokyo Round, entered into force in 198., This round's version of provisions were limited in scale in as much as only goods were taken into consideration for liberalization. The second round between 1981 and 1986 ended up with GPA (Government Procurement Agreement) that expanded the boundaries of the previous provisions to purchases of services and works. In the agreement the threshold of value of contracts stated at the end of the first round of GATT negotiations, were also reduced. The current regime was established with the agreement that was signed in 1994 and entered into force in 1996 after the Uruguay Round under the umbrella of the WTO. The development of public procurement regulations was developed hand in hand in international and regional context. The longest standing regional model in the regional sphere, the EU model, also contributed to the development of the side agreements of GATT and WTO[23].

[23] Harvey Gordon, Shane Rimmer and Sue Arrowsmith "The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO" in

2.2.2.1 Pre-GATT Rounds Process and Exclusion of Public Procurement from the International Regulations

After the Second World War, during the reorganization of the economic and trade relations within the Bretton Woods system, the government procurement came to picture, not as a unique issue but in relation with the reduction of tariffs on trade in goods. At the time, the US was zealous in covering the government contracts and the procurement activities under the jurisdiction of international trade regime, but it was challenged by the other parties.

The US called for a "United Nations Conference on Trade and Employment" at the first meeting of the United Nations Economic and Social Council. The objective of the US government was the establishment of an International Trade Organisation for which the US came out with a "Suggested Charter for an International Trade Organisation". In the suggested charter, the liberalisation of the government procurement was also included. The US proposed that government purchases and contracts should be treated as any other trade contract. The proposal hence required government purchases to be subject to the general non-discrimination obligations of National Treatment and Most-Favoured- Nation (MFN).[24] The US proposal was rejected by other states as it required a change in the "buy national preference" principle. In subsequent period of the London, New York, Geneva and Havana Conferences which were held primarily for the

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The WTO and Government Procurement, eds. Simon Evenett and Bernard Hoekman. (Cheltenham: An Elgar Reference Collection,2006),159.

[24] Annet Blank and Gabrielle Marceau, "The History of the Government Procurement Negotiations Since 1945" in *The WTO and Government Procurement*, eds. Simon J. Evenett and Bernard Hoekman. (Glos: Edward Elgar Publishing Limit 2006), 3.

establishment of the ITO Charter, the preparation committees also covered issues related with the government procurement.[25]

In the London Conference held in November 1946, the Preparatory Committee discussed the meaning of central, provincial and municipal governments as a framework for the scope of the government purchases. The US side argued that obligations should be applicable as well to local governments if they are controlled by the central government.[26] In order to clarify the coverage of the government procurement, the other conceptual discussion centered on the distinction between the concepts of 'government procurement', 'awarding of contracts' and 'state trading'. A distinction was made between the concepts according to level of commercial purposes of state, on whether it is a purchaser or a trading actor.[27] The US government endorsed to contain these acts within the MFN (Most Favored Nation Treatment)[28] clause of the GATT. According to a US delegate, the clause could be a response to the differing interpretations of the three concepts which emphasise the clause "fair and equitable treatment." This proposal made by USA to subject the government procurement under the general trade principles would therefore enable states to enter into any government procurement market if one state permits it.

In the meetings of the sub-committee on Procedures, however, the US proposal for general coverage of government procurement was diluted. A

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[25]Ibid.,5-6.

[26]Ibid.,6.

[27]Ibid.,7

[28] Article I of GATT aims eliminate any inequality between the countries in their trade relations: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Please See: The Text of General Agreement on Tarriffs and Trade, Geneva, July 1986, http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

phrase was added: “the provision of this Article shall not apply to the procurement by governmental agencies of supplies for governmental use and not for re-sale”.[29] The other countries nonetheless agreed on enforcing MFN and NT principles for government procurement and state trading in a separate article on this particular issue.[30]

In the Havana Charter discussions, the Committees adopted a protectionist language such that imports for government procurement were subjected to neither MFN nor NT obligations but to “fair and equitable treatment”[31]:

> (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
>
> (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies affected through governmental purchases of domestic products. (Article 8)[32]

The Havana Conference produced two multinational instruments: the GATT and the ITO. GATT was signed in 1947 and the ITO Charter, which was designed as a specialized agency of the UN, was agreed upon in 1948. As the ITO Charter had not been approved by the US Congress,

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[29] Annet Blank and Gabrielle Marceau, 9.

[30] Ibid.,9.

[31] Ibid.,13.

[32] United Nations Conference On Trade And Employment Held At Havana, Cuba From November 21, 1947, To March 24, 1948, Final Act And Related Documents Interim Commission For The International Trade Organization Lake Success, New York, April, 1948..33 (AccessedSeptember 10,2011) http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

latter liberalization attempts were processed and multinational norms were established under the GATT round. In its original version, the GATT also adopted a discriminatory treatment in government contracts for the domestic suppliers. The same provision of Article 8 of the ITO Chapter was also re-expressed in Article 8 of the GATT that the provisions of the agreement cannot be applied for government contracts. The attempt to open the route for government contracts started in the1960s through the initiative of the OECD but it proceeded under GATT rounds.

2.2.2.2. GATT Rounds on Public Procurement

The first GATT round covering government procurement issue took place between 1977 and 1981. The GATT Tokyo Round gave birth to the first GPA. In the next period between 1981 and 1986, GPA was revised to expand its coverage. Lastly, the current regime was established with the third negotiation round, in Uruguay, between 1986 and 1994. While a plurilateral agreement was achieved here, the agreement was not multilateral. The objective of the regulation in the government procurement field under the GATT umbrella was to apply the GATT principles in government procurement in order to guarantee international competition in the field. The decisions over the application of transparency principles to the tendering procedures and the extent of preference regimes for domestic tenderers, entities subject to the GPA were the main themes during the Tokyo Round and Uruguay Round.

From 1963 onwards, OECD undertook the work for the reconciliation of the US government procurement procedures with the approach of EEC (EC). The step taken by OECD resulted in the first Government Procurement Agreement adopted in the context of the Tokyo Round. Within the framework prepared by OECD, the negotiations in the Tokyo Sub-Committee on Government Procurement ended up with a consensus about the scope of application of the code, the entities to be subjected,

and dispute settlement methods.[33] In 1964, the OECD Trade Committee set up a working group to find the "fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers." The Committee came up with a set of guidelines in line with two EC Directives in force. The US was rather passive at the time, but proposed a more binding set of norms for a specific sector: the heavy electrical equipment, which had considerable trade importance for OECD members.[34] The EC meanwhile adapted three Directives applied to the public procurement sector. The US and EC procedures were differentiated regarding the award criteria of the contracts. In the US regulations, "price" was the only criterion. But in the EC criteria of awarding contracts, "price" as well as "quality" requirements were included. By 1976, the EEC Directive has liberalized the coordinating procedures for the award of public supply contracts and the procurement of goods in its internal market. The negotiations for the international rules on government procurement were also transferred to Tokyo Round.[35]

The regulation of the public procurement field is generally explained on the basis of economic bottleneck that developed in the Keynesian-oriented economies of the North. According to this analysis, the states in mid-1970s were under budget pressure that they faced two choices: either to raise taxes or to cut their rate of contribution to welfare spending. The states chose the second option in order not to be challenged by the capital owners as they looked for more value-for-money bids. The second feature of the mid-1970s was the privatization of the state-owned enterprises which caused the new privatized entities to open their market to foreign bids in order to lower the costs (of state

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[33] Annet Blank and Gabrielle Marceau, 4.

[34]Ibid.,15.

[35]Ibid.,16.

purchases. Lastly, profit seeking induced the liberalization of the government procurement market as the export politics between the regional countries made the states and the entrepreneurs to look for export options in the neighbouring countries. The most concrete example for the last cause is the development within the EU. Hence, both domestic regulations and the international harmonization processes towards incremental liberalization of the sector are related with the value-for-money objective. But then, the secondary policies by which states used to favour domestic industry, especially the small or disadvantaged firms, fell into conflict with the liberalization of government procurement market.[36] For this reason, the procurement regime brought about a variety of derogations, and uncertainties.

In the OECD forum, which prepared a base for Tokyo Round, the US and EEC had differing views on the principle of discrimination, award criterion of contracts and issues related to publicity. The US chose to address the problem of procedural discrimination initially, while the European members insisted on the resolution of formal and procedural aspects of discrimination against non-domestic tenderers. For the publicity issue, the US delegation proposed ex ante and ex post transparency/publication obligations, while the EEC preferred solely ex ante publicity due to its lack of procedures. Then, the US pushed for the use of ”price” for the award of contracts while the ECC wanted price and quality based criteria for the award of contracts[37]. In the OECD forum, the developing states have no formal standing. But the text adapted at the end of the OECD forum and transmitted to the GATT negotiations for the first meeting of its Tokyo Sub-Committee on Government Procurement contained a statement:

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[36] Simon J. Evenett, 150-152.

[37] Annet Blank and Gabrielle Marceau, 22,24.

which had been established with the pressure of the developing states who believed government procurement held out possibilities for expansion of their trade and provided scope for special and differential treatment in their favor.[38]

2.2.2.2.1 Government Procurement at Tokyo Round

The issues that remained on the agenda of the Tokyo Sub- Committee on Government Procurement consisted of: the scope of application of the code, regarding which government entities would be subject to the Code and the dollar-value threshold of contracts that would require states to apply the procedures of the Code; the transparency requirements, consisting of ex-post information and the procedures for the settlement of disputes; the rules on developing countries who were put under a category of derogations by US initiative during the OECD panel discussions; and lastly, the issue of definitions. [39]

Issue of threshold is a matter of debate in government procurement regulations since states could bypass the objective of the legislation through the use of high threshold levels. A low threshold would cause administrative burden over the states while a high threshold would limit the scope of the agreement. Furthermore, a low threshold level would open markets for the entrepreneurs in the developing states while a high threshold create double burden over the developing states since the companies producing economically low value-added products and have lower capacity for competition in the nations of developing states would neither have the chance in the government procurement market of the developed states nor secure their share in domestic market. The other issue related with minimum threshold was whether it will be a general application for all entities of the state or a requirement only for particular entities. Canada, US, and Switzerland were in favor of a general

[38]Ibid, 22.

[39]Ibid, 24.

application with higher level of threshold. On the other hand, the developing states preferred the lowest possible threshold in the markets of developed countries to be able to put their products on market in any circumstances. It was finally decided that the threshold will cover contracts over the value of SDR 150.000.[40] In line with this principle, the OECD was reviewed the obligation so that the contracts are not divided with the aim of removing them from the scope of the Code obligation.[41]

The issue of purchasing entities to be covered in the scope of the agreement became a challenging area for decision. The US offered to be subject to liberalization with its entire federal establishment while the EEC preferred the exclusion of telecommunication and electrical generating equipment, since the EEC Directives at the time do exclude the fields of energy, telecommunication and transport. In the end, strategically critical entities were not covered in the scope of the Agreement.[42]

The Tokyo Round negotiations took place in the period when the Group of 77 was pressuring for differential and preferential treatment in favour of developing states on diversified platforms. At Tokyo Round negotiations, the provisions in favor of developing states allowing differentiated treatment were adopted. These included limited derogations from national treatment obligation, and the extension of the benefits of the Code to the least developed states who are not party to the Code. Finally, however, very limited number of the developing states become a party to the Code as the adopted threshold was high and the proposals made by developing states were not realized.

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[40] "The currency value of the SDR is determined by summing the values in U.S. dollars, based on market exchange rates, of a basket of major currencies (the U.S. dollar, Euro, Japanese yen, and pound sterling)." http://www.imf.org/external/np/fin/data/rms_sdrv.aspx.

[41] Annet Blank and Gabrielle Marceau, 24-25.

[42] Ibid., 25.

The obligations for ex post information were strengthened in the Tokyo Code, as the US was meticulous about transparency, particularly with respect to the publication of the awarded tenderer. However, after the agreement was signed and the procedures started to be implemented, the US found loopholes to avoid even from the transparency principles, if not requirements, that nationality of the awarded tenderers was not publicized.[43]

The GPA (Agreement on Government Procurement) negotiated during the Tokyo Round of Trade negotiations entered into force on January 1, 1981. The agreement was evaluated as an attempt for cross-fertilization of the US and EEC applications. It attempted to open the government procurement of goods to international competition. However, the scope of the Agreement was limited on the coverage of certain central government entities.[44]

Shortcomings related with the AGP cropped up due to the doubts of the parties about violation of the rule of reciprocal implementation of principles. A credibility gap emerged because of fear of protectionism which is so keenly felt in the area of government procurement. To overcome the problem, the states improved the text. It was to widen the covered entities and include service contracts within the scope of the agreement.

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[43] Linda Weiss and Elizabeth Thurbon, "The Business of Buying American: Public Proocurement as Trade Strategy in the USA", Review of Internat,ional Political Economy, 13:5, (December 2006): 715.

[44] Signatories of the Tokyo Round Agreement on Government Procurement were Austria, Canada, European Community, six members of the European Communities, Finland, Japan, Norway, Singapore, Sweden, Switzerland, US, Hong Kong, Israel by 1983, Greece and Spain by 1982, Portugal by 1993.

2.2.2.2.2. Government Procurement at Uruguay Round

Between 1981 and 1986, after the AGP entered into force, negotiations on government procurement were cut. However, from 1987 onwards, a new wave of initiatives came out to develop a multilateral framework after the Uruguay Round of Trade Negotiations was launched under the broader GATT context. In 1986, a Protocol composed of textual improvements was adopted into the 1981 Agreement. The amendments included: the widening of the scope of the agreement from purchase of the products to any procurement of products, i.e including leasing, and renting, and the decrease in the threshold value. The parties decided to work on service contracts, their nature and probable implementations. [45] The improvement works proceeded within an Informal Working Group after 1981. After 1986, the developing countries that were on the side of improving, clarifying and broadening the GPA by including the service contracts, favoured further amendments of the GPA within the framework of the Uruguay Round Negotiating Group on Negotiations on Goods.

One of the dimensions of the broadening was the coverage of the Agreement beyond the central government. It was decided that the regional, local, and other entities whose procurement policies are controlled by, dependent on, or influenced by central, regional or local government would be included in the scope of the Agreement.

In order to enforce the implementation of the Agreement, the Uruguay Round states tried to find agreement on a dispute settlement mechanism.. The one discussed was cross-Agreement retaliation.[46] This option was decided not to be covered in the GPA which is deemed not to

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[45] Annet Blank and Gabrielle Marceau, 31-34.

[46] In GATT context the cross-retaliation means in case of break of the agreement, a possibility emerges for the other side to retaliate by suspending concessions for an area different from the one triggered the dispute.

be part of the Single Undertaking of the Uruguay Round. The risk of selection of government procurement as an area of retaliation, due to a conflict in Agreement on Government Procurement, made the negotiators to exclude this area from retaliation due to conflict under WTO agreement..[47] Currently, the dispute settlement mechanism is operationalized by panels established by the Dispute Settlement Body established under the Dispute Settlement Understanding.[48]

Concerning the preferential treatment for domestic tenderers, the states at the negotiations hesitated to relinquish the privileges for domestic tenderers. In the final GPA in 1996, MFN and NT rules could not became obligations, but a list of entities was prepared to determine the scope of application of the GPA[49]. Thus, there was an attempt to respond to the need for a balance between the domestic preferences of the countries on the one hand and transparency and non-discrimination (in free trade) expectations by the parties on the other. Arrowsmith states that the GPA was concerned with removing trade barriers but not directly through value for money. The tool of transparency, which has function to support non-discrimination, was therefore used in the system. Transparency ensured familiarization of the entrepreneurs with the system and this tool indirectly contributed to value for money and prevention of corruption.[50] In the reconciliation of domestic interests and international

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[47] Annet Blank and Gabrielle Marceau, 41.

[48] World Trade Organisation, Uruguay Round Agreements, Agreement on Government Procurement, Art. XXII Consultation and Dispute Settlement, , http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.

[49] Annet Blank and Gabrielle Marceau, 4.

[50] Sue Arrowsmith "Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha" in *The WTO and Government Procurement*, eds. Simon J. Evenett and Bernard Hoekman. (Glos: Edward Elgar Publishing Limit, 2006), 100-101. For further analysis on the main aim of the GPA, please see Sue Arrowsmith "The National and International Perspectives on the Regulation of Public Procurement: Harmony and Conflict" in *Public Procurement:*

provisions, transparency rules became the determining element. Arrowsmith states that the current balance between flexibility and transparency is the correct way and that it is not as rigid as the UNCITRAL Model Law. On the contrary, it legitimizes flexible rules such as use of different tendering models. Flexibility on the other hand was increasingly favoured in the developed states as USA and UK instead of transparency rules that limit discretion.[51]

During Uruguay Round, the so called Blair House Agreement made by US and EC in November 1992 turned into a conflict when the EC's Utilities Directive came into force and brought the formerly excluded areas of water, telecommunication and transport into the EC's procurement regime with discriminatory provisions in favour of Community suppliers. The response of the US was to apply sanctions against suppliers from the EC. To settle the dispute, a Memorandum of Understanding was formed between the EC and US counterparts where the electricity sector was opened up respectively.

At the Uruguay Round, the agreed GPA rules firstly widened the scope of the agreement since the procurement of goods and services (construction-works), leasing, and hiring arrangements have become subject to the Agreement.[52] Furthermore, both local and sub-central government entities and central governmental bodies are obliged to operationalize tendering according to GPA norms and rules.[53] The scope of the agreement also widened since the signatories committed to apply

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Global Revolution, eds. Sue Arrowsmith and Arwel Davies.(London: Kluwer Law International 1998),1.

[51] Sue Arrowsmith, 108.

[52] Uruguay Round Agreement, Agreement on Government Procurement, Article I Scope and Coverage, http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm#articleI (AccessedOctobre 19, 2012).

[53] Article I Scope and Coverage and Annex1, Annex 2, Annex 3, Uruguay Round Agreement, Agreement on Government Procurement.

MFN and NT principles for products originated in other signatory countries.[54] Secondly, at Uruguay Round, 'transparency' principle was the leading principle such that publication of awards, qualification of suppliers, invitation to tender, selection and award procedures and criteria, time limits, and documentation requirements were restated.[55] Thirdly at Uruguay Round, the special treatment for developing countries was regulated and they were given the right to negotiate for exclusion from national treatment.[56] Lastly, the GPA allowed for preference regime. The reason for giving in to the path for protectionism was that 'good governance' and 'efficiency' principles shall not be at the cost of "fairness and social justice" principles. Hence, states were given the space to moderate the effects of globalization by implementing the preference system.

The preference system could be a tool for promoting both social justice for disadvantaged groups and domestic middle sized companies as well as the patronage system, which had been the focus of criticism by the developed states for the Southern countries. But to pursue a social policy a state has to have significant market power to be able to negotiate substantial preference programs in the GPA negotiating table.[57] It is thus inevitable that developed states rather than the developing states that

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[54] Uruguay Round Agreement, Agreement on Government Procurement, Article II, Article IV.

[55] Uruguay Round Agreement, Agreement on Government Procurement, Article XI, XIII, XVII,XVIII.

[56] Uruguay Round Agreement, Agreement on Government Procurement, Article V. Vivek Srisvastava, "India's Accession to the Government Procurement Agreement: Identifying Costs and Benefits" in *The WTO and Government Procurement*, eds. Simon Evenett and Bernard Hoekman,(Cheltenham: An Elgar Reference Collection,2006), 463-464.

[57] John Linarelli,334-335.

need the preference programs often had the opportunity to avail of the principle.

In parallel with the Uruguay Round, the negotiations for a new Agreement on Government Procurement were concluded in 1993. The agreement was signed in April 1994 and entered into force on January 1, 1996. The GPA was ambiguous in terms of its sector-specific and country specific lists of derogations and was designed merely as a temporal solution. The signatories of the Agreement were Austria, Canada, EU with its member states, Finland, Israel, Japan, Korea, Norway, Sweden, Switzerland, the US, Hong Kong, Iceland, Liechtenstein, the Netherlands with respect to Aruba, Singapore, Switzerland, and Chinese Taipei.[58] Currently, 23 states[59], including Turkey, India and Australia are in observer status. Nine of the observers[60] are negotiating for accession. Ostensibly, the number of the GPA members increased mostly due to EU membership initiative. In its original form mostly developed industrial states, although not all, became party to the agreement while the developing states avoided putting themselves under obligations of the agreement. The number of members of the GPA was therefore limited. In order to increase membership and turn the agreement into a real multilateral agreement, the simplification, clarification, correction of textual errors, increase in text coherence, modernization through the

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[58] World Trade Organisation, Government Procurement: Parties and Observers to the GPA, accessed:10.11.2012, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

[59]Albania,Argentina,Armenia,Australia,Bahrain,Cameroon,Chile,China,Colombia , Croatia,Georgia, India,Jordan, Kyrgyz Republic, Moldavia, Mongolia, New Zealand, Oman, Panama, Saudi Arabia, Sri Lanka, Turkey, Ukraine. Please See: World Trade Organisation, Government Procurement: Parties and Observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

[60] Albenia, Armenia, China, Georgia, Jordan, Krygz Republic, Moldova, Oman, Panama, Please see: World Trade Organisation, Government Procurement: Parties and Observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm.

use of electronic procurement models,[61]and the introduction of gradual accession[62] have been suggested.

Discourse around free trade for government procurement was constituted on the basis of the establishment of a transparent system which brings value-for money via competition, prevention of corruption, increase of efficiency, and mutual export gains. But then, not only did the developing states avoid being a party to the agreement but that also the industrial states, which are party to the agreement, conflicted with each other. For the developing states, the cost of transparency principle, which ensures value-for-money purchases, competition and corruption prevention, is equated with the "liberalization of markets" requirement that is claimed to be a factor for securing the increase in the export potential of the states. But the expectation of an increase in export markets may not proceed in the way it was envisioned. Rather than increasing the range of their exports, the developing states may end up with more imports and the loss of small firms, which are even protected in the industrialized states through secondary goals and SME policies found within the EU Directives. Thus, India for instance, which is an observer country currently, the transparency side of the agreement was worth negotiating for. And although she was willing to accede to it, she nonetheless opposed to extend her obligations to the market access agreement, as the second obligation outweighed the benefits of transparency.[63]

Trionfetti explains why the developing states are reluctant to involving GPA. He used as explanatory framework the Heckscher-Ohlin Model, the

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[61] Sue Arrowsmith, 110-114.

[62] Federico Trionfetti "Discriminatory Public Procurement and International Trade" in *The WTO and Government Procurement,* ed. Simon Evenett and Bernard Hoekman. (Cheltenham: An Elgar Reference Collection, 2006),371-372.

[63] Vivek Srisvastava, "461. For the comparison of different reasons of the develoing countries to be reluctant to sign GPA can be found in Debroy and Pursell, 1997 and Walker, 1997 Please See: Federico Trionfetti,369.

New Trade Theory and the New Economic Geography models which interconnects the procurement and economic interests of the private suppliers.,. Firstly, by using the assumptions of the Heckscher-Ohlin Model, Trionfetti argues that industrial sectors and products are differentiating in both developing states and industrial states. In latter, producers supply more of the goods that states tend to buy and less of the goods states seldom buy. The trend is the reverse in the developing states in that home based demand is very large in these countries. Consequently, political engagement between the domestic suppliers and the government is more of a determining factor. On the other hand, political interplay between the government and the domestic producers are less intense in the industrial states since suppliers do not have a strong interest in the removal of discriminatory procurement.[64] This analysis is valid and shows the behaviour of the domestic suppliers, their impact over the governments in developing states and how much governments are dependent on capital. It partially explains the situation in the developing states, in which some sectors have to be protected from the impact of the domestic suppliers. Moreover, the lack of resistance to remove the discriminatory procurement policy is itself a form of political scenario in industrial countries since, new markets with the initiative of their governments will be provided anyway to the suppliers.

Secondly, on the basis of the new trade theory, Trionfetti rationalizes the discriminatory policies of the developing states on the basis of the size of the home market which is negatively correlated with average costs. In this analysis, the developing states are assumed to be operating in small markets and they are under the burden of higher costs. Governments then, through discriminatory procurement increase the size of the domestic market thus eliminate the cost disadvantage of domestic suppliers.[65] Hence, rather than transparency, the opening of markets

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[64] Federico Trionfetti, 369-370.

and free trade concerns of the parties play a decisive role in becoming a party to the agreement. The examples show the governments' concern for the protection of their domestic market and the welfare of their own people through secondary policies. These policies are not free from the impact of the domestic stakeholders, namely the ones whose right is in favourably discriminated. The contrary argument also uses a similar discourse such as the protection of welfare of the country through the prevention of red tape between the suppliers and governments and protection of the budget of the government and tax payers by deriving value-for-money.

To sum up, historically, government procurement was shaped in the GATT instrument. It affected and was affected by the regional liberalization attempts, particularly by the EC regulations[66]. Likewise, the developed countries and OECD, rather than developing countries, brought the issue to the international sphere. The developing states as well as the leaders of the trend challenged each other and disputes arose over this issue. As a result, GPA remains to be a plurilateral agreement, by being simply an Annex IV of the WTO and reciprocity is the governing principle in which only the members of WTO that signed the agreement are subject to it. However, steps are now being taken for the establishment of multilateral rules with the launching of Working Group on Transparency in Government Procurement at the Singapore Ministerial in 1996 and the initiatives under GATS Article XIII.2. The aim is to negotiate government procurement in services through a Working Party on GATS rules.[67] The developing states questioned the need for an agreement for transparency during the negotiations of Working Group on Transparency[68] and argued for weak provisions without binding rules.[69]

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[65] Ibid.,370.

[66] Sue Arrowsmith and Peter Kunzlick, Social and Environmental Policies in EC Procurement Law, (New York: Cambridge University Press, 2009), 247.
[67] Sue Arrowsmith, 98-99.

In the Doha Round of 2001, the developing states resisted a new agreement on transparency. In the Ministerial Declaration adopted on 14 November 2001 the following decision was taken:

> Negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.[70]

In the 5th Ministerial Conference a consensus was not achieved on the modalities. In 2004 the General Council decided that transparency would no longer form a part of the Doha Round and no work has been carried out since then.[71] Without being part of Doha Round, negotiations on GPA continued. In 2006, negotiators reached an agreement to revise the 1994 text in order to extend the coverage of the agreement, eliminate the remaining discriminatory measures, improve the text in user friendly manner, update procurement practices by incorporating new procurement tools of electronic auction and introducing flexible

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[68] Simon J. Evenett states that separating negotiations on transparency from the general negotiations on foreign aceess to procurement markets did not contributed to the target. Please See: Simon J. Evenett, 170.

[69] Sue Arrowsmith, 202-210.

[70] World Trade Organisation, Doha WTO Ministerial 2001: Ministerial Declaration, Wt/Min(01)/Dec/1, 20 November 2001 Ministerial Declaration, Adopted on 14 November 2001, Accessed 17.01.2012, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#transparency.

[71] Margaret Liang, "Government Procurement at GATT/WTO:25 Years of Plurilateral Framework, *AJWH,* Vol. 1, No. 2 (September 2006): 281. And John Linarelli, 322.

transparency rules, and lastly to increase the number of developing states accessing the GPA regime.[72]

The most prominent expectation from the revision of the agreement was the expansion of the markets through the accession of developing countries, particularly China which joined WTO in 2001. The EU is said to be the most ambitious partner seeking for the revision of the Agreement in order to be able to access contracts from states and provinces of the USA, Canada and Japan railways.[73] In December 15, 2011 the ministerial-level meeting of the committee on government procurement reached an accord to revise the GPA that would extend the public procurement further. The New York Times evaluated the agreement as a "landmark agreement that opens up government-procurement contracts worth as much as $100 billion to more foreign competition."[74] The U.S. Trade Representative Ron Kirk interpreted the expansion of the scope of the Agreement as that for US producers they "will have the opportunity to support more American jobs with broader, deeper access to government procurement work in many of our partner economies."[75] On the other hand, despite the expectations from China, she is still not a party to the agreement and still continues with the negotiations.

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[72] The re-negotiation of the Agreement on Government Procurement (GPA), http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm

[73] The New York Times, Trade Negotiators Push to Liberalize Public Procurement, 12.10.2010, accessed 19.01.2012, http://www.nytimes.com/2010/10/13/business/global/13wto.html?scp=2&sq=Agreement+on+Government+Procurement&st=nyt.

[74] W.T.O. Reaches Deal on Public Procurement — Minus China, 15.12.2011 (Accessed January 19,2012) http://www.nytimes.com/2011/12/16/business/global/wto-reaches-deal-on-public-procurement.html?_r=2&scp=1&sq=Agreement+on+Government+Procurement&st=nyt.

[75] Ibid.

To sum up, government procurement was developed concretely under WTO structure since the 1980s. Although a multilateral agreement was not reached and the states were allowed to determine the particular public entities covered by the agreement, the general WTO principles were transferred to government procurement field and the non-party states were under expectation, if not pressure, to be party to the agreement. The main themes around the international norms were promoting good governance and deterring corruption, and facilitating the effective management of public resources.[76] On the other hand, the main aim of the agreement and the promotion of these norms was to expand the rights of the countries to access to government procurement markets. Towards this main aim the developing countries especially were promised certain advantages and that some protectionist measures would be taken into the standardized system under which their government procurement market could be liberalized. Which of these objectives is emphasised in the reform process of the developed states and developing states will be discussed in the next part.

[76] WTO, Committee on Government Procurement, Ministerial-Level Meeting of the Committee on Government Procurement, (15 December 2011), GPA/112 16 December 2011.

CHAPTER 3

NATIONAL AND REGIONAL REGULATIONS IN THE NORTH

3.1 Introduction

Apart from the international treaties and agreements, the adopted policies in the Northern countries also were also turned into a model for the developing countries. The regulations and laws in the Northern countries also established a model that can be suggested by the international organizations. Meanwhile, the protectionist policies embedded in the public procurement sector was in effect in the Northern countries causing trade related conflicts among these states. The European Commission endured to regulate the field in order to secure the free movement of goods, capital and people, the freedom to provide services, and the non-discrimination principle through the establishment of transparent implementation ensures a competitive free market.

This chapter will first discuss the US reform process and the extent of change in the liberalization of the US procurement market. Second, the EU implementations that extensively affect the practices in its member states since the EU Directives are transposed into national laws will be discussed. These will show which principles and discourse around the reforms are being used for regulating the field.

In the US, the reform in public procurement, which was part of New Public Management Reforms that prioritized management technics and effective governance, made an impact on the contracting agencies. The "Buy American" Act had been the central law that regulated the public procurement market in the USA since the 1900s. But then the USA

emerged as the main figure that advocated for the free trade agreements. Its discourse on reinventing the state through new public management and the establishment of an efficient state went hand in hand with liberalization of trade for public procurement, state interventionism and deregulation in the field. In truth, however, its public procurement market was not liberalized. On the contrary, the US government supported American firms in public tendering bids.

The EU regulations had an impact over both global regulations and the reform agenda of its member and candidate states. The EU regulations were established in order to open the public procurement market for the other member states and the GPA parties. The language or discourse around the reform in each case was the establishment of a competitive market by eliminating state intervention in the sector. The language of the neoliberal reforms was used in the capitalist states but the question that remained to be asked was to what the extent were the aims to eliminate protectionist rules in the field realized.

3.2. USA

The US traditionally protected its government procurement market through a series of laws, particularly the Buy American Act which was enacted in 1933. i The contracting authorities are bound by strict domestic rules on the purchase of goods. the US system can be characterized to be ruled by the principle of accountability.

The Buy American Act was a preferential scheme for the procurement of end products by the federal government. The award of contract to non-US tenderer can be allowed only if US articles are inconsistent with public interest[77] and US end products are not available in the market.

[77] Executive Order 10582 establishes the public interest and reasonabe cost waivers, also agencies have the authority to waive application of preference on

The waivers from the BAA was also related to international and regional trade agreements such as NAFTA, the bilateral agreement with Mexico, the GATT Agreement on Trade in Civil Aircraft, the Canada-US FTA and the Israel-US FTA for a certain amount over the thresholds specified in the agreements.[78]

After 1997 Tokyo Round GPA, the BAA was abandoned for the advantage of the signatories of the agreement. Before the Uruguay Round, significant changes in the protectionist field had therefore been achieved. The Uruguay Round even pushed further for minor changes in the federal law. Despite the advocacy of some groups and pressure from the states to implement their own regulations and the establishment of variety of exceptions due to security concerns, imports were made eligible for procurement of some products and services.[79]

The procurement regime in the US was reformed prior to when the obligations of the GPA went into force. The previous regime was inefficient in terms of time and resource management as it required detailed administrative and bureaucratic work. These inefficiencies and overregulation were created in order to prevent corruption and fraud and also to promote social goals.[80] The initiative for reform in the federal procurement system started as part of the Al Gore's 'Reinventing Government' initiative. The traditional federal procurement[81] system was based on the awarding of contracts to the lowest bid. The system aimed

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public interets group case by case. Please See: ; Joseph Francois, Douglas Nelson and N. David Palmeter, "Public Procurement in the United States: A Post Uruguay Round Perspective" in *The WTO and Government Procurement*, eds. Simon Evenett and Bernard Hoekman. (Cheltenham: An Elgar Reference Collection, 2006), 413.

[78]Joseph Francois, Douglas Nelson and N. David Palmeter, 412-414.

[79] Joseph Francois, Douglas Nelson and N. David Palmeter, 412.

[80] Eric M. Patashnik, *Reforms at Risk: What Happens After Major Policy Changes are Enacted* (Princeton and Oxford:Princeton University Press, 2008)92.

[81]Ibid.,93.

for economic, simple and open management. However, the side result of this system was rigidity and slow and expensive management.

In the 1980s in response to scandals, the Competition in Contracting Act of 1984 and the Procurement Integrity Act of 1989 were enacted, but these also did not facilitate the procedures for procurement officials. Moreover, the public image of contractors remained negative. In the 1990s, the second wave of reform was started to simplify and commercialize the federal acquis. This initiative started during the presidency of Clinton with the Administration's National Performance Review or reinvention of government. Within this framework, the report on procurement reform "From Red Tape to Results" was released by the Clinton Administration[82]. A series of reform laws[83] was released. Although these reforms introduced a series of flexible methods in contrast to developments in the EU and WTO, they did not intend to liberalize the system for foreign bidders. The "Buy America" provisions were untouched and an open procurement procedure was not altered despite the attempts of the reformist coalition. In 1996 the reforms generated opposition from industry trade associations rather than enthusiasm due to concerns of possible harmful effect of the new

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[82] Al Gore, Steven Kelman were the chief leaders in the reform of the system, Kelman was a professor of public management and appointed to the head of Office of Federal Procurement Policy, he expressed the need for deburecratization of the system and claimed the anti-corruption measures make converse effect that officiers are impossible to do something right while their main focus was doing nothing wrong, Please see Eric M. Patashnik, 95-96.

[83] The Federal Acquisition Streamlining Act of 1994, the Federal Acquisition Reform Act of 1996 and the Information Technology Reform Act of 1996: These reforms waved the paperwork while the previous wave in 1990 deregulated the purchasing system, the 1996 wave was to flex the system further particularly in defense procurements that agencies can purchase items more easily, in the award of contracts agencies are allowed to eliminate the unrealistic bids in the early stages, moreover they were allowed for more discretion in information technology procurements including those interconnected to national security matters. The reform created or retained a more flexible system for businesses owned by women, small firms and untouched the buy America provisions to favor domestic products over the foreign products. Please see Eric M. Patashnik, 97-98.

regulations to small businesses.[84] The sustainability of the reforms was thought possible through the human resources dealing with government procurement and their autonomy to implement policies free from intrusive control. However, this autonomy depended on political intentions. The change of political power led a change in the discourse of the new leaders of agencies.

The reforms swung like in pendulum with the change of power and the emergence of scandals.[85] During the Iraq war and from 2004 onwards, the reform agenda shifted with the use of flexible procedures of new procurement regime. . The agenda of Bush administration was "not to make government contracting more business-like, but rather to give more federal jobs to private firms."[86] In contrast to the deregulation of the Clinton administration, the Bush administration prioritized the opening up federal works to the private sector by having the tasks performed via nongovernmental agencies. An observer of the new regime interpreted the aims of the Clinton and Bush administrations as contrary to each other: openness, fairness, economy and accountability on one side and speed and ease of contracting on the other side.[87] New monitoring and auditing measures were instituted after 2006 when the Congressional power passed on to the Democrats due to increasing dissatisfaction. However, these measures did not mean the return to pre-1990 procurement procedures. In fact rather than contradict each other, the reforms after the 1990s even completed each other. In the domestic regulation of the procurement regime the "Buy America" provisions were maintained during the 1990s reforms. The US strategy was to apply the provisions of

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[84] Ibid., 98-99.

[85] Scandals aroused around government contracts signed related with Iraq war (Halliburton, KRB company) and Hurricane Katrina generally due to awarding of contracts without competition. Please see Eric M. Patashnik, 103-106.

[86] Ibid., 102.

[87] Ibid., 106.

the Buy America in the domestic market to strengthen the national champions and also to increase the export rates through government and business coordination.

The governments led the international agreements in containing liberalization of government procurement market that allowed the national champions to enter new markets. Although these two measures seem to be conflicting with each other, they proceeded hand in hand. One side of the trade strategy was to expand the possible markets by signing bilateral free trade agreements with non-WTO GPA members. In these agreements the US insisted on the inclusion of government procurement market and in return allowed this same right to the other states. But as these states were non GPA countries, the US became the only rival to domestic products, while the other party became just one of the many in US tenderers.[88]

The agreements contained American friendly rules. Although the rights appear to be also mutual among bidding companies, the small companies from the developing states have little capacity and resources to challenge the awards in US courts. Then also, although the Buy America rules seemed to have been waived, the buy national norms were still in effect within other laws and practices such that the BA norms continued to prevail. As a result, the US received more waivers than she did and succeeded in reconciling the two strategies.

The other way the Buy America was put into practice was through a government institution, the Advocacy Center. The task of this institution was to help US exporters resolve their problems especially in cases when unfair competition arose. However, in line with the export promotion policy of the 1990s, the Advocacy Center directly helped the US firms in their bids in foreign countries by providing financial backing, business

[88] Linda Weiss, "The Business of Buying American", 708.

counseling or advocacy support abroad.[89] The home front was also protected via Buy America as a legal requirement. First the US did not report the share of public procurement awards between the domestic and foreign suppliers. The US domestic firms were awarded even if they had weaker offers.[90] In some cases, there was collaboration among different institutions and procedures for transparency and fairness were abandoned to favour the national champions.[91]

Weiss and Thurbon also claimed that particularly the procurement in the defense sector was the main tool for the US government to realize developmentalist practices. According to writers, the end of the Cold war and the succeeding period of economic liberalisation did not eliminate the developmentalist procurement practices of the US. As a major contractor the government encouraged the industries in the country for producing differing type of equipment. Procurement was also still a tool for the research and developmental goals of the US. The new method was further commercialization and establishment of capital ventures with high-technology producing small companies.[92]

To sum up, the US reforms aimed to establish effective and flexible purchasing methods and to innovate new measures for developementalism in the post-Cold war era. According to Weiss, the US government impacted upon the international rules according to its developmentalist norms. Research related state aids were taken out of the scope of the agreement. The new trend for the developed states was

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[89] Linda Weiss and Elizabeth Thurbon, "The Business of Buying American" 702-713.

[90] NEC vs Cray referred in Linda Weiss, "The Business of Buying American", 715.

[91] Boeing vs. Airbus referred in Linda Weiss, "The Business of Buying American", 717.

[92] Linda Weiss, *Crossing the Divide: from the Military-Industry to the Development-Procurement Complex*, Paper Prepared for the Berkeley Workshop on the "Hidden US developmental State",(San Francisco: 2008), 5-8.

to make investment in these sectors by becoming purchasers. Then US reforms in the procurement field brought new managerial methods for the contracting authorities but the reforms did not abolish the mind-set behind the Buy American Act as it survived the domestic and developmentalist norms.

3.3. EU Regulations of Government Purchasing

The EU public procurement law was the most comprehensive regional regime for government purchases. It was based on the general principles established in the treaties and developed further through the enactment of Directives and the interpretations of the norms by the European Court of Justice. The four main freedoms of the common market, freedom of movement of goods, capital, people and services, shaped the procurement framework as well. The directives established the thresholds and the procedures for their implementation. But aside from these directives, procurement became a subject of the EU law in relation to the EC Treaty. As a result, contracts that were excluded from the scope of the procurement directives could still be bounded within the EU law and subject to review of European Court of Justice.

3.3.1. General Principles of Community Law that Shapes Public Procurement Regulations in EU

According to Arrowsmith and Kunzlik's categorization, the free movement of goods, freedom of establishment and freedom to provide services are the general principles in the treaties that put the state under the negative obligation of public procurement practices. Article 34 EC, (Article 28 TEC), for instance, regulates the content of "free movement of goods" principle and prohibits "all quantitative restrictions on imports and all measureshaving equivalent effect" between the member states. Arrowsmith and Kunzlik argues that the article applies to both

government contracts and any measures affecting domestic markets including those dealing with supply of goods, works and service contracts. The scope of the article is therefore very extensive. Furthermore, the discussion on ECJ interpretation reveals the scope of the phrase of Article 34 EC, "restrictions and measures of equivalent effect".

According to Arrowsmith and Kunzlik, the ECJ interpretation of the article prohibits direct discrimination, indirect discrimination and non-discriminatory measures that hinder or restrict imported goods. Direct discrimination of imported and domestic goods in government procurement is an infringement of the treaty. This includes requirement to buy some percentage of the good within national market or certain region of the national market or placing imports at a disadvantage. Indirect discrimination of imports occurs when trade is hindered and this creates an impact on imported goods. The indirect discrimination can be an issue when domestic goods are favored in practice. In the literature, a distinction was made between the "establishment of the market" and "restriction to access to market". "Establishment of the market" identifies the procurement decisions that have impact over imported goods without causing indirect discrimination. Hence, the public entities can establish the market by specifying what to buy or with which quality and specifications. For instance they may establish the characteristics of the market by increasing their demand for "green" procurement. However, the ECJ interpretation is stricter according to Arrowsmith and Kunzlick in that "establishment of market" is treated as an infringement of the treaty. ECJ also treats non-discriminatory measures as hindrance to trade. Measures that have equal impact on domestic and imported products are treated as infringement of Article 28.[93] These measures

[93] Sue Arrowsmith and Peter Kunzlick, Social and Environmental Policies in EC Procurement Law, (New York: Cambridge University Press, 2009).

involve contract workforce, qualifications of suppliers, specifications, and award criteria.

Article 36 of the EC treaty, on the other hand, defines the limits of the responsibility of member states for not hindering trade, thus:

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.[94]

In order to claim the derogations stated in Article 36, the discrimination has to be justifiable. Arrowsmith and Kunzlik states that ECJ uses the rule of reason and accepts a broader range of reasons for derogations such as environmental protection, consumer protection, effectiveness of fiscal supervision, and the legitimate interests of economic and social policy. Broadening of derogations is bounded by the rule of reason and proportionality criteria. As the state entities could have differing concerns that can be tied with the measures under Article 36, the possibility for avoiding the use of open procurement methods and the claims of derogations could thereby increase.

Apart from Article 34, Article 37 of the EC also obliges member states to adjust state monopolies in order to ensure that no discrimination emerges regarding the procurement and the marketing of the goods between the member states.

The second basis of the procurement rules within the EC Treaty is freedom of establishment and freedom to provide services, which are

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[94] Consolidated Version of the Treaty on the Functioning of the European Union, Art 36 (ex Article 30 TEC), 30.03.2010, c83/47, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF, (accessed July 26, 2011).

stated in Article 49 and Article 56 respectively. The right of establishment protects the entrepreneurs belonging to a member state to set up or manage an undertaking or a branch, agency or subsidiary in another member state without facing any restrictions. In the procurement context the article has been interpreted as, when an enterprise has been established in another member state, it cannot be restricted from access to and bidding for government contracts.

Complementary to Article 49, Article 56 prohibits the member states from putting restrictions on freedom to provide services other than services that are intended to the enterprises that are established in a member states. According to Arrowsmith and Kunzlik, freedom to provide services is protecting the rights of enterprises acting in another member state on a temporary basis, without having to set up a branch or agency.[95] Freedom of establishment and freedom to provide services can also be subject to derogations on the grounds of public health, public morality and public policy under the rule of reason and principle of proportionality.

The treaties also put forward the positive obligations that can be applicable in the procurement implementations of the member states. These involve the obligation of transparency and equal treatment. Regarding the obligation of transparency, the Treaty does not openly obligate the member states to transparency. But the ECJ put forward the interpretation that the treaty implies the requirement of transparency with the condition that advertising of contracts be ensured in the implementation of the Treaty's non-discrimination obligation. The application of transparency principle is also uncertain in terms of which contracts are covered and on the very content of the transparency. Although the ECJ in the literature obliged the states on transparency,

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[95] Sue Arrowsmith and Peter Kunzlick, Social and Environmental Policies in EC Procurement Law, (New York: Cambridge University Press, 2009), 77.

the broad implementation of this principle was challenged.[96] As a result, the stability in the implementation and interpretation of this rule has not yet been fully established.

To sum up, the procurement regime is in broad terms governed by the principles of prohibition against discrimination on the grounds of nationality, the free movement of goods, the concomitant prohibition against quantitive restrictions on imports and exports, freedom of establishment, and the freedom to provide services. The major principles over these rules are: transparency, equal treatment and non-discrimination, and contestability in the meaning of competition.

3.3.2. Historical Development of EU Public Procurement Regime through Directives concerning Public Purchasing

Currently the public procurement regime in the EU has been regulated by a series of directives. These are: Directive 2004/18 covering service, supply and works contracts which encompasses previous directives that were designed for specific contract types; Directive 2004/17 on the Utilities; and Directive 2009/81/EC concerning the fields of defence and security. Remedies Directives are also in effect to secure the rights of the applicants in cases where there is a need for judicial review.

3.3.2.1. First Initiative: Directives on Supply and Works Contracts in 1970s

Historically the procurement regime developed since the 1970s starting with regulations on works contracts through Directive 71/305 and

[96] Apparently, the court is also either applying internal situation doctrine that does not put the member states strict transparency rules; or by applying the leverage principle, taking cross border interest as the main focus and obliging states to focus strictly on the transparency rule. Please See: Sue Arrowsmith and Peter Kunzlick, Social and Environmental Policies in EC Procurement Law, (New York: Cambridge University Press, 2009).

supply contracts under Directive 77/62. After the foundation of the basic norms in trade in the 1970s,[97] secondary legislation in the form of contract-based procurement directives (coordination directives) started to be established. In 2004 supplies, works and service contracts were consolidated via Directive 2004/18 EC, as well as public utilities via Directive 2004/17. For each contract type different Directives were used.

Until the end of the 1980s, only the supply of goods and works contracts were regulated by the Directives. The implementation of these directives, however, were neither ubiquitous nor were they detailed and well established.

For the supply regime, the first enactment was Directive 70/32 that aimed to integrate markets relating the supply of goods for the public procurement market not only for products originating within the member states but also from third countries whose product is admitted for free circulation within the Community by a member state. The Directive prevented states, territorial authorities and public corporate bodies first, from inhibition of usage of imported products and second, from the preferential treatment of domestic products in the supply of goods with exception to state aids and preferential taxation.[98] The aforementioned free movement of goods principle in the founding treaties of the EC has in fact been re-regulated and detailed with this Directive.

The second regulation for the supply contracts of the public institutions came up when the Council of Ministers adopted the Directive 77/62/EC on the basis of the Articles 100 and 30 EC. Both articles were aimed to

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[97] "coordination" directive" concerns the coordination of provisions laid down by law, regulation or administrative action in respect of the issue; differs from the "recognition directives".

[98] Since the English translation of the Directive is not available in the eur-lex.europa.eu, the information stated in the following reference has been relied on. Christopher Bovis, *EU Public Procurement Law* (Cheltenham: Edward Elgar, 2007), 18.

ensure more effective compliance with the Treaty in terms of adherence to the negative obligations in the Treaty and to impose a number of positive obligations on the member states.[99] The mainstream norms referred to in the Directive were: the advertisement and transparency in terms of upcoming contracts (Article 6.2 and Article 9); prohibition of discrimination created through the technical specification (Article 7.2); the application of advertisement rule and implementation of procurement procedures (restricted procedure in Article 14 and 19; and open procedure in Article 13); establishment of criteria for the award of contracts (Article 25), and participation in tendering (Article 17 and 18). All these norms mainly targeted the establishment of effective market competition. However, the enacted Directives also contained a *de minis rule*. This is a tool to determine a threshold over which the public entities are bound with the rules defined in the Directives. As a result, while the Commission tried for the strengthening of implementations based upon common market norms, a threshold level which creates an exceptions system was prescribed within the Directives. Connecting this type of exception system with protectionism may come to mind but it would be an incorrect interpretation since transparency procedures defined in the Directives would create a burden over the public entities in terms of bureaucratic paper work and effective time management. The Directive 77/62/EC was amended in 1980 through Directive 80/767 in order to harmonize the EEC directives with the international multilateral agreements namely, the 1979 GATT Agreement on Government Procurement.[100] Accordingly, the tenders launched by the central governments for the supply of goods were opened to third country products on the basis of the reciprocity principle of the GPA.

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[99] *Ibid.,*19.

[100] Bovis, "EU Public Procurement Law", 20

The aforementioned directives on supply and works contracts have clarified and detailed the principles in the treaties that oblige states with the principles of transparency, equal treatment, and establishment of competitive market. Through the Directives, the tools and procedures to realize the abstract norms are defined. For instance, procurement procedures (open or restrictive method) are defined. Member states have been obliged with setting up objective criterions to be used in the application of tenders and award of contracts. They have also been required to advertise upcoming tenders and were prohibited from discriminative implementation through technical specifications.

The Directives on the other hand exempted the utilities sector from the scope of the works and supply contracts that are subject to Community law. The utilities subject to the production, distribution and transmission or transportation services for water, energy and bodies administer transport services were not in the cover of the Directives in 1970s. The application of a special regime for utilities and their exclusion from the common commercial policy can be linked to the protectionist policy of member states in those areas where public investment is more intense. Bovis asserts that the late regulation of the procurement activities of the utilities may be because of the high purchasing volume in these sectors which turns it to a domestic industrial policy instrument. By avoiding transparent and competitive regime in these sectors, the member states thus sustained the implementation of preferential procurement methods in certain strategic national industries.[101] According to Bovis, the requirements for high technology and capital in the sectors would leave the European market vulnerable due to the possibility of a high flow of direct investment made by Japanese and American entrepreneurs whose high technology industries are more advanced and sophisticated.[102] On

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[101] Christopher Bovis, "EU Public Procurement Law", 27.

[102] *Ibid.*, 29.

the other hand, in the Directive's exclusion of these sectors is explained by the different modes governing these services in the member states, such as: being established under either public or private law and operating through different legal status either under public undertaking or with separate legal personality.

3.3.2.2. White Paper on the Completion of the Internal Markets 1985

The White Paper of the Commission in 1985 addressed the aim of achieving a single market and the completion of the common market by 1992. With this objective, the Commission classified the measures needed to be taken such as the removal of physical, technical and fiscal barriers. Public procurements come up under technical barriers. The Commission stated that despite the removal of the border controls an open market cannot be achieved unless the technical barriers are abolished. Where public procurement represents a significant part of the GDP of the member states, the authorities turn to technical barrier as a means to keep their purchases and contracts within their own country despite the enactment of the coordination directives in the previous decade.[103] Relying on statistics, the Commission found out that those Directives for the procurement of supply and works were not being applied in the member states effectively and extensively. The suggestions made in the White Paper were: the improvement of Directives to increase transparency, particularly publication of the awards of contracts; establishment of prior information system for the upcoming tenders; revision of the thresholds in the Directives; policing of compliance from the tenders and awards; extension of the scope of the Directives, particularly to the service contracts; and taking necessary steps to deal with the complicated situation in the utilities sector in order to extent

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[103] COM 85 310 Final, Completing the Internal Market White Paper From the Commission to the European Council,23.

coverage to these fields (telecommunication, energy, transport, water) before 1992.[104]

3.3.2.3. Amendment of Directives in 1990s

The proposal for the completion of the procurement regime in the White Paper led the Commission to amend the Directives. The coverage of the public procurement regulation in the Community level was expanded with the inclusion of service contracts and the utilities sector. By1993, three coordination directives on the basis of contract type (works, service and supply), one utilities directive, and two remedies directive were regulating the procurement regime.

The first step taken for the amendment of the current regime during the second part of the 1980s was the adoption of Directive 88/295 for public supply contracts and Directive 89/440 for works contracts. The reason for the amendment was contained in the White Paper of the Commission and the GATT Agreement on Government Procurement. The aim was to achieve stricter enforcement of the free movement of goods principle. The amendments were related to procedures: the adoption of common rules in the technical field to supplement the new policy of mutual recognition of national requirements; the harmonization of technical standards[105];

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[104]Ibid., 24.

[105] Article 8 of *Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC*, The Council of The European Communities. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988L0295:en:NOT. (Accessed September 3,2011); Article 10 in OJ 1989 L 210, *Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts*. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri=OJ%3AL%3A1989% 3A210%3A 00013A0021%3AEN%3APDF.

the extension of time limits and clarification of procedures of publication of advance information on annual procurement programme and notice of award decisions[106]; the revision of the calculation of the threshold value of the contracts [107]; and lastly, clarification of the exempted sectors from the Directives in order to put an end to the divergent interpretations of member states[108].

A new procedure, which were already common in the member states, was introduced to the Directive most probably to retain implementation of the Directive within the borders of the member states. Negotiated procedures whereby only those suppliers invited by the contracting authority would submit tenders had been allowed. The open procedure, by which all the interested parties can submit offers, was at the same time taken as the default norm.[109] Moreover, through the amendment of Works Directive 89/440, the scope of the Directive was widened to the entities subsidized by the State that were not part of the Annex I of the Directive which identifies a list of bodies and categories of bodies subject to the provisions of the Directive (Article 1a)[110]. Accordingly, when the States subsidize 50% of an entity awarding a works contract, member states must comply with the Directive. To sum up, comparing with the previous period, the subject matter of the regulations were similar but the Commission interpreted the norms in a broader perspective but on the other hand, a detailed and complex system with the exemptions and inclusions emerged. Beyond the amendment of the Directives of the previous period, the most significant development within the EU law of

[106] Article 9, 10 and 12 of Directive 88/295 ; Article 5a of Council Directive 89/440/EEC.

[107] Article 5 of Directive 88/295, .

[108] Article 3.2 and 4 of Directive 88/295,

[109] Article 2 of Directive 88/295; and Article 5 of Council Directive 89/440/EEC.

[110] Article 1a of Council Directive 89/440/EEC.

the 1990s was the regulation of the government service purchases and government purchases in the utilities sector.

Since one of highest proportions of the GDP allocated for public procurement was investments in the utilities sector, procurement activities in this sector (entities operating in water, energy, telecommunications and transportation sectors) were regularly excluded from the community regulations until 1992 when Commission targeted to complete the common market,. As a step further in completion of the common market the public procurement regime was introduced to utilities sector by the Utilities Directive 93/38 regulating service, works, and supplies contracts in this sector. The reason for introducing a special regime for the utilities sector is explained firstly by the high value of the contracts in these sectors. The arrangement of the *de minimis* rule[111]according to the needs of the sector allowed a certain level of protection in the utilities sector. If the utilities sector was subjected to the provisions of the service and works contract, whose threshold levels would be very low for the contracts in utilities, the sector would be completely subjected to the requirements of the Directive. On the other hand, increasing of the threshold levels to the needs of the utilities would not be promising since such an act would lead to the elimination of the standard works, and supply contracts from the scope of the Directives.[112].

Not only the Commission required the liberalization of the excluded sectors in the White Paper.; The European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy also made a similar

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[111] Why de minimis rule is important can be explained with two core reasons; first the thresholds of value leaves an area for the local contractor to act and bid, this can serve to the policy makers to support the medium and small entrepreneurs; second, the de minimis rule lessen the administrative burden on contracting authorities, and quicken the process as the international tendering processes creating a high cost over the contracting authorities.

[112] Chritopher Bovis, "EU Public Procurement Law", 26.

suggestion to its report to the Parliament on Recommendation on Telecommunication in 1980 and 1984 Communication to the Council on public supply contracts. Further, the European Parliament in its Resolution shared the same view and called the parties to take similar action. Upon the Recommendation 84/531 of the Council, the Commission opened the supply of telecommunications sector to community level competition through Directive 88/301[113].

The exclusive directive on utilities came through Directive 90/531 which was adopted by the Council. The entities covered by the directive were not defined on the basis of the division on public and private law since the utilities were subject to different law systems in the member states. In contrast to the previous contract-based-directives, public bodies, undertakings and non-public authorities, and undertakings acting with a right granted by the member states within the water, energy, transport and telecommunications sectors were subject to the Directive.[114]

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[113] Ibid., 28.

[114] (Article 2) of Council Directive 90/531:
" a)the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:
(i)drinking water, or
(ii)electricity, or
(iii)gas or heat, or the supply of drinking water, electricity, gas or heat to such networks;
(b)the exploitation of a geographical area for the purpose of:
(i)exploring for or extracting oil, gas, coal or other solid fuels, or
(ii)the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;
(c)the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.
(d)the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services." OJ 1990 L 297, Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0531:EN:HTML

Although the coverage of the Directive seemed very wide, it was equipped with a variety of exemptions particularly purchases made for radio-television broadcasting. Bus transportation was also exempted from the Directive. Due to the extensive definition of exemptions, the Directive created fragmented areas of coverage. The reason for creation of so many exempted areas might be to leave a space for the local sources of supply and to promote regional development.[115]

Excluding the exemptions, the EC Utilities Directive was created within the atmosphere of the establishment of an international procurement regime. The GATT regime introduced a regime for reciprocal accession to international public markets. However; Article 29 of the Directive 90/531 created another preferential scheme within the EU. It provided that contracting authorities were permitted to reject the proportion of product originating from third countries. When two tenders are equivalent, or if the price difference does not exceed 3 %, the member states were permitted to use the preference for the EC offer/product instead of the one originating from a third country.

While the Commission was making preparations for 1992 single market target, the developments in the international procurement procedures became part of the Community law. The completion of the single market in 1992 came hand in hand with the inclusion of the previously excluded areas to the Community law. These included the regulation of the service purchases by the Community. Directive 92/50 attempted to open the service sector to the intra-community competition. This Directive required identical transparency rules such as publication of procurement plans, procurement notice in the official journal of EU, and community wide advertising of tenders to prevent discrimination; prohibition of discrimination by indicating a certain product in technical specifications; and lastly, establishment of objective criteria and procedures for the

[115] Christopher Bovis, "EU Public Procurement Law",33.

tendering period and the award of contract. The Service Contract directive also excluded a long list of fields[116] from the scope of the Directive that prevented the establishment of a single complementary EU procurement regime and the maintenance of protectionist values for the SMEs. In effect, the development of the EU regime was based on free movement of goods and competitiveness but it was also not completely practiced within due to its Directives' many exemptions.

The fragmented structure of the public procurement directives was handled in 1993 for the utilities, works and supplies contracts. A consolidated regime was introduced with three Directives and then amended afterwards when the current regime was established in 2004. In the there was a widening of the enforcement areas of public procurement in the European Community law, a need arose to regulate the cases of infringement of the Community law. The remedies regime was then introduced to ensure the guarantees of transparency and non-

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[116] Contracts that have been excluded from the application the Directive are: peculiar service component within the supply and works contracts and
" (iii) contracts for the acquisition or rental, by whatever financial means, of land, existing buildings, or other immovable property or concerning rights thereon; nevertheless, financial
service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;
(iv) contracts for the acquisition, development, production or coproduction of programme material by broadcasters and contracts for broadcasting time;
(v) contracts for voice telephony, telex, radiotelephony, paging and satellite services;
(vi) contracts for arbitration and conciliation services;
(vii) contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, and central bank services;
viii) employment contracts;
(ix) research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority." Council Directive 92/50/EEC of 18 June 1992 Relating To The Coordination Of Procedures For The Award Of Public Service Contracts,
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992L0050:20040501:EN:PDF. Accessed June 13, 2011.

discrimination. The Directive 89/665 EC was amended in 2008. In its current version, the Directive revised the service, supply and works contracts that are determined in the 2004 consolidation directives. Council Directive 92/13, which was amended in 2008, also put forward the review procedures, standstill periods, time limits for applying review, penalties in case of infringement, and correction method in the application of Community rules for the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

3.3.2.4. Green Paper on Public Procurement in the EU: Exploring the Way Forward, European Commission 1996

Since the directives amended in 1990s did not respond to the needs and targets in the public procurement market, the 1996 Green Paper of Commission put forward the challenges of effective public procurement implementations. The Green Paper of 1996 emphasized the significance of the establishment of a coherent community level public procurement regime and the relationship between the regime and the other Community policies. The objective of the procurement policy was then merged with the objectives of the single market. Both were assessed as the means for creating competitive conditions that would ensure long term sustainable development, job creation, achievement of value-for-money for tax payers by selecting the best bid without any discrimination, and the cutting of the budget deficit in line with the requirements of the Maastricht criteria. The subordinate benefits of the public procurement regime are the establishment of fair, transparent, non-discriminatory procurement system that obliterates fraud, and corruption.[117]

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[117] Green Paper on Public Procurement in the European Union: Exploring the Way Forward, European Commission 1996, 3-4.

In 1996 the Commission assessed that the procurement regime made contribution to the practices in the procurement market, particularly with the increase in the transparency of the contract award procedures, the number of procurement notices published in the Official Journal of the European Union, and the structural change of the firms (entering in mergers and joint ventures).[118] However, the Commission found that the procurement regime was still not being completely implemented. The reason given by the Commission was the non-compliance of national laws with the Directives. The reason why the directives did not create the intended result according to the Commission was the lack of implementation and faulty or unqualified implementations. The faulty implementations were: excessive use of the negotiated procedure, the accelerated procedures with short deadlines for the tender submissions, unsatisfactory quality of notifications, and confusion in the evaluation of the tenders particularly evaluation of selection and award criteria which prejudice the implementation of objectivity criteria. Apart from these, the contracting authorities avoided the use of the general norms of the procurement regime when their tender is lower than the threshold determined in the Directives. Contrary to the provisions, they also set individual norms such as change in technical specifications after the publication of the procurement notice. These failures in the implementation of the Directives are equal to the non-application of the rules. The Commission suggested a more strict enforcement measure starting with effective monitoring and extensive usage of the remedies directive in order to settle the disputes by sanctions.

The Green Paper also put forward the other community policies in relation with the procurement regime in order to prioritize these policies in the future design of procurement regime. The Commission laid stress on the small and medium sized entrepreneurs who face with challenges

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[118] Ibid.,5, in reference to the Document COM (96) 520 Internal Market 1996 Review.

in the bidding and contract award phases. The proposed measures were the training of stakeholders, promotion of subcontracting, and establishment and implementation of the standardized specifications in the Community level. In terms of environment and social policy, the Commission suggested pursuing European social policy on employment and social protection, as well as environmental protection in the tender evaluation and preparation. The Commission lastly suggested the extension of the procurement procedures to the excluded areas such as defense procurement and another spheres where the Community budget has being used, namely to structural and cohesion funds.[119] In this respect, the Community placed particular importance to the Central and Eastern European Countries, both on their legislative alignment and personnel training through the technical assistance projects carried under PHARE programme.[120]

The Commission Communication of 1998[121] is composed of the analyses of the responses to the questions raised in the Green Paper by the stakeholders. This document clarified the solutions suggested against the poor implementation of the procurement regime. Three main targets suggested were: simplification of Directives while maintaining their basic structure, adapting them to the new electronic age by using information and communication technologies, and aligning the procurement regime with the social policies of the Union. The simplification sought by the measures were facilitation of dialogue, introduction of flexible procedures, the widening of rules by taking account the concessions, and

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[119] Ibid., 29-43.

[120] Ibid., 48-49.

[121] Commission of the European Communities.Commission Communication, Public Procurement in the European Union, Brussels March 11, 1998, COM (98) 143. Accessed February, 10, 2012. http://ec.europa.eu/internal_market/publicprocurement/docs/green-papers/com-98-143_en.pdf.

public-private partnerships. [122] Of great interest to this thesis is one of the suggestions made by the Green Paper and further highlighted in the Communication: setting up of the monitoring through independent authorities to deal with disputes in the public procurement field. These independent authorities would share the burden of work of the Commission in fighting irregularities in the execution of the contract award and corruption in the procedure for awarding the contract.[123] These institutional structures were later on adopted by the candidate countries. Besides the establishment of Turkish Public Procurement Authority, the public procurement agencies in Bulgaria and Poland were created prior to their EU membership in 2004 to supervise and monitor the system.

3.3.2.5. Last and Current Regime: 2004 Directives, Defence Directive

Currently, the remedies directives, the comparatively recent Defence Directive and Public Supplies, Works and Service Directive 2004/18/ EC, and the Entities operating in water, energy, transport and postal service sectors Directive 2004/17/EC have constituted the public procurement market regulations in secondary law.

The 2004 Directives on utilities and the supply, service and works contracts were based on the norms and policies established in the 1996 Green Paper and the 1998 Communication. The Directives attempted to

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[122] Ibid., 5-12.

[123] Ibid., 12-14. A recent study on the motivations and factors on compliance and non-compliance to directives make similar conclusions that internal incentives, positive impact of the expected gains and organisational pressure has more impact on comliance but the same effect of compliance may not be achieved through certainty and severity of sanctions or resistance of suppliers. Please See: Kees Gelderman, Paul Ghusen, Jordie Schoonen, "Explaining Non-Compliance with European Union Procurement Directives:A Multidisciplinary Perspective", *JCSM* Vol 48, No 2 (2010):, 250-259.

simply the previous fragmented structure of the Directives. The result is the alignment of service, supply and works contracts into one Directive and the maintenance of a separate regime for utilities. This separation between utilities and the public sector designed a dichotomy.[124] However, the separate defence procurement showed that the EU public procurement regime applied differentiated levels of protection and free market between the sectors with critical importance in terms of economic, industrial and security consideration on the one hand and the remaining part of the public procurement market on the other. Bovis argues that the maintenance of a distinctive regime for the utilities sector paved the way for influencing the purchasing behaviour of the entities that they could still apply anti-trust laws and nation-based sector specific regulations while complying with the EU procurement regime.[125]

The merger of the rules for the supply, service and works procurement procedures represented a successful attempt for a supranational codification and harmonization of the domestic regal regimes. This codification process in EU regime which continued since the 1970s has been said to be a constitution of a rationale for legal expectations and certainty and also a contribution for legal efficiency and a compliant regime.[126] The legal efficiency, according to Bovis, was augmented with the congruence of the establishment of the Directives and the enlargement of the EU. The new member states could directly adopt a single and well-disposed regime instead of the precedent fragmented regime with higher uncertainties[127]. In this manner, the new regime could achieve a fully integrated public procurement sector by abolishing

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[124] Christopher Bovis, ”EU Public Procurement Law,” 50.

[125]Ibid.,51.

[126]Ibid.,50.

[127]Ibid.

any non-tarriff barriers[128]. Hence, the new member states were put under the burden to open up their market in more quickly than the gradual way as experienced by the 'old' member states in the 1970s.

In the 2004 Directives, the coverage of entities eligible to participate in tendering was extended. New agreement and award procedures[129] were defined by augmenting the use of electronic means in the tendering process. Moreover, the new Directives emphasized that sustainable development[130], protection of the environment, and European social policy goals should be taken into consideration in the evaluation of tenders and in the establishment of technical specifications.

The latest development in the Communities' public procurement regime was the enactment of the Defence Directive whose basis was being prepared since the 1998 Communication in which a suggestion was raised up to resolve the sensitivity around the security issue. It suggested the division of materials to categories according to their level of secrecy and intention of purchasing for the armed forces or military usage.[131] Later, the Commission specifically addressed the regulation of the public

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[128] Ibid., 146.

[129] Article 29, Article 32, Article 33, Article 42 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:134:0114:0240:EN:PDF . (access November 14, 2011).

[130] Article 3 details the elements of sustainable development: public policy, public morality, public security, public health, human and animal life, and plant life. These include alignment with the economic, social and environmental policies of the Community that the compliance with Directives are conditioned to act according to social inclusion norms, elimination of discrimination and positive discrimination for disadvantaged grous; promotion of employment opportunities and encouragement of small and medium sized entreprises through subcontracting and concession practices.

[131] 1998 Commission Communication, 26.

procurement regime in the defence field.[132] Directive 2009/81/EC was enacted in order to enforce the general public procurement principles of the Community, particularly with respect to competitiveness in the supply of military and sensitive equipment and the work, supply, services related with this equipment. However, this Directive was bound by the limits of the Article 346 of the EU Treaty which allows member states to exclude the application of the other provisions of the Treaty in the certain situations.[133] The definitions of "military equipment" in Directive 2009/81/EC and in the Article 346 of TFEU were in conflict and needed to be reconciled. The Directive could only be made applicable if "contracts for military and sensitive equipment and related works and services fall within the scope of the Directive unless they are excluded under Article 346 TFEU"[134]. With respect to the security dimension, the Directive also put deliberate burden over the contractors for the after-sale services of equipment in order to ensure the security of supply (Article 47)[135] and the security of information (Article 7). As a result, with the enactment of the Defence Directive one of the fields for which the nation states insist to keep the right for market protectionism and use any exceptional clause

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[132] Please See: Commission of the European Communities, *The Green Paper Defence Procurement*, COM(2004)608 final,2004, http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0608en01.pdf, Communication of 2006 on the application of Article 296 of the treaty in the field of defence procurement, and the Commission Communication of 5 December 2007 on a Strategy for a stronger and more competitive European defence industry.

[133] "(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes." Article 346 of the EC Treaty

[134] Ciara Kennedy-Loest and Nicolas Pourbaix "The New EU Defence Procurement Directive" *ERA Forum,* 11 (2010)402.

[135]Ibid., 406.

in international agreements[136] is integrated in the procurement regime of the EU and the member states are obliged to incorporate the provisions of the Directive until mid-2010.

A comparatively new method, different from the traditional procurement methods of governments called PPP (public private partnerships), had been drawing attention as the public sector benefitted from the private sector's works or services. Hence, the term started to come up in the strategy papers more frequently. The cooperation was induced by budgetary constraints on the part of the public sector. Bovis argues that a public market based on the norm of public interest was processed by the state within the monopsony/oligopsony character. Under the neoliberal economy rules, the governments departed from the traditional corporatism by means of a contract that created the process of either privatization or contracting out. In both ways the traditional corporatist market was dispersed and a new market place emerged.

In the case of privatization, the state transfers its assets but maintains its competence with controls and regulations. Privatization is accompanied by simultaneous regulation of the state, since the state needs to ensure that the privatized industries pursue the public interest. In case of contracting out, the state does not transfer its assets and operations, but transfers the undertaking. Due to budgetary constraints, the states deliver services from an outside economic operator rather than through insourcing. As a result, through outsourcing, either by means of privatization or contracting out, the state departs from being asset owner and service deliverer.[137] The contractualised governance requires the

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[136] Please see offset agreements in GPA, offset agreements are assessed as discriminatory and prohibited as a rule. However, developing states in transition period in accession to GPA and defence sector is exempted from the general rule. Christopher Bovis, "Public-Private Partnerships in the Defence Sector: How Offset Agreements Interface Between the Private and Public Stakeholders" *EPPPL,* 4 (2008): 205.

state to leave its direct relationship with the service receiver. It then turns into an arbitrator between the contractor and the service deliverer.

PPPs are the tool on how governments can get new functions while transferring the responsibilities for public service to private companies. Public-Private Partnership has been more intensively discussed in the first decade of the 2000 and widened from works directive to other secondary laws. PPP is applied in two forms, either in concession model (contractual format) or joint-venture model (institutional model). The contractual model of PPP proceeds from a contractual link between the contracting authority and the private sector who is assigned with tasks and responsibilities through a concession contract or other arrangements such as private finance initiative. Private Finance Initiative leans on the use of a public infrastructure and the finance of private sector in the delivery of a public service. A privately financed project is designed, built and completed and then, operated by the private sector. In the process of operation, the cost of the project can be compensated by the users of the service with direct charges over the service.[138]

The difference between concession and public procurement is the risk taken over by the private sector in return for the right of exploitation of the construction or the service.[139] In the second model of the PPP, the institutional model, public and private parties cooperate jointly to complete a task within an entity. As the public sector is a direct party to the joint-venture, it has more presence and visibility in the decision making bodies and more control over the development of the project.[140]

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[137] Christopher Bovis, "Public Procurement in the European Union", 38.

[138] Ibid., 38 and Bovis, "EU Public Procurement Law", 179-204.

[139] Communication From the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions. COM (2005) 569 final, 6.

[140] Christopher Bovis, "EU Public Procurement Law", 56.

This current method of procurement contributes to the transformation of citizens to customers since "public service" functions of the state is being transferred to private entrepreneurs to whom the management rights over the services to be provided are transferred.

The Commission published a Recommendation for the use of PPPs in line with Treaties and the Public Procurement directives. Furthermore, a separate PPP directive was proposed by the Commission to the Parliament and the Council.[141] In the implementation of the concession regime, the EU aimed to transmit the risks and responsibilities of the work to the private parties. The use of Directives was suggested to the member states that were bound with this previous rule in the award of contracts.[142] The proposal for the concessions directive also aimed to establish a flexible procurement regime in line with the nature of the concessions.

After the 2008 global economic crisis, however, the EU policies in the field seemed to transform into a more protectionist character. One of the latest developments on the agenda in 2011 was first, the establishment of measures to protect EU contractors in the EU. Second, the EU community started working on an alternative model for public private partnership. The European Commission made a proposal to EU Parliament and the Council for regulating the access of third-country goods and services to the Union's internal market. Under this plan, the Commission would be allowed to approve the applications of contracting

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[141] European Commission, Proposal for a Directive of The European Parliament and of the Council on the Award of Concession Contracts, Brussels, 20.12.2011, COM(2011) 897 final 2011/0437 (COD) (Accessed: 14.04.2012), http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM2011_897_en.pdf.

[142] Commission Interpretative Communication on the Application of Community Law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), Brussel 05.02.2008, (accessed: 14.04.2012). http://ec.europa.eu/internal_market/publicprocurement/docs/ppp/comm_2007_6661_en.pdf, 6-7.

entities and to exclude tenders where the 50% of the tender originate from non-European countries for the contracts equal to or above the EUR 5.000.000 estimated value. The Commission would be bound by the international agreements in its decision but Article 6 points out that the reciprocity principle would be operationalised to restrict the tenders from the third countries who are applying restrictive tender procedures and domestic preferences systems in their national legislations.[143] The Commission justified this approach through the impact assessment report in which the opinions of representatives of NGOs, trade unions, contracting authorities and businesses were taken into account. The Commission and the Commissioners underlined that EU has the most liberal public procurement market and that 84% of the EUR 420 billion of market is open to bidders from the third countries. This ratio though decreases sharply for US, Japan and especially for the countries that are not party to the GPA.[144] Moreover, it stated that if a country continuously restricts the European contractors in tendering, the Commission may limit the access of companies from this country to the EU market or impose a price penalty.[145] This decision of the Commission was advocated by the Michel Barnier, the European Commissioner responsible for the Internal Market and Services, who stated: "The EU should no longer be naïve and should aim for fairness and reciprocity in

[143] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Access of Third-Country Goods and Services to the Union's Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries, Brussels, 21.3.2012 COM(2012)124 final, (Accessed 07.04.2012) http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf.

[144] European Commission, Fair play for public procurement - 02/04/2012 (accessed 07.04.2012), http://ec.europa.eu/news/economy/120402_en.htm.

[145] Ibid.

world trade [...] The Commission will remain vigilant in the defence of European interests and European companies and jobs."[146]

Although the proposal was made by the Commission, opposing views arise among the member states, especially from the Germany who did not prefer a trade war considering its trade surplus. It was supported by France in the eve of its Presidential elections. The main and strongest argument against the proposal was that the production of the European companies also originated from third countries that these EU companies would also be discriminated in the implementation of the law.[147]

The second measure taken by the Commission in facing the economic crisis was the 'public-public cooperation' in which the public entities perform the tasks with their own resources instead of launching procurement process or establishing public private partnerships.[148] The Commission by evaluating the Regulations and Case Law pointed out that the public entities can cooperate in the performance of the public tasks without finance transferring, and no particular legal form is needed to be institutionalized in this process which means the process is an exception to the public procurement regulations. [149]

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[146] European Commission - Press release, European Commission levels the playing field for European business in international procurement markets (Accessed 07.04.2012), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/268&format=HTML&aged=0&language=EN&guiLanguage=en.

[147] Charlemagne, " Trade policy in the EU: Germany's blast at Barroso", The Economist, 22.03.2012 (accessed 07.04.2012) http://www.economist.com/blogs/charlemagne/2012/03/trade-policy-eu-0 and Charlemagne, "Unfree Trade", Economist, 24 March 2012, (Accessed 07.04.2012), http://www.economist.com/node/21551064.

[148] The availability of capital market execution of PPP has drop down with the global financial crisis according to the Report of the European PPP Expertise Centre, March 2010, "Capital markets in PPP financing", (Accessed 14.04.2012), http://www.eib.org/epec/resources/epec-capital-markets.pdf.

3.4. Different practices of public procurement in the North

The enactment of Directives and their simplification and interpretation e was a phase in the composition of the procurement regime. But how the system functioned, to what extent the member states transposed the directives and applied them in a comprehensive way, whether it has become an issue in the enlargement process, and to what extent real changes have taken place constituted another phase. While the western part of the EU was still protective up to the last decade of the previous century, they were also enthusiastic to enter new markets, which can be the new member states in Central and Eastern Europe that had a legacy of insourcing rather than outsourcing.

In a report in 2004 on functioning of public procurement markets, the Commission noted the variation of transparency rates between member states[150]. The rate of publication of public procurement tender and award notices doubled from 1995 to 2002 but this rate was not more than the 20% of the total. The member states favoured foreign firms when they applied via local subsidiaries[151] but the award for direct cross-border

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[149] Please see: European Commisssion, Commıssıon Staff Workıng Paper Concerning the application of EU public procurement law to relations between contracting authorities ('public--public cooperation'), (Accessed: 07.04.2012), http://ec.europa.eu/internal_market/publicprocurement/docs/public_public_cooperation/sec2011_1169_en.pdf

[150] Greece, Spain and UK have the highest transparency rates with 46, 24 and 21% of their estimated public procurement value had published; Germany, the Netherlands and Luxembourg are in the other side of the scale with 8,9 and 13%. Please See: A Report on the Functioning of Public Procurement Market in the EU: Benefits from the Application of EU Directives and Challenges for the Future" 03/02/2004, 8-9.
http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf(accessed: 03.09.2011).

[151] Subsidies are firms that are located and bidding in a country different from where their headquarters or parent companies are based.

public procurement remained marginally low.[152] These suggested that prohibition of discrimination on national grounds had become applicable but also freedom of establishment was not being applied in comprehensive way. The other significant finding in the report was about the share of SMEs in the award of contracts. Successful SMEs in the award of contracts constituted a high share but this rate was low compared to the rate of SMEs to total number of firms.[153]

In terms of price levels, the opening of public procurement markets was associated with the decrease of prices. However, the risk of creating a closed market within the borders of EU was also raised. The establishment of a single European market turned into the favoring of industries located in the EU and against third country firms. And so, the expectation from liberalization did not materialize. The report expressed that the regime was achieving the target as the level of prices were decreasing with the application of the directives.[154] Either the quantities imported increased or the prices decreased. These two variables do not need to complement each other. Foreign bidders in a foreign country may decrease the price levels without winning the contract.[155]

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[152] "A Report on the Functioning of Public Procurement Market in the EU: Benefits from the Application of EU Directives and Challenges for the Future" 03702/2004, pp.2-13. Accessed 03.09.2011.
http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf.

[153] Ibid., 20.

[154] Ibid., 16.

[155] Quantitive study on the European trade statistics after 1993, trade figures of 43 product groups shows Single Market affects the price levels and quantities imported. Please See: Jorgen Ulff-Moller Nielsen and Lars Gottlieb Hansen "The EU Public Procurement Regime- Does It Work?", *Intereconomics*, (September/October 2001):260-263.
For further theoretical background on effect of liberalisation and home-biased procurement on trade levels: Baldwin (1970), Trionfetti (1997,2000), Miyagiwa (1991), Francois, Nelso and Paltemer (1997) in Federico Trionfetti" Discriminatory Public Procurement and International Trade" in *The WTO and Government Procurement*, eds. Simon J. Evenett and Bernard Hoekman.

The establishment of free trade rules in public procurement regime within EU and its compatibility with other international rules were justified on the basis of value-for money argument which is related with competitiveness and profit making for companies. Thus, while the governments sought savings, the multinational companies entered public procurement markets through the security of procurement regulations.

Regarding the implementation of the neoliberal reforms in the US, the US government intended to increase in house competitiveness to enable the contracting authorities a more efficient purchasing system. The 2010 contracting reform intended to decrease the number of the contracts that were awarded without competition, which was common in the period between 2000 and 2008[156]. For this reason, the amendments in the implementation directly targeted the establishment of competition, efficiency and effectiveness. The US put itself under the international obligations on the basis of its intention to enter in new markets. The US authorities appreciated the 2011 amendment in the WTO GPA since it

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(Cheltenham, Northempton: An Elgar Reference Collection, 2006), 363 -369. And Simon J. Evenett," Is There A Case For New Multilateral Rules on Transperancy in Government Procurement?" in *The WTO and Government Procurement,* eds. Simon Evenett and Bernard Hoekman. (Cheltenham, Northempton: An Elgar Reference Collection,2006),166-171 for equilibrium analysis of the procurement regimes.

For the costs of liberalisation of government procurement please see: Vivek Srisvasta who discussed costs of transforming the existing system; leaving up the benefits of preferential treatment, which are theoratized through New Trade Theory in Krugman 1988, Helpman and Krugman, 1986, Branco 1994, McAfee and McMillan 1989, Chen 1995, Laffont and Trioe 1991; third cost of the liberalisation is infact a challenge to its arguments that discrimination may not signify a restriction to trade so indiscrimination may not bring the expected benefits discussed in reference to Baldwin, 1970, 1984, Baldwin and Richardson, 1972, Matto 1996 . Please See: Vivek Srisvastava "India's Accession to the Government Procurement Agreement:Identifying Costs and Benefits" in *The WTO and Government Procurement,* eds. Simon Evenett and Bernard Hoekman, (Cheltenham: An Elgar Reference Collection,2006), 462.

[156] Peters Orszag, "Cutting Waste and Saving Money Through Contracting Reform" *White House web site*, 07.07.2010 (Accessed 11.04.2012) http://www.whitehouse.gov/omb/blog/10/07/07/Cutting-Waste-and-Saving-Money-Through-Contracting-Reform

would increase the market opportunities for the US companies. The US trade Representative Ron Kirk stated thus:

> Government procurement represents one of the most rapidly expanding areas of opportunity for traders of goods and services. With the revision of the WTO Government Procurement Agreement, suppliers in the United States will have the opportunity to support more American jobs with broader, deeper access to government procurement work in many of our partner economies.[157]

The main themes regarding the implementation of the neoliberal reforms in the public procurement fields had therefore been constructed according to needs of the economies of the Northern capitalist states. Since the main aim of the states was to increase profitability and economic growth, the adopted norms were shaped in line with this main target. However, the regulations around the public procurement were not depolitical or universal since the Northern capitalist states kept the intention to boost their economies by supporting domestic capital groups. While the procurement norms were defined as a depolitical system, transparency, efficiency, competitiveness, these norms continued to be selectedly implemented in favour of specific groups of capital owners based in the states in question. Hence, while depoliticisation was one of the main targets of the neoliberal procurement policy, clientelist relations in fact constructed the field.

3.5. Evaluation

The principles of "competition" and "equal treatment" have been the dominant and determinant norms in the debates among developed capitalist countries in relation to public procurement. Public

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[157]Office of the United States Trade Representative, Press Release, "United States Welcomes Opportunities for U.S. Suppliers Under Newly Revised WTO Government Procurement Agreement", http://www.ustr.gov/about-us/press-office/press-releases/2011/december/united-states-welcomes-opportunities-us-suppliers.

Procurement has been a facet of domestic protectionism and industrial development of states. Although attempts to break protected areas were started in 1950, the reform initiatives in this field markedly increased only since the 1980s. The main aim of the regulations in the international context was to extend the above stated general principles into government procurement and to build up free trade practices. The intensification of reform initiatives around the procurement issue both in regional and international context coincided with the neoliberal reforms upon which the Washington Consensus provisions were enforced on the developing states and the developed states altered their public expenditures.

As a solution to the crisis in the 1970s and the resultant decrease of profitability, the neoliberal agenda prescribed for a strict monetary policy on the basis of monetarist presumptions, the decrease of government expenditures, the elimination of ineffective production interventions of the government, and the establishment of free market through privatization. The neoliberal theory, which underlined privatization, deregulation, and the rule of law, bore faith in the invisible hand of the economy as long as the state undertakes the responsibility to secure the capitalist relations and the norms that these relations are based upon. Accordingly, the regulative state was bound by the principle of non-intervention which is inherently linked to the demand for the depoliticisation of the economic sphere. As a result establishment of capitalist principles by the state are naturalised as if these norms were depolitical constructions.

The norms surrounding the public procurement reforms are identical with the ones promoted by the neoliberal economy values and the new public management approach through which the state is required to act in support of private entrepreneurs by pulling its public responsibilities away. Hence, the initiatives for the opening of the government procurement markets conform to the neoliberal economic presumptions.

The discourse around the opening of the government procurement markets and the introduction of more flexible procurement processes are compatible with the principles of free trade and privatization of government assets. The reform of procurement regimes also relates directly to the concerns raised in 1990s particularly in the US such as: good governance, reinventing government, and the new public management system. As Patashnik expressed,

> Reinventing government was never about the elimination of administrative inefficiencies per se. It was about redefining the accountability relationships between bureaucrats and elected officials. It was about reshaping citizen expectations of government.[158]

The regulations in the public procurement field aimed to provide a secure sphere for entrepreneurs who invest, and to persuade the citizens on the benefits of the structure where the state is delegating its responsibilities to private sector and is using public-private partnership relations in its service to citizens.

The discourse around the neoliberal economic policy is to cure the ills brought about by of the Keynesian economic theory. On the other hand, competition and free trade practices developed in the North prepared the ground for the reconstitution of capitalist relations and the subordination of the labour particularly in the developing South states through the globalised trade and credit relations that dissolve the production relations.[159] The public procurement regulations have become one of the means of neoliberal agenda, in which competition, public saving and economic growth are claimed to be inherently bounded. The reforms in the North countries and in international regulations are based on the benefits of the competitive free economy and the establishment of a

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[158] Patashnik, 109.

[159] Burnham, 22.

transparent regime. The discourse over the reforms is embedded in economic objectives more than any other objective.

At the same time, while competition, equal treatment and effective methods are stated to be the main principles upon which the reform process is based, the reverse practices of states remained on their agenda. For instance, the countries tended to be protectionist in a variety of fields and that the areas of non-discrimination were selectively determined. Moreover, although the EU tried to establish free movement of goods and services, it was discriminating in the establishment of common market and was becoming increasingly discriminative on the ground of nationality; its purpose was either to promote the market share of EU-based companies or to force third countries, like China, to open their public procurement market to EU companies. As for the EU members, the EU forced her partners to apply her system of procurement rules.[160] Thus, while promoting liberal discourse, the regulations concerning public procurement opened the door of differing discriminatory provisions.

[160] EU also establishes a separate Guide for the countries that receive EU funds in order to determine the methods of use of the EU funds. The Practical Guide is the main tool of the EU to enforce the EU procurement procedures that is applied both by the candidate countries that use of the EU budget and ACP countries that receive aid from the EU. Practical Guide is embodied with "rule of origin" that require the states to spend the EU funds for the goods and services originating in the EU countries and the receivers of the specific funds. As a result seperate common markets are being created for the users of these funds.

CHAPTER 4

PUBLIC PROCUREMENT DISCOURSE PROMOTED TOWARDS THE SOUTHERN COUNTRIES

4.1. Introduction

The public procurement procedures developed in the international organisations were imposed on the developing states. The WTO GPA was modified in accordance with the needs and expectations of the developing states to enable them to have a smooth transition period. The EU Commission required the adoption of its procurement procedures by its enlargement candidate countries. The IMF also made the release of its credits conditional on the structural adjustment reforms that required the liberalisation of the public procurement market of the developing states. Within these backdrops, the following questions will be asked in this chapter: how was the discourse over public procurement reforms within the general framework of structural adjustment reforms constructed for the developing states? What were the strategies, means, and processes adopted in the reform of the developing countries? How were the independent regulatory agencies depicted within the neoliberal and new public management approach? When the economic problems were not resolved through the neoliberal agenda, how was the situation interpreted by neoliberal point of view? The chapter will conclude with a critical evaluation of the neoliberal discourse directed towards the Southern states.

4.2. IMF, WB and EU Discourse and Conditionalities towards the South

Firstly, the EU enlargement towards Mediterranean and particularly Central and Eastern European countries coincided with the establishment and modification of the public procurement regulations of the Commission. In the process of membership, the candidate states were expected to adopt the acquis communataire as conditionality. The Copenhagen Summit in 1993 initiated the guarantee for membership of the CEE countries and other potential candidates as long as they met the conditions. One of these conditions is "the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union." This requirement also implied the necessity for the establishment of necessary administrative structures the transposition of the acquis communautaire into the national law, and the appropriate implementation of legislation by the administrative and judicial structures. The procurement directives hence became a condition for CEE countries to be a member of EU. The signing with CEE countries of the Europe Agreements, which included a public procurement clause, constituted the first step of the integration. The opening of the public procurement market was also a step in the establishment of a common market. But beyond the political aim of establishment of consistency and unity in the laws and policies among the EU member states, there were economic motives in the conditions for EU membership. The opening of the CEE markets promised a fertile field for economic trade to the EU member states.

While the above situation was prevailing, the Commission paper on the functioning of the public procurement market, however, was stating that the even the core states of the EU were still protective in their public procurement implementations in the 1990s. In a report on functioning of public procurement markets in 2004, the Commission also denoted the

variation of transparency rates between member states[161]. The rate of publication of public procurement tender and award notices doubled from 1995 to 2002, but this rate was not more than the 20% of the total. The member states favored foreign firms when they applied via local subsidiaries[162]; and the award for direct cross-border public procurement remained marginally low.[163] These suggested that the prohibition against discrimination on national ground was being applied but, on the other hand, the freedom of establishment was not being implemented in comprehensive way. Thus were the achievements of the EU procurement regime in the Northern countries of the EU.

During the enlargement process, the alignment of national laws with the EU procurement regime and with the European procurement standards were demanded in the Progress Reports and the Enlargement Strategy Papers of the candidate countries. In these reports, the European Commission discussed public procurement in relation to the prevention of corruption[164] more than in relation to internal market and economic

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[161] Greece, Spain and UK have the highest transparency rates with 46, 24 and 21% of their estimated public procurement value had published; Germany, the Netherlands and Luxembourg are in the other side of the scale with 8,9 and 13%. Please See: A Report on the Functioning of Public Procurement Market in the EU: Benefits from the Application of EU Directives and Challenges for the Future" 03.02.2004, pp 8-9. Accessed: 03.09.2011.
http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf

[162] Subsidies are firms that are located and bidding in a country different from where their headquaters or parent companies are based.

[163] "A Report on the Functioning of Public Procurement Market in the EU: Benefits from the Application of EU Directives and Challenges for the Future" 03/02/2004, 2-13. Accessed 03.09.2011.
http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf.

[164]Communication From The Commission, 2005 Enlargement Strategy Paper, Brussels, 9.11.2005
COM (2005) 561 final (Accessed 31.01.2012), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0561:FIN:EN:PDF and Brussels, 12.10.2011.

competition rules. The basic suggestion given was the establishment of necessary institutional structures[165] and the alignment with the EU law. The establishment and strengthening of these agencies were also stated as vital for the administrative governance in EU.[166] Similarly, the OECD reports on the developing countries and their procurement capacities significantly focused on the establishment of anti-corruption mechanisms. The necessity of effective procurement procedures for value-for money was also underlined but the benefits of effective public procurement system were linked to the rescue from the risk of corruption in the developing states.[167] The reports on procurement and combating

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COM(2011) 666 final, Communication From The Commission To The European Parliament And The Council, Enlargement Strategy and Main Challenges 2011-2012, (Accessed 31.01.2012), http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/strategy_paper_2011_en.pdf; Brussels, 5.11.2008 COM(2008) 674 final, Communication From The Commission To The Council And The
European Parliament, Enlargement Strategy and Main Challenges 2008-2009, http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/strategy_paper_incl_country_conclu_en.pdf.

[165] Establishment and operationalization of public procurement agency and public procurement review body in Bosnia Herzegovina, strengthening of administrative capacity dealing with public procurement in Montenegro, Communication From The Commission, 2005 Enlargement Strategy Paper, Brussels, 9.11.2005
COM (2005) 561 final (Accessed 31.01.2012), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0561:FIN:EN:PDF;
even, for Turkey it has been stated there is a lack in "organization that guarantees a coherent policy in all areas related to public procurement" Brussels, 8.11.2006 COM(2006) 649, Communication From The Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2006 – 2007 Including annexed special report on the EU's capacity to integrate new members, (Accessed September 7, 2011) http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/com_649_strategy_paper_en.pdf.

[166] COM(2006) 649.

[167] OECD, *Fighting Corruption and Promoting Integrity in Public Procurement*, 2005; OECD and World Bank, *DAC Guidelines and Reference Series, Harmonising Donor Practices for Effective Aid Delivery Volume 3: Strengthening Procurement Capacities In Developing Countries, 2005,* accessed 10.10.2011*, http://www.oecd.org/dataoecd/12/14/34336126.pdf*; OECD Policy Roundtables, *Collusion and Corruption in Public Procurement*, 2010, accessed 13.10.2011, http://www.oecd.org/dataoecd/35/19/46235884.pdf.

corruption, however, did not present only the developing states as endemic to corruption. They adopted a more balanced language. For instance, in the 2010 OECD report investigating corruption in public procurement admitted that: "Corruption has rightly been condemned as a barrier to development and a scourge on the welfare of citizens in developing and developed countries alike."[168] But in the same vein, the OECD reports underlined that transparency is the main tool to avoid corrupted practices and these procedures were lacking in the developing states. While the language of corruption was being vastly used, the same reports of the international financial organisations also put forward that of all corruption cases corruption in public procurement particularly is of the severe type.[169] In order to combat corruption in public procurement, market sanctions in the criminal code were suggested. But the most widespread suggestion given was the establishment of public procurement agencies to monitor the procurement market and to act as a means to establish good governance practices. Governance was thus proposed as a new method of administration, in line with public management techniques that aimed at

> downsizing- the size and scope of government; managerialism or the use of business protocols in government affairs with the aim of improving responsiveness and competitiveness; decentralisation; debureaucratization or the restructuring of government to emphasize results rather than processes; and privatization.[170]

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[168] OECD Policy Roundtables, *Collusion and Corruption in Public Procurement.*

[169] IMF, Chapter III, Building Institutions, accessed: 26.11.2011, http://www.imf.org/external/pubs/ft/weo/2005/02/pdf/chapter3.pdf.

[170] Eran Vigoda-Gadot and Sagie Meiri, "New Public Management Values and Person-Organisation Fit: A Socio-Psychological Approachand Emprical Examination Among Public Sector Personnel" *Public Administration,* 86:1 (2008), 113.

The emphasis on managerialism and good governance induced governments to launch the professional management techniques in public sector. These included clear assignment of responsibilities and correspondingly the diffusion of power and the establishment of forms of corporate governance such as the board of directors.[171] Hence, as a model of governance, independent regulatory agencies, were suggested for the particular field of public procurement as well as for a variety of other sectors.

4.3. Dominant Neoliberal Arguments in favour of PPAs

The neoliberal theory argued for depoliticisation of the economy, the separation of economic and political fields, and the "autonomy of state". The neoliberal theory was at the forefront for the promotion of the establishment of independent regulatory agencies. While the state was leaving her responsibilities, a new actor was being sought to regulate the free market economy. The agencies therefore were a sign of the gradual abolishment of the economic responsibilities of the state as well as the increasing role of other actors. These institutions could be regarded as tools of the state to keep its relations with the sectors. The regulatory agencies were conceptualized as entities to be distanced from the impact of politics, politicians, and other actors as well. The literature on independent regulatory agencies revolved around the level of independence of these entities and the conceptualization of independence.

International actors like OECD encouraged the states to establish the agencies and to secure their autonomy in the meetings they held. The IMF and the EU also promoted the establishment of agencies in Turkey

[171] George Larbi, " Applying the New Public Management in Developing Countries" in *Public Sector Reform in Developing Countries: Capacity Challenges to Improve Service*, eds. Yusuf Bangura and George Larbi. (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2006), 32-34.

as well as in other similar countries. This promotion of independent regulatory agencies by the international capitalist organisations can be observed through the publications and academic researches they conducted. The expert meeting by OECD in 2005 specifically promoted the establishment of accountable and independent regulatory agencies. The OECD promoted the system by at least preparing a ground for discussions with the participation of implementing bodies on the balance between accountability and autonomy. The OECD Secretariat revealed the following process on how it prepares the countries for a coherent framework of reforms in connection with regulatory agencies:

> "The updated OECD guiding principles on Regulatory quality and performance call for ensuring adequate institutional frameworks with appropriate staffing for regulatory units, avoiding overlapping responsibilities among regulatory authorities. These principles also underline the need to ensure that regulatory institutions are accountable and transparent, and to coordinate competition law enforcement and sector regulation. The APEC/OECD Integrated Checklist insists on the timing of reforms when establishing regulatory authorities, including creation of appropriate regulatory authorities prior to market opening in certain service sectors, as this is important in ensuring competition and the effectiveness of regulation. […]The OECD ICCP Committee produced a report on the institutional structures and responsibilities in the field of telecommunication regulations (OECD 1999), based on a survey administered in 1999. The International Energy Agency has also produced an overview of Regulatory Institutions in Liberalised energy Markets in 2001. Beyond the OECD work, the IMF and the World Bank have also produced comparative results. The World Bank Forum for Utility Regulation produced an international directory of utility regulatory institutions in 1997…"[172]

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[172]Stéphane Jacobzone, "Independent Regulatory Authorities in OECD Countries: An Overview" , in *Designing Independent and Regulatory Authorities for High Quality Regulation*, OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation: Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005, 73-77.

The international actors thus provided a system of regulation for both the developing and developed states and a guide for the establishment and implementation of the agencies.

Independent regulation is not a new concept. Separate regulating agencies had existed in the 1930s in North America especially in the financial sector. However, the number of financial regulators increased by the beginning 1960s. Increases were also achieved in the end of 1980s and mid-1990s especially for the energy and telecommunication sectors.[173]

The widespread existence of the regulatory agencies brought the issue of the limits of their autonomy and the independence. The establishment of these autonomous agencies was justified through a variety of reasons dwelling on their perceived advantages, such as: expertise on the regulated sector, ability to be flexible under changing conditions, credibility in providing function for the government, a means to demonstrate fair and pro market regulations of governments, as a tool for stability and efficiency that can secure the market, as a tool for politicians to shift the blame in case of failure of implemented policies, as a tool to fix policies in case of political uncertainties, as a tool to reduce the decision making costs due to political conflicts, and lastly, as a tool for political participation as they were expected to be more sensitive to the varied interests of the people.[174] This list implies then that the market

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[173] Ibid., 80. For a comparative study on the reguatory agencies in the US, Please see: Michal C. Moore, "Maintaining Efficient and Effective Relations Between Regulatory Authorities", OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation: Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005, 175-187.

[174] Fabrizion Gilardi, Evaluating Independent Regulators, OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation:Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005, 102-103. Giandomenico Majone in the same meeting refers to similar functions of the

cannot be efficient and secure for the investors if politicians are strong actors and that the politicians need to take themselves out of equation in order to secure their legitimacy for economic decisions by making themselves unaccountable. The list also touched upon contradictory advantages of having independent regulatory agencies. The issues of accountability and legitimization of the IRAs within the democratic society were constructed upon two conflicting ideas.[175] These are the increase of participation through IRAs and the other is the prevention of the tyranny of the majority rule created by the politicians who may be not efficiency-minded but rather personal and political benefit-

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agencies by emphasizing how politicians can make use of the agencies with their feature of expertise, low decision making costs and credibility, "Strategy and Structure the Political Economy of Agency Independence and Accountability", OECD,126 . Giando Majone, details the history of the independent agencies and delegtaion of powers that non-delegatiom doctrine found supporters in the United States by 1880s in the establishment of Interstate Commerce Commission, lastly in 1935 in Supreme Court had used the non-delegation doctrine. The reason of the suspicion of the Supreme Court was arising out of constitutional theory and seperation of powers principle. In the UK, although suspicion voices argued for the creation of independent agencies would disturb the rule of law or free ageny fom the pressure. UK started to practice delegation powers by 1970s with creation Civil Aviation Agency. In France also the delegation of powers were prevented with Constitution but in 1970s, the number of agencies started to increase and with the open minded interpretation of the Conseil Constitutionnel, the violation of constitution is explained with infringement of essential aspects of governmental policy. As a result, the agencies were bound with the government policy. Hence the existence of the agencies is increased with 1990s but they were started by established in US in the 1880s and were corresponded with a classical conservative view in Europe until the end of 1980s. In Europe they were regarded as constitutional anomalies and oxymorons. Majone explains the perception and lte solution of the issue in Eurpe explains with differing understandings of agency and conditions thet create the agencies. The diffence particularly for him is understanding of agency in United States is as decision making centre whose autonmy is similar to managerial dicretion that the they need to be accountable for their decisions and need to assigned a comparable level of indepence .However,Europe, according to him, percepts agencies within the perspective of hiearchical subordination. For further detail please see: Giandomenicio Majone,"Strategy, Structure the Political Economy of Agency Independece and Accountability", OECD,129-135.

[175] Sosay in her article on the legitimacy and accountability issue of independent regulatory agencies discusses the IRAs in terms of their status within the democracies by posing the arguments for and against the democratic legitimacy of the IRAs.

oriented.[176] These two ideas are based upon conflicting assumptions on the human nature and on the level of human rationality. In the first assumption, the human person is perceived as rational and who is aware of his/her needs and therefore deserves to participate in policy making not only through the electoral democracy but through more participatory institutions on a continuing basis. In the latter view, however, humans, especially the masses, would make irrational choices and electoral and party politics would lead to irrational policies that are implemented through technocrats and the experts on the issues.[177] Within this analysis, the second thinking, represented by Weber, Schumpeter and Von Hayek, would assess IRAs as legitimate institutions that would be free from majoritarian rule and more in line with rule of law, as these institutions could generate outcomes for the welfare of the people. The IRAs in this point of view could be the basis for the development of an impersonal rational bureaucracy theorized by Weber. Accordingly, the IRAs were conferred the features of rational bureaucratic organisations as Weber pointed out: the principle of fixed and official jurisdiction areas as determined by law; management of office based upon written documents, and rules that are stable, exhaustive and transparent.[178] The IRA's exception from the Weberian conceptualisation is the lack of hierarchy that would facilitate the supervision of the lower office by the

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[176] Friedrich August von Hayek,Majortiy Opinion and Contemporary Democracy in The State and Its Critics, Elgar Reference Collection, Vol I, (Brookfield: Edward Elgar Publishing Limited, 1992),240.

[177] Please see Sosay for further detail on the theretical bachkground of the issue, the comparison made between the Weber, Schpeter, Von Hayek common understanding of human, irrationality and politics link and Habermasian perception of these three. Gül Sosay, "Consequences of Legitimizing Independent Regulatory Agencies in Contemporary Democracies:theoretical scenarios" in *Delegation in Contemporary Democracies,* eds. D. Braun and F. Gilardi, (London:Routledge,2006),171-190.

[178] Max Weber, "Bureaucracy" in *Classics of Public Administration, Third Edition,* eds. Jay M. Shafritz and Albert C. Hyde. (California: Brooks/Cole Publishing Company, 1992), 51-52.

higher office. However, even with the lack of this feature the IRAs were nonetheless conceptualised as effective organisations over traditional bureaucratic offices. In the final analysis, in both Weberian and IRA type organisations, the terms of employment in the organisation and the rule of law were regarded as the means to secure the autonomy of the office.[179] The bureaucrats in both types are expected to avoid developing clientelist relations and to act according to their distinctive status.

On the other hand, the other theoretical approach towards IRAs mentioned above, in contrast legitimizes the delegation of power to the IRAs. In this approach, the electoral policy is not paving ways towards participation but that the IRAs are opening new channels of participation and are protecting the electorates from bureaucratic arrogance of majoritarianism.[180] In both these approaches there is suspicion that politics and the establishment of clientalist relations would intervene in the market. Hence, the IRAs were given features that were legitimized by both liberals and institutionalists: either bureaucratic/technocratic agencies or political agencies, or the efficient agencies preferred by neo-liberals which prioritize efficiency over redistribution.

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[179] Ibid., 53-54. In Weberaian conceptualization, office holding is a vocation can be achieved through training and examination; official is appointed by a supreme authority and held it for life. The legal guarantees of tenure for life, fixed salary and career within a hierarchical order assure independence to the bureaucrat.

[180] Majone McCubbins in Gül Sosay, 183-184. Giando Majone, express his view on the functions and resons of justification of the agencies that explanation of reason of delegation of powers to independent agencies with cognitive reasons such as expertise, effeciency and effectiveness, accordng to Majone cannot be coherent justification itself as politicians is being involved in technical processes in their legislation activities. Instead Majone feature the reasons of delegations assuming politicians as making rational and functional choices and avoiding cost of decision or policy failure possibilities, creating credible and stable institutions and an economic regulation system. Giandomenicio Majone, "Strategy, Structure the Political Economy of Agency Independece and Accountability", OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation,: Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January 2005,130-131.

The hypothetical and practical reasons for the creation of IRAs and the delegation of power to them include the governments' desire to increase their credibility by transferring their responsibility of alternating policies to another entity. The other reason for transferring (power to these agencies is explained by the political uncertainty, the political expectations of the governments, and the role of veto players in the system. Gilardi states that politicians tend to extend the independence of IRAs when they expect that they will not be in the future government. On the hand, if the risk of replacement for the governments is high, then political party with the expectation of getting power in a short time period will avoid delegating power to the IRAs who may delimit the party itself when it takes over the government.[181]Both the establishment of IRAs and the delegation of power to them is shaped on the basis of the incentive of the politicians to balance the system according to their own ends. Apart from these political incentives, as Gilardi argues 'symbolic imitation' of states leads to the increase in the number of the IRAs such that establishing IRAs had become a common feature of state organizations in the EU states that new members adopt the system. Moreover, the

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[181] Fabzio Gilardi exemplifies the objectives of the governments in establishing the IRAs, in each case the main objective of political parties to hold the power as far as possible, if the context does not allow them to hold the power, then create institutions that can prevent the rivals from holding power.Gilardi by using the realist approach also comments on other possibilities in the process establishment of IRAs: However if the replacement risk of the specified government is high but the country creates stable governments that means the delegation of power will be binding for another party. Delegation of power to independent agencies arising of this incentive also expected to be affected from the existence of the veto powers. Gilardi states that replacement power would be less of a problem for the countries with many veto players. This can be interpreted as states with many veto players would not frequently delegate much of power to IRAs as the power is already very diffused, and change in political power may not lead political reversals. However, looking the existence of the IRAs this arguments may not be valid, since states with strong check and balance systems has already established many IRAs. Fabzio Gilardi, Delegation to Independent Regulatory Agencies in Western Europe: Credibility, Political Uncertainty, and Diffusion" in *Delegation in Contemporary Democracies*, eds. Dietmar Braun and Fabrizio Gilardi. (London and New York: Routledge, Taylor and Francis Group, 2006), 132-137.

pressure of the EU led its members to establish the agencies through the Directives.[182]

The second debate on the IRAs in the literature pertains to the level of delegation of power. In consideration of the liberal assumptions and the notion of retreat of the state or depoliticisation, researches on the level of independence of the agencies define independence as being free from the politicians and politics. This assumption ignores the possibility that the individual and structural reasons that make politicians inefficient could possibly also impact upon the staff of agencies. Moreover, the politicians who are accountable to the people for their decisions are taken out of the equation with the granting powers to an entity that is not accountable to people. This delegation of powers with the aim of depoliticisation is itself a political act since the free market economy is prioritized according to the peoples' will. Moreover, depoliticisation is also a political act since in this assumption of being free from a particular business is taken for granted. The issues of level of delegated power and accountability are inherently related. This debate over the level of autonomy is also relevant for this thesis since the next chapter will focus on the particular case of Turkey. The level of delegation of powers to IRAs is measured through the institutional status of regulators, whether they are ministerial departments, decentralized ministerial agencies, independent advisory bodies or independent regulatory agencies. Also to be assessed in this connection are the nomination process of the heads of the independent regulators, the terms of employment as head of agencies, and the financial resources that ensure budgetary autonomy. Accordingly, the status of the agencies affects the independence of that agency such that IRAs organized as ministerial bodies stay within the hierarchical structure of the state and are therefore politicised. The governance

[182] Ibid., 139. Gilardi states that following the EU directives IRAs much likely to be established, after Directive 97/51 the likelihood increased 7 times, please see Gilardi, 133-135.

structure of a regulatory body, whether it is being ruled by a board or an individual, also gives clues about the level of independence of the institution. A board, for instance, is supposed to secure a higher level of independence from the politicians. The appointment of heads of regulatory bodies is also relevant for the independence of the agencies. If the nomination is confirmed by the council of ministers or the parliament and if the terms of appointment are longer, then, the members of board and the head of the board can secure a higher level of independence. [183] On the other hand, confirmation of nomination by the parliament can also redound to democratic legitimacy of the agency. Budgetary autonomy is a dimension of independence in that if the financial resources are based on the state budget, the agency could be open to the manipulations created by ministries. The other resources for the agencies are fees levied on the regulated industry, a system which is common for financial regulators.[184]

In comparing the differences between the status and independence of agencies among core members of EU, the first observation is that each country has its own definition for these independent entities.[185] Second, the level of autonomy transferred to agencies differs between the countries. Party affiliations of the IRA members are found more intensive in Italy while it was very low for Britain. Politicians may seek to affect the regulation through their personal and political links. Despite these minor

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[183] Stéphane Jacobzone, Independent Regulatory Authorities in OECD Countries: An Overview, OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation, Proceedings Of An Expert Meeting In London, United Kingdom, 10-11 January 2005, 80-84.

[184] Ibid., 86.

[185] Please see Mark Thatcher, " Independent Regulatory Agencies and Elected Politicians in Europe", OECD Working Party On Regulatory Management And Reform Designing Independent And Accountable Regulatory Authorities For High Quality Regulation, Proceedings Of An Expert Meeting In London, United Kingdom, 10-11 January 2005, 204.

differences, however, the research has concluded that the politicians do not have direct influence over the agencies but informal relations between the politicians and the regulators are also being developed:

> On some rare occasions, IRAs have pursued strategies that conflicted with the objectives of the governments [...] IRAs have acted in cooperation with governments or have accelerated and developed government policies. Thus for instance, the pro-competition stance of the telecommunications and energy IRAs in Britain accelerated developed previously rather timid government policies, playing significant role in the liberalization of the entire telecommunications, gas and electricity markets.[186]

To sum up, the autonomous or independent regulatory agencies were on the one hand designed for the establishment of a more efficient system according to market economy norms. But on the other hand, the "entities to be autonomous from" and the level of independence for these institutions remained ambiguous. The main "entity to be autonomous from" is defined as state and politics; and second, refers to the other actors that may interrupt the processing of free market. However who compose these entities remained ambiguous. In one sense the actors external to state are regarded as civil society to whom the IRAs and the state have to be in embedded in autonomy in order to ensure the participation of the non-state actors in policy making. On the other hand, those entities that are strong enough were subject to suspicions as they are the domestic allies of the predatory state. The conceptualization of independent regulatory agencies has been shaped in accordance with the liberal conceptualization of an ideal 'autonomous' state[187]. These debates around the developing Southern states and definition of their problems on the basis of lack of institutionalization and the suggestions

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[186] Thatcher, " Independent Regulatory Agencies" , 211.

[187] Peter Evans, "The State as Problem and Solution: Predation, Embedded Autonomy and Structural Change" in *The Politics of Economic Adjustment: International ConstraintsDistributive Conflicts and the State*, eds. Stephan Haggaard and Robert R. Kaufman, (Princeton:Princeton University Press,1992),

for establishment of independent regulatory agencies and other forms of governance in order to have better policy implementations in fact aroused out of the unsuccessful results of the implemented neoliberal agenda of 1980s.

4.4. Liberal Warnings Regarding Neoliberal Transformation of States

The neoliberal policies were initialed in the USA and UK. But as a complete agenda for the transformation of economic policies with tailor-made approach, these were initialed in the developing states through the use of credit relations that spurred global resistance against capitalist social relations.[188] In the 1960s, one of the options that emerged in response to the economic crisis and decreasing welfare of the dominant class, was the corporatist strategy. The measures it prescribed were that of government regulation, income policies, and price controls that were attempted not only in the European countries (Portugal, France, Spain, Italy, UK, and Sweden) but also to some extent in the US under Nixon's regulatory reforms programs. This option was not considered a solution but rather a political threat to the economic elites according to Harvey such that another option, neoliberalism based on monetarism, was endeavored as an alternative first in Chile and Argentina. According to Harvey, the first strategy benefitted the basically the ruling elites and the foreign investors in those countries. But this did not mean that the alternative neoliberalism as a response to the 1970s financial bottleneck provided wealth and development for the economies that adopted it. On the contrary, especially for the developing countries, it created further

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[188] The spread of central bank independence, which is a condition of the international credit organizations, globally is explained with trade relations between the countries, the states adopt similar patterns either not to lose ground in the trade or they are enforced to adopt similar patterns with normative reasons in seek of credibility. As a result a condition of neoliberal policies would spread in ordinary relations of the states. Please See: Simone Polillo and Mauro F. Guillén, "Globalisation Pressures and the State: The Worldwide Spread of Central Bank Independence" *AJS,* Vol 110, Number 6, (May 2005): 1764-1802.

burden and poverty. In addition, the neoliberal economic policies were launched without the consent of the all parties of the ruling elites. The enforcement of these policies was implemented through exclusionist ways since the changes in structure that they brought would also constitute a threat to some segments of the economic elites and ruling class that are tied to particular social and political structures of their counties.[189]

How neoliberalism was adhered to can be explained with its resolution to the crisis by the top one per cent income owners. Harvey, in comparing the share of national income of the top one per cent of income earners in the late 1970s and late 1990s, showed that the top 1 per cent income earners more than doubled their share from the national income. The change did not result in the overall growth of the economies and the distribution of the wealth. Rather, income and wealth concentrated in the upper group such that the ratio between salary workers and salaries of the upper group has been increased 15 times in US[190]. It appears that the initialization of the neoliberal policies in the developing countries not only contributed to the construction of global imperialism. They also restored class power all over the world, although its prescriptions were not fully applied in the core countries.[191]

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[189] This argument in fact is made by neoliberals in their explanation of predatory state relations.However, as classes are reconstructed by the neoliberal policies the argument make sense, because the capitalist relation does not enforce the dominance of particular capital over other, due to competition between the capital, the status of the particular holders of capital would change but the reltaion between the classes is protected.

[190] Harvey, *A Brief History of Neoliberalism*, 16

[191] Rather than decrease of state expenditures, where the expenditures are made is changed. The social expenditures have been decreased, but state continued to make expense; moreover, the policies in the state personal policies prioritized managerial approaches in order to increse the efficiency and decrease the level of expenditures; the result is that state increased the expenditures;

The neoliberal policies prioritized the separation of political and economic spheres by eliminating the role of the politicians and bureaucrats in the economic affairs underlined the predatory character of the states. But at the same time, the process of neoliberal transformation in the states was operationalized by the politicians and technocrat group around the executive power. One of the main features of the transformation was its incapability to realize its objectives of resolving the economic problems and increasing the level of production. According to Harvey the transformation benefitted the economic and ruling elites of the countries and the foreign investors. This did not mean, however, that neoliberalism addressed the 1970s financial bottleneck and provided wealth and development to the economies of the developing countries. On the contrary especially, it created further burden and poverty.

How neoliberalism was adhered to can be explained through its resolution to the crisis that faced the top 1 per cent income owners. Comparing the share of national income of the top 1 per cent of income earners in the late 1970s and late 1990s, Harvey showed that the top 1 per cent income earners more than doubled their share from the national income. The change did not produce overall growth of the economies and distribution of the wealth. Rather income and wealth concentrated in the upper group such that the ratio between the salaries of workers and of the upper group increased 15 times in US[192].

Hence, the 1980s, like the 1920s brought a wave of reregulation, adoption of rules based economic strategies which provided the state legitimacy for its actions and greater maneuverability. In the 1980s, Burnham explained that the rule-based economic strategy was put into effect either through assigning tasks to an international body to automatically adapt the rules or by assigning the tasks to national bodies

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however the accomplishement is that state shifted the policies in line with the needs of the free market economy.

[192] Harvey, *A Brief History of Neoliberalism*, 16

that are independent from the government. In addition, the new economic policies were launched without the consent of the all parties of the ruling elites. The enforcement of the policies was implemented through exclusionist ways[193] since the change in structure would constitute a threat to some segments of economic elites and ruling class that are tied to particular social and political structures of the counties. Aside from the critiques on how the neoliberal implementations contributed the vulnerabilities in the South, explanations were also made on character of institutional changes that occurred in the process of its implementation.

Manzetti and Blanke's work on neoliberal transformation in South America is illustrative for understanding the criticisms to neoliberal implementations. According to Manzetti and Blanke, the neoliberal implementations operationalised by a technocratic group multiplied the problems inherent to state. The economic situation in these countries persisted rather than being ameliorated due to incorrect implementations of the monetarist approach.

First, Manzetti and Blanke determined that market reforms implemented to curb corrupted activities were not able to achieve this end, but instead led a transformation in the nature of the corruption:

> Serious economic crises have recently created pressure in Latin America for sweeping discretionary executive power to reverse state centered economic policies. Many think that such reforms immediately curb corruption because they reduce state economic resources that have often been used corruptly. However, we shall contend that, while old forms of graft continues unabated, a new politics of corruption is emerging

[193] This argument in fact is made by neoliberals in their explanation of predatory state relations.However, as classes are reconstructed by the neoliberal policies the argument make sense, because the capitalist relation does not enforce the dominance of particular capital over other, due to competition between the capital, the status of the particular holders of capital would change but the reltaion between the classes is protected.

> in many Latin American countries embarking on market oriented reforms.[194]

Manzetti and Blanke did not relate the market reforms with the corrupted activities in the developing states that were adapting neoliberal policies. They focused on the definitions and the factors of "corruption" and explained engaging in corruption on the basis of concepts of 'willingness' and 'opportunity' of politicians., Their explanation of corruption was based on institutional structures and moral calculations. According to this view, corruption arose in the developing states due to the lack of strong institutions that could prevent corrupt activities of the bureaucrats, the lack of regulations that tightly determine the borders of activities, and the perception of corruption in the society.[195] The neoliberal agenda made a claim to prevent corruption by changing the state structure and regulations, enforcing an administrative reform that would cut down the abilities of the state and bureaucracy, introducing efficient and transparent methods, and by defining corruption as an immoral act in order to spread of its negative connotations. However, the implementation of the agenda itself gave rise to new forms of corruption. Market-oriented policies produced corrupt activities with a changed character.[196] Manzetti and Blanke argued that corruption occurred in the Southern states experiencing economic transformation as the privatization process intensified and when discretionary power expanded against the checks and balances.

Manzetti and Blanke explained further that the severe economic situation, high inflation and fiscal deficit led the Latin American politicians to adopt neoliberal policies promoted by the IMF and World

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[194] Luigi Manzetti, Charles H. Blake, "Market Reforms and Corruption in Latin America: New Means for Old Ways", *Review of International Political Economy*, Vol 3, no.4 (1996):662-663.

[195] Ibid., 666.

[196] Ibid, 668.

Bank. The proponents of the neoliberal policies claimed that the reforms would contribute to combating corruption since market deregulation and privatization would ensure transparency and eliminate political manipulations in the market.[197] However, Manzetti and Blake observed that this claim made by neoliberals was not realized:

> Privatization and deregulation per se do not end the possibility that public officials may engage in corrupt activities if some preliminary steps are not taken. [...] the opportunity structure for corruption changes as the economy moves from being state-led to being more market oriented. Unprecedented economic crisis gives the executive a mandate for change. The crisis is instrumental in enabling a president to impose a more centralized decision-making process than would normally exist. [...]This absence of checks and balances reduces the probability of getting caught.[198]

Manzetti and Blanke underscored the role of the executive branch and the mis-implementation of neoliberal policies. This situation of increase in the power of the executive was illustrated in the literature why and how states do not retreat from their place in the neoliberal transformation. Moreover, the increase of the power in the executive also showed the correlation between non-democratic forms of governance and the neoliberal transformation.[199] Furthermore, technocrats around the neoliberal president that eliminated the other ministries put pressure

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[197] Ibid, 667-668

[198] Ibid,669.

[199] Decrees, and laws have been used in order to facilitate and justify the privatizations; laws that abolish the intervention of the Congress allowed the administration of the process by presidential decrees: The Law for Economy of the State and The Economic Emergency Law in Argentina allowed privatizations of utilities as telephone, highways, railways and maritime and also suspension of the subsidies and liberalization of government purchases to foreign products; as a result, in practice, law and legislative powers were manipulated for the realization of the project that state has been politically involved despite the neoliberal discourse on separateness of economic and political spheres. Please see: Judith Teichman, "Mexico and Argentina: Economic Reform and Technocratic Decision Making", *Studies in Comparative International Development*, Vol.32, No.1 (Spring 1997):,, 40,46,48-49.

over the trade unions and the working class in order to expedite the reestablishment of class relations in the privatization process.[200]

The argument made by the Manzetti and Blanke was based upon the neoliberal purview of 'depoliticisation'. From this perspective, the forms of implementation, rather than neoliberal policies, were problematized while bad state policies, the lack of institutions and public tolerance were defined as the causes of corruption. Bound with the presumptions of the neoliberal theory, Manzetti and Blanke refocused on the discretionary power of the executive[201] and stated that the traditional methods of corruption had been replaced with new forms in the privatization process, which cannot be controlled due to lack of institutionalization and the excessive power of politicians. As a result, the neoliberal warning on the corruption in effect reconstructed the neoliberal presumptions on state and politics. It is suggested that it is not the neoliberal policies that are related with the corruption cases but that the state tend to turn into a predatory state. Hence, the neoliberal project itself became a political project instead of simply being an exponent of economy norms, when the liberal circles reproduced the argument of depoliticisation in cases of failure of the project. Justifying the reform process with terms such as "corruption", "rentier state" and "crony capitalism" tend to exonerate the approach and charge the implementers.

4.5. Critical Evaluation

The neoliberal reforms and their approach have been analyzed from a critical perspective. The liberal explanation for the continuation of corruption and state intervention in the market was blamed on bad state implementations and on the temporary increase of executive power for

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[200] MacLeod, 52.

[201] A series of corruption cases are examlified for both Brasil, Venezuela and Argentina by Manzetti and Blake, 675-684.

the implementations of the neoliberal reforms. Thee critical perspective pointed out the inherent dynamics of the neoliberal policies that caused corrupt activities as well as the use of "corruption" or "state failure" discourse in order to justify the neoliberal reforms in the developing countries.

Bedirhanoğlu noted that the neoliberal conception of corruption changes contextually on the basis of the needs of the international financial organizations strategy towards Southern states. Accordingly, the technical definition of corruption as simply an act of bribing has been revised following the 1997 East Asian crisis, when the international financial organizations extended the definition of corrupt activities to rent seeking and further based their definition of corruption on political, ideological and traditional grounds.[202] The recent shift in the definition of corruption shows that the promotion of domestic industrial capacities started to be identified or associated with corruption.; With this, procurement regimes that are associated with traditional industrial policies of the states have begun to be evaluated and interpreted as rent-seeking activities. This political discourse on corruption has enabled the international financial institutions to set their agenda for the transition of the Southern countries in line with Washington consensus, particularly at the time of economic crisis. Bedirhanoğlu argued that the use of corruption discourse for the implementation of the neoliberal transition is a political strategy. Moreover, this strategy not only enabled the opening of the markets and the determination of the economic norms in the country in line with Washington Consensus, it also enabled the re-definition of corruption as being antithetical to transnational capital interest and global competitiveness.[203]On the other hand, rentier

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[202] Pınar Bedirhanoğlu, "The Neoliberal Discourse on Corruption as a Means of Consent Building: Reflections from post-Crisis Turkey", *Third World Quarterly*, Vol.28, No:7, (2007): 1244.

[203] Ibid., 1251.

relations and industrial policies for the sake of domestic entrepreneurs in the Northern states were taken out of the corruption discourses through the use of legal definitions.

Focusing on WTO and international trade regulations, Linda Weiss argued that the liberalization of trade policies through multilateral agreements is state augmenting. Especially for the industrialised states, the range of products and activities subjected to the agreements are those with diminishing importance while the excluded areas from the international agreements are the developing sectors for which the developed states intend to intervene and promote domestically.

The treaties were arranged according to the technical and economic strategies of the governments that can promote exports and foreign direct investment. Thus, rather than having the retreat of the states as a central actor, they not only intervened in the economy but also both determined the areas of domestic industry and prepared an international ground for their protection. For instance the excluded areas from the GATT agreements involved national security concerns. Their controls are not clearly guided. Similarly, despite the agreements aimed to restrict subsidies to attract foreign direct investment, the ambiguity of restrictions provided the states to manipulate the rules for domestic protection. Moreover the differentiation of the prohibited areas in the subsidies and countervailing measures (SCM) Agreement allowed states to subsidize especially in the innovation and investment fields and in the infrastructure and financing for exports and pre-commercial technologies.[204] Hence the knowledge deepening and high-tech development sectors, which is more profitable and modern way of capital accumulation instead of machine based industries, were being supported.

[204] Linda Weiss, "Global Governance, National Strategies: How Industrialised States Make Room to Move Under the WTO", *Review of International Political Economy*, 12:5, (December 2005): 723-749, 729-730, 740-742.

Despite the increasing role of the international organisations to ensure the implementation of the multilateral agreements, the states emerged as the determining factor of the diffusion of powers to the other actors in governance of the trade relations. According to Weiss, the multilayered structure of institutions in the globalization era and the increase of global governance rules in fact augmented the role and effectiveness of the state as states defined the areas of intervention more selectively in order to shape the future of the nation[205]. The states were not only intervening and supporting technology and science development by intervening in the market. It was also seen that the intervention contains the decision of what to support and to which way the science and technology will be directed. That is why Weiss named the process as "governance of science and technology." The process was being shaped to merge with the national priorities and the needs of the capital in the sector. The state still remained a determining and active actor.

Weiss' argumentation about the augmentation of the state in the era of global capitalism also showed that the countries where capital is more powerful have defined the law and "corruption" in relation to their objectives. Hence while the corruption discourse which was based upon rentier and private relations to explain the reason of the financial crisis in the Souther states provided a ground for the international financial institutions to justify the neoliberal failures and on the other hand, enabled the implantation of transnational capitalist interests in the Southern countries. While the association of state with local and national producers on the basis of industrial development was interpreted as rentier relations, the establishment of international laws and norms on the basis of the transnational capitalist interest was regarded as market relations. Using then as definition of the financial institutions basis of the corruption it can be also argued that the attempts for the adoption of Washington Consensus policies and structural reforms as condition of

[205] Ibid, 744-745.

credit relations are also ground of rentier relations between the financial organisations and the multinational capitalist companies. Therefore, when the neoliberal transition takes competition as a reference point in the Southern states, the state is bargaining for profit maximization of the transnational companies rather than political and moral concerns on corruption.

4.6. Evaluation

This chapter aimed to put forward that the neoliberal public procurement reforms are being promoted in the Southern states by prioritizing differing set of norms for the process. While the international procurement regulations were developed in relation to efficiency and competition principles in the North, the international credit organization promoted the public procurement regulation within structural adjustment programs on the basis of the incapability of the state structure in the South and the widespread possibility of corruption.

The neoliberal agenda in the 1980s aimed at the reshaping of class relations and the reproduction of capitalist class relations in monetary and contract relations. The new approach was for the expansion of credit relations and individualization of credit relations in order to internalize the capitalist social relations and prevent resistance against the policy of debt enforcement. Bonefeld argued that capital responded to the resistance in the developing states by "threatening the stability of credit relations upon which existing social relations rested."[206] The threat of credit expansion was implemented through a shift in policy from tight credit to credit expansion in the first stage by which the unity of opposition was destructed and resistance was decomposed on the basis

[206] Werner Bonefeld and John Holloway, "Conclusion: Money and Class Struggle" in *Global Capital and National State and Politics of Money*, eds. W. Bonefeld and J. Holloway. (London: Palgrave Macmillan, 1996), 216.

of market equality.[207] Market equality meant, however, the erosion of the positive rights which create the threat of unemployment, poverty and homelessness. These became the tools of disciplinary power of the credit expansion. Bonefeld and Holloway argued that as long as capital ensures labor subordination through the use of credit relations and as long as the state guarantees credit relations by reducing welfare spending, people will be led to embark upon debt relations individually to afford their lives. Credit relations are individualized and production is weakened. The series of complementary neoliberal policy enforcements tried to resolve the economic bottleneck through decomposition and recomposition of the class relations in order to accumulate surplus value. Harvey pointed out the neoliberal agenda was a creative destruction of capitalists that aimed at labour subordination through strengthening of the capitalist social relations.[208] Since the capitalist accumulation of surplus value was the inherent objective in the neoliberal policies, the economic agenda did not establish an automatic growth in the developing states. The consecutive economic crises of the 1980s were evaluated on the basis of the state structure of the developing states and high tendency for corruption in these structures. However, there was enough evidence on the widespread corruption cases both in North and South countries. As a result, the ”corruption” discourse for the developing states was selected and used to justify neoliberal reforms instead of a discourse on the competition-oriented character of the neoliberal public procurement reforms, a fact that only illustrated how the promotion of reforms was biased.

The neoliberal agenda assessed the failure of the transition countries but not the incompatibility of its aim and norms. The growing role of the executive power and techocratisation in the neoliberal transition were taken as the reason for corrupt activities. The failure of the developing

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[207] Bonefeld and Holloway, 216-217.

[208] Harvey, “Creative Destruction”,153.

countries in the “creative destruction” of the capitalism was moreover employed to justify the neoliberal values, which in the first place failed as a direct response to the problems that they were supposed to address.

CHAPTER 5

PUBLIC PROCUREMENT REFORM PROCESS IN TURKEY

5.1. Introduction

The neoliberal restructuring of Turkey is directly constitutive for the reform in public procurement sector. In Turkey, the public procurement market is huge in that the public purchasing constitutes around 7% of the GDP[209]. The Public Procurement Law (PPL) enacted in 2002 was designed mainly in accordance with the requirements of the international actors, in terms of tender types, general principles as transparency, and establishment of an independent regulatory agency for the field, the Public Procurement Authority (PPA). At the same time, there was also a significant demand from certain segments of the public for the regulation of the field due to corruption claims attributed to the previous law.

This chapter commences with the practices of public purchasing before the enactment of the PPL in 2002 and continues with the preparation of the PPL under the influence of the OECD and IMF who professed strong positions on the restructuring of the state after experiencing consecutive economic crisis. The economic crisis particularly after 2001 led the politicians to depend upon credits from the IMF and capital from foreign investors. By 2001 the structural reforms designed in line with IMF

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[209] Kamu İhale Kurumu, Kamu Alınları İzleme Raporu, 2011, accessed at 20.06.2012, http://www1.ihale.gov.tr/duyurular2012/2011_yil_sonu_kamu_alimlari_raporu.pdf and TÜİK, Gayri Safi Yurtiçi Hasıla 4. Dönem 2011, accessed at 20.06.2012, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=10785. Accordingly the total amount of contracts signed according to public procurement law and direct purchase is 91 771 406 TL and GDP of 2011 is 1 294 893 000 000 TL.

requirements were intensified. PPL was one of those laws required by the international finance institutions.

In this context, the process of enactment of the law firstly will be discussed in relation to how legitimating grounds were prepared and on which provisions of the law the national and the international actors placed their focus. . Hence this chapter aims to display the discourse around the PPL and PPA to understand how the neoliberal public procurement regulations were legitimized. The PPL was legitimized mainly on the ground of introducing good governance and transparency in the public procurement market in Turkey which was characterized as a premise to be inherently corrupted.

The second focus of this chapter is on the amendments in PPL that led to conflicts between differing segments of the bureaucracy and between national and international actors as well capital groups. During the preparation of the law, an intra-bureaucracy conflict emerged between the Ministries. This conflict continued in the latter period between the traditional and the new structures of bureaucracy. Apart from that conflict, there was also a debate mostly on the provisions of the PPL procedures related to the liberalization of the public procurement market and the opening of the tenders to foreign contractors. This issue led a continuous conflict and negotiation between the international actors on one side and the Turkish politicians supported by Turkish entrepreneurs on the other during the period of enactment and amendments of the law. Thus, while the objective for the enactment of the law was depoliticisation, the field in fact was being politicised further.

Thirdly, this chapter will proceed with analysing the period in which the PPL entered into force when a new political context was being established simultaneously. The new political context and the debates around the independent regulatory agencies will be discussed.

Fourthly, this chapter will discuss the amendments in the PPL and I will focus on the objectives for making the amendments and the expectations from the amendments of the parties in government, PPA, Turkish capital groups and the EU.

Lastly, I will analyse the implementation of the law as to what extent the target of combating corruption was an appropriate objective and to what extent the strengthening of market economy constituted as the real objective. Although these objectives lay behind the introduction of the PPL, due to the contradictory nature of capitalism and the neoliberal market economy, the original PPL was deformed and the conflict between the capital groups determined the final outcome of the law.

5.2. Enactment of Law

In this section I will firstly describe the government's purchasing procedures applied before the enactment of the PPL in 2002. I will then present the negotiation between the Turkish government and the international actors regarding the enactment of this law.

5.2.1. Government Purchasing in Turkey until 2002

Prior to enactment of Public Procurement Law (Law No. 4734), government purchases in Turkey were implemented according to three main laws. Government purchases first came to the scene with government sellings. The first regulation in the field was the dated 1857 Regulation (nizamname) that was amended with an additional regulation in 1914.[210] In 1921, the new Turkish state prepared regulations for the 1921 dated by-law that required the central bodies and their departments in İstanbul to make their purchases via a Commission established under the Ministry of Finance. The first comprehensive law,

[210] Adem Karabayır, Kamu Alımları,Yeni Kamu İhale Usulleri ve Araçları,5-6 Şubat 2008, Ankara, www.oecd.org/dataoecd/36/25/40405487.ppt.

"Law on the Buying and Selling Activities Made on Behalf of the Government" (Law No. 661) was enacted in 1925; It was replaced with "Law of Auctions, Reverse Auctions and Tendering" (Law No. 2886 and amended by Law no. 2940)which was enacted in 1934 and stayed in force until 1983 with a series of amendments. "State Tender Act" (Law No. 2886) was enacted in 1983 and entered in force in 1984. All these laws had been regulated for both public expenditure and revenues, namely purchasing, selling, leasing and swapping, works, design, repair, and transportation activities of government agencies.

The current law, Public Procurement Law (No. 4734) was designed on the basis gathered from the implementation experience of the State Tender Law. Knowledge and practices truly are crucial for understanding the discourse around the PPL.

During its enforcement, the State Tender Act (No. 2886) was detailed through a series of secondary laws with the decree issued by Council of Ministers and administrative circulars revealed by mainly two ministries: Ministry of Finance and the Ministry of Public Works and Settlement. Both were actively involved in the design of the new procurement structure but they also downgraded the new structure by the beginning of 2000s.

The State Tender Act (Law no. 2940) was designed to regulate both the spending and revenue making activities of the entities at the central governmental level that are financed with general and annexed budgets, the municipalities, and other local administrations. Article 71 of the law, lists the conditions when and which government agencies are not subject to this law. The main exception referred in this Article is state economic enterprises. As these entities conduct procurement and purchasing according to their own internal procedures, their practices were open to deviations from the general rules of the procurement regulations. Exceptions from the law, particularly the exception of SEEs, were

criticized since the deviations from the law disabled the economic operators from understanding the system and act accordingly. The other reason for the criticism of prevailing exemptions from the law was that they caused deviations from the general rules of accountability, competitiveness and transparency.[211] The other distinctive feature of the law was its provisions on "estimated value", the evaluation of tenders and the award of contracts. The contracts were awarded under the State Tender Act on the basis of the reductions made on the appropriate value. The appropriate or estimated value was said to be determined on the basis of the criteria established by the ministries under the coordination of the Ministry of Public Works and Settlement. These values therefore were not required to be determined prior to the bidding process according to particularities of the tender, thus opening a space for personal discretion by the public officials. This process was criticized for opening the door to favoritism and corruption.[212]

The State Tender Act regulated the procedures for works and supply contracts. It was limited in terms of its scope, considering the high share of the service contracts within the total current public expenditure. Apart from the limitations in the scope, the implementations were criticized. For instance, the works contracts were subject to carnet system. Carnets were contractor certificates with different status levels. The system was designed to award the contracts to the best candidates based on their past performance record and professional capacities. However, the system had loopholes in that the staff of the Ministry of Public Works and Settlement, particularly the high level bureaucrats, were giving carnets automatically even to those with greatest liabilities. As the carnets could be bought and sold, the contracts were being awarded to inexperienced economic operators that developed the close relations with bureaucrats.

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[211] IPPC, Kadir Akın Gözel, Reforming Public Procurement Sector in Turkey, 51, http://www.ippa.org/IPPC1/BOOK/Chapter_4.pdf And The World Bank, Country Procurement Assessment Report, 2001, 1.

[212] Ibid, 52.

Hence the system was open to corruption and abuse and it became public knowledge that public procurement in Turkey in 1990s had been associated with corruption.[213] In 2001, the World Bank prepared a report on the public procurement system in Turkey and underlined the loopholes and abuses in Turkish public procurement. However, the World Bank's criticism of the system was not limited with the abuses in the system. The report also underlined how this system operated to the detriment of foreign economic operators. For instance, the procedures required foreign contractors to submit documents that certify their completed comparable works. The overwhelming number of these documents was then evaluated on the abuses that negatively affect the foreign bidders.

Not directly within the purview of the State Tender Act but within the secondary law, the foreign bidders were restricted to bid in the public procurement market to a certain extent. The World Bank report on Turkish procurement system was critical about the restricted participation of foreign bidders. Accordingly, Regulation No. 18293 of 26 January 1984, allowed procuring entities to decide on the invitation of foreign bidders, but the countries for the advertisement of the tender was subject to decision of the procuring entity based on its knowledge of foreign sources of supply.[214] Another regulation reviewed in the report was COM Decree No. 85/9342 (March 27, 1985) which determined certain values for the application of international open tender procedure with the authorization of either the head of procuring entity, ministry or council of ministers. The World Bank report also emphasized the administrative barriers before the foreign contractors such as the requirement to have a registered address in Turkey and a certificate of

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[213] Seçkin Doğaner, Soygunun Öteki Adı Devlet İhalesi, (İstanbul, İletişim, 1999), 115-116, 109-119; Kadir Akın Gözel, 52, The World Bank, Country Procurement Assessment Report, 2001, 3.

[214] A similar provision was also made in article 22 of the State Tender Act.

membership from Turkish chamber of commerce and industry. [215]The same decree also established a 15% preference rate for domestic bidders. Taking into consideration the enactment date of the law, the requirements requested from the foreign tenderers could be regarded as standard protective measures against fraud in the context of lack of information technologies. The international financial institutions nonetheless emphasized the discriminatory aspect of the implementations and took issue with the abuses in the system in relation to impacts on economic operators and the loss of opportunities for the international capital groups.

The procedures in the State Tender Act consisted of closed and sealed envelopes for bidding, selective restricted bidding, public bidding, negotiated procedure, and competition. The selection of the procedures was largely left to the decision of the procuring entity. In comparison to international norms, the advertisement and transparency measures were evaluated as inadequate due to short notification periods for the advertisement of the tenders, which required 10 days for publication in local gazette. In the same vein, the evaluation periods for the offers were also defined in a restricted manner. Neither for tenderers nor the procuring entities were provided sufficient time. The offers prepared or evaluated within a very limited time period cannot be expected to be comprehensive. The other lack of the system that was noted in terms of transparency was the lack of contract award notification.

Apart from the notification and transparency issue, the evaluation process was not clear in terms of steps in the administrative, technical and financial evaluation. The Law did not oblige the authorities to award the contract to the best financial offer but allowed the procuring entities to select among the offers that have enough capacity. The procedures on how and on which criteria the evaluation committee would evaluate the offers were also not clarified in the Law. The system of awarding the

[215] The World Bank, Country Procurement Assessment Report, 2001, 4.

contract to the lowest financial offer, or the offer with the greatest reduction, was a common procedure. This practice was open to abuses since the economic operators undertook the contracts with the lowest financial offer and without a comprehensive planning; the projects turned into inapplicable operations and also the cost of the tenders was increased above the estimated value. As a result, the economic operators benefitted from the cost variations during their slow performance for completion of tasks. To sum up, the lack of evaluation criteria created deviations from the value for money and fair competition principle.

Furthermore, the previous law was also criticized for the lack of administrative body to deal with the complaints. In fact, the procuring entity, the Ministry of Finance, and the Court of Accounts or courts were the responsible entities to deal with complaints before a suit is filed in a court. However, a lack of structured and independent body to review the appropriateness of implementation of the law was missing in the system.[216]

To sum up, the procedures in the State Tender Act and obligations of the procuring entities were not comprehensive since the transparency and competition principles were used in a selective manner that the law was associated with corruption and the ineffective management of state affairs. However, the main problems were not only the lack of transparent practices of notification periods of tenders or notification of award decisions. Beyond that, the law did not have strict procedures to force the procuring entities to prepare a detailed plan for their needs and the budgetary constraints. The cost of the works and estimated value were thus taken for granted without a research. As the evaluation was made according to reductions in the estimated value, the public agencies award the contracts to economic operators that would make unreasonable offers. During the implementation period, however, the

[216] Kadir Akın Gözel, 52. And The World Bank, Country Procurement Assessment Report, 2001, 9.

economic operators had right to receive more than the contract value with the increases in the cost. And so, if the public agencies did not make the necessary budgetary revisions, the projects would run the risk of being left unfinished. Therefore, the reductions in the financial offer were not the efficient solution and were causing indirectly the violation of the principles of competition and transparency in the long-run. Moreover, the loopholes in the carnet system opened the system to corruption. The lack of controls and auditing opened the ground for arrangements between politicians-bureaucrats and economic operators where even those without necessary experience could be awarded large budgeted contracts.

At the end of the 1990s, corruption cases were of public knowledge and the bureaucracy and politicians were considered untrustworthy in the eyes of public.[217] One of the reasons for this suspicion was directly related to tendering and procurement cases. In the meanwhile due to the economic and political crisis during the 1990s, Turkey was implementing an economic program prepared by IMF, which was appreciated by some segments of the society but criticized by others s, and at the same time attempting to achieve the EU criteria as a candidate state.

The next part will discuss the economic and political conjuncture at the end of 1990s, the steps taken in response to the economic crisis with the influence of the IMF and international actors and the conflicting reactions of the bureaucracy, politicians and stakeholders in response to the new policies.

[217]Seçkin Doğaner, 32-43, 89-96.

5.2.2. Preparation and Enactment of the Public Procurement Law under the Impact of the Troika

By mid-1990s Turkey signed a standby agreement with the IMF after a 10 year period without IMF credit.[218] The IMF financial assistance can be received upon a request by the member state to resolve the balance of payment needs tied up with an agreement of specific policies reached between the IMF and the member state.[219] Although the reason of lending credit is resolving balance of payments, the suggested economic measures have multi-dimensional character such that social and political structures are being rearranged with the tailor made policies of IMF. The arrangements and Letter of Intent to IMF, reflect the mindset of IMF rather than suggestions to respond to the specific needs of the member states. Since the economy is perceived as independent of social and political constraints and is presented increasingly within mathematical forms, the IMF policies responding to balance of payments problems end up with similarities for differing countries. In the 1990s, the trend was for IMF to impose the conditionality of implementation of structural reforms.

From 1997 to 1999, the primary concern for Turkish authorities in their communication with IMF and in the every IMF report, was structural reforms. These structural reform packages also reflected the mindset and discourse of the World Bank that this was transposed into practice by Turkish authorities.[220] As one of the main pillars of the Letter of Intent to

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[218] Zeynep Erdinç, "Uluslararası Para Fonu -Türkiye İliskilerinin Gelisimi ve 19.Stand-By Anlasması" *Sosyal Bilimler Dergisi,* no.18 (Ağustos 2007), http://sbe.dpu.edu.tr/18/99.pdf.

[219] IMF Lending, http://www.imf.org/external/np/exr/facts/howlend.htm.

[220] July 2, 1999, IMF Mission for the 1999 Article IV Consultation Discussions and Third Review of the Staff Monitored Program-Turkey; 25 Sept 1997, Statement by the Hon. Gunes Taner, Governor of the IMF for Turkey, at the Joint Annual Discussion.

IMF, the structural policy targets, were prepared in close collaboration with World Bank.[221] In the reports and letters between Turkey and IMF, the Banking Law, privatization, reform of social security system and agricultural support policies were the main policy targets. In the latter period, either Intent Letters were based on these issues or the release of funds was interrupted due to deviation from in the implementation of these reforms.

In the meanwhile, especially after the change of the government in 1997, Turkey was enthusiastic to develop its relations with the EU. In 1999 at Helsinki Summit, Turkey's candidate status was recognized with its intention to continue reforms in compliance with the Copenhagen criteria. The recognition of candidate status brought the burden of adaption of the EU acquis and the implementation of a list of economic and social reforms including institutional reforms. Although the public purchasing chapter came to the fore as a negotiation area after the opening of EU negotiations in 2004, the topic had been shown in Progress Reports since 1998. Furthermore, in the preparation of the new Public Procurement Law, the structural reforms had already been enforced not only by IMF but also World Bank and EU authorities together.[222]

Despite the ongoing financial program in collaboration with IMF, in 2001 Turkey experienced a financial crisis that led to the loss of jobs, increase in unemployment, and decrease in growth rates. The financial crisis of February 2001 rather made the government more committed to the structural reforms which were seen as a cure for recovery and

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[221]IMF, *Turkey Letter of Intent,* 18 December 2000 (accessed 07.11.2011). http://www.imf.org/external/np/loi/2000/tur/03/index.htm

[222] "Ek Niyet Mektubu Hazır", *Cumhuriyet,* 25.06.2001 states that the World Bank will release the funds upon the executive board of IMF declares the eighth review is completed.

establishment of stability.[223] In the implementation of the economic program, however the government was not completely acting in collaboration with IMF, since it had difficulty in realizing its full commitment to the program in terms of privatization of large state companies like Turk Telekom. As a result, when the IMF representatives were giving positive messages about Turkey in Press Releases on the progress and endorsement to the program[224], the mission from IMF in Turkey was also being hard during the negotiation for the implementation of the economic agenda. An assessment paper on Turkey in July 2001, stated the central objectives of the IMF policies, thus:

> the structural policy agenda focus on three key areas: banking, fiscal transparency, and policies to enhance the role of the private sector in the economy. The common thread of these policies is an effort to enhance the efficiency of the economy through greater transparency, better governance and stronger regulatory environment.[225]

The regulatory capacity of the government was therefore the main objective of the IMF to secure capitalism. In the period, the public procurement law did not come out as with issues related to tobacco and sugar law, privatization of state banks or capitalisation of private banks and privatization of Turk Telekom, Turkish airlines or energy sector state companies. These issues were the main targets under structural policy and public procurement law had comparatively a minor position as a subject to be negotiated. However, the discussion around and

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[223] Turkey Letter of Intent and Memorandum on Economic Policies, May 3, 2001; News Brief: IMF Managing Director Köhler's Statement on Turkey, April 27, 2001; IMF Worked with Authorities to Solve Turkish Problem, A letter to the Editor By Michael Deppler Director, European I Department IMF, Financial Times, March 19, 2001, Press Release: IMF Approves Augmentation of Turkey's Stand-By Credit to US$19 Billion, May 15, 2001.

[224] Transcript of a Press Briefing by Thomas Dawson, May 10, 2001, http://www.imf.org/external/np/tr/2001/tr010510.htm.

[225] Turkey: Sixth and Seventh Review Under the Stand-By Arrangement; Staff Supplement; and Press Release on the Executive Board Discussion, Series: Country Report No. 01/89 ,June 14, 2001.

justifications for the enactment of law was in compliance with the general approach of the IMF. The law was promoted around the idea of establishment of transparency, good governance, corruption prevention system and in terms of its contribution to fiscal policy.

On March 2, 2001, after his appointment as the state minister responsible from economy, Kemal Dervis set out a substantial new step in economic reforms with his Letter of Intent dated 3rd of May.[226] Before the publication of the Letter, amendments in State Tender Act and regulation on expropriating were stated as within the priority measures in the framework of the economic program. The other main regulations targeted to be enacted were establishing the autonomy of the Central Bank of Turkey, the sugar and tobacco law, the law permitting privatization of 51 % of Turk Telekom, the petroleum and natural gas law, and amendments in the commerce and banking related laws. These urgent targets in the economic program were designed to be realized in exchange for the possible release of funds by the Executive Board of the International Monetary Fund at the end of April 2001. [227] The economic program was clarified in mid-April 2001, when Derviş described the main targets of the program as "restructuring of the financial sector, promoting transparency and strengthening of public finance, enhancement of competitiveness in the economy, and strengthening of social solidarity".[228] This economic program was based upon 15 laws that were to be enacted as a condition for the financial support of IMF.[229]These

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[226]IMF, Letter of Intent, May 3, 2001, http://www.imf.org/external/np/loi/2001/tur/02/index.htm.

[227] "Derviş Para Turuna Çıkıyor," *Hürriyet*, March 22, 2001, accessed November 16, 2011, http://hurarsiv.hurriyet.com.tr/goster/printnews.aspx?DocID=-233316.

[228] "İş Güvencesi Yasası Çıkacak," *Cumhuriyet*, April 15, 2001, accessed September 27, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0104/15/t/c0501.html.

laws required the independence of the Central Bank, abolition of some of the funds provided from general budget of government account, elimination of state protectionism for a list of sectors and ensuring for the opening of these sectors to free market economy, and redefinition of state borrowing with stricter rules and limited guarantee shares. Public Procurement Law came out as one of the targets to prevent incremental costs and to establish efficient and competitive tendering.[230] In the Letter of Intent of May 3, 2001, the government committed to enact a series of laws and regulations, including presentation to the parliament of a draft public procurement law until 15 October. The law was required to be prepared considering the UNCITRAL standards. The public procurement law was stated as a proof of compliance with structural benchmarks.[231]

Considering the political parties and actors in the period, and although Minister of State Kemal Derviş was very enthusiastic about the urgent enforcement of the laws in order to complete the 6th and 7th Reviews and comply with structural benchmarks, the coalition of three parties was cautious about the reforms. ANAP had been putting reservations on the Banking Law and MHP was challenging the law on privatization of Telekom. The President, who had been assessed as one of the responsible parties of the financial crisis of February 2001, was in a dilemma between to publish the laws as it had been required by IMF or to send them back to Parliament to be re-voted. The President, Ahmet Necdet Sezer, was known for his dissenting opinion on the Telekom Law in 1994 but politically was not in position to be responsible for the financial crisis.[232] In March 2001 the program was criticized among the

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[229] Ibid.

[230] Ibid.

[231] "Niyet Mektubu," *Radikal*, May 19,2001,accessed August 26, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=597837&Date=26.08.2011&CategoryID=101.

economists for its focus on financial economy and in terms of its insufficiency to affect the real economy. The economists and the representatives of the entrepreneurs were expecting urgent measures to stimulate the economy and to address the financial crisis rather than purge the banks and funds, increase prices, and impose tight monetary policy.[233] The other criticism directed towards the programming and implementation of the economic program was directed to the IMF due to its interference with the bureaucrats in the law making process and in pushing the parliament to the back burner.[234]

While the IMF established itself as a political actor, political conflict and deviation from the program arose due to differences in political calculations between and within the political parties and the bureaucrats. The problems arosed between the IMF and Turkey and among the coalition parties because of the deviation from the Intention Letter submitted to IMF. Although the reform promised to the IMF was approved by each member of the coalition, discrepancies between the coalition partners increased in the implementation period. Thus, the attitude of the politicians was being also criticized for their tendency to direct the economy according to their political interest.[235] IMF insisted on the appointment of a professional team composed of people experienced

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[232] "Gözler Onay için Köşk'te," *Cumhuriyet*, May 14, 2001, accessed September 27, 2011,
http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0105/14/t/c0506.html

[233] Güngör Uras, "Bu açıklamalar piyasayı ne rahatlatır ne işletir," *Milliyet*, March 15,2011, accessed,
http://www.*Milliyet*.com.tr/2001/03/15/yazar/uras.html; In "Sakinleştirici Paket: Program Birsey İfade Etmiyor, Fuat Miras (TOBB Başkanı); Hurşit Güneş on the other hand, was declining the cirticisms on ignorance of real sector do not make sense. Build up trust by the implementation of the program would be the way towards coverage of the cirisis., 11.07.2011 *Milliyet* 8.

[234] Tuncay Özkan, "IMF Meclis'e Karşı", Milliyet, June 13, 2001, 18.

[235] Güngör Uras , "Köşeye Sıkışmış Durumdayız", Milliyet, 04. 07.2001; "Mehter Takımı Gibisiniz", Milliyet 04.07.2001;Hasan Cemal, "Türkiye'yi *Dünya*ya Rezil Etmek", *Milliyet*, 05.07.2001

in the private sector to the executive board of Turk Telekom and blamed the politicians for their denial of the economic program by making appointments with political character.[236] As a result, the Public Procurement Law was not breaking news in the media up to the end of 2001, as the agenda was full of structural changes. On the other hand, the politicians were making their last move to protect their interest before giving autonomy to the institutions. But the conflict between the groups was due to partisanship rather than the protection of the rights of the public. Consequently, the institutions and responsible ministries in the implementation of tender law would later create a similar conflict of personal and institutional interests in the preparation and enactment period of the Public Procurement Law. The other actor collaborating on structural reforms, the World Bank, had already prepared a report on the State Tendering Act in which the loopholes of the system were presented and a series of corrective policy suggestions were made.

The Ministry of Public Works and Settlement and The Ministry of Finance were the two main institutions responsible for the execution of the State Tender Act. These two ministries took part in the preparation of the new draft law. The draft law prepared with the participation of the ministries but was assessed as insufficient by the experts from EU. The reason for the insufficiency claimed by EU was the lack of an independent Procurement Authority and procedures on service and supply purchasing. Moreover, the EU remarked that selective restrictive bidding does not comply with EU procedures. Minister Koray Aydın of Public Works and Settlement was in conflict with the requirements put by the EU and World Bank authorities. Basically, the international actors pushed for the establishment of an independent/autonomous council which was regarded as the guardian for the establishment of transparency, predictability, neutrality, and prevention of discrimination. The Enactment of the law until 15 October was the condition for the

[236]"IMF ile Zor Pazarlık", *Milliyet*, July 6,2001.

release of Public Sector Funds by the World Bank. [237] The draft law was revised by the experts from the Ministry of Public Works and Settlement, the Ministry of Finance, EU and World Bank. Although to a large extent the draft was already prepared in the second half of the October, establishing an independent public procurement authority remained a problem such that the draft law could not be sent to the Council of Ministers to be presented to TGNA. The answers to questions were still ambiguous as to how will the board be formed and how will it function and what will be its extent of independence or autonomy. The Ministry of Public Works and Settlement expressed its opinion to connect the independent Procurement Authority to the Prime Ministry[238] as if the institution can still have financial and administrative autonomy. The establishment of an autonomous Board led by the Turkish bureaucrats divided opinions into two groups. On the one side Ministry of Public Works and Settlement and The Ministry of Finance opposed it while on the other hand, the State Planning Organisation (SPO), the Undersecreteriat of Treasury and the Secretariat General for EU Affairs opposed the approach of the two aforementioned Ministries.[239] These three institutions are more actively involved in relations with the EU, IMF and the World Bank in the name of Turkey that and the policy requirements and reforms were framed through these institutions. As a result, these three institutions developed their position in line with the requirements enforced by the international actors.

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[237] "İhale Yasasına AB Rötuşu," *Cumhuriyet,* September 07, 2001, accessed September 28, 2011,
http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0109/07/t/c0502.html.

[238] "İhale Yasa Taslağı Tamam," *Hürriyet*, October 19, 2001, accessed October 6, 2011,
http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=22644.

[239] "İhale Özerkliğe Takıldı", *Milliyet*, 24.10.2001,8.

Meanwhile, due to the bad publicity on corruption, named "vurgun" in the Ministry of Public Works and Settlement, its Minister, Koray Aydın, resigned from the Ministry and deputyship. Kemal Derviş insisted on the importance of the law and the need to enforce it immediately. The two ministers were also making contradictory declarations about the timing of the law which negatively affected the financial markets. These contradictory expressions on the timing of the enforcement of the law, according to some journalists, represented the differing objectives of the ministers. For instance, MHP was said to be attempting to politicize the procurement field by acting with partisanship to keep its power in the field by preventing the transmission of powers to another entity other than the Ministry that was given to MHP as a seat in the coalition. On the other hand, the media supported Derviş who constructed his discourse on combating corruption. While the issue was being discussed on political grounds, depoliticisation claims were still being supported. [240] In the ends, the conflict over the law was resolved by the leaders of the coalition partners. In presenting the law, the Minister of the Public Works and Settlement stated that the law cannot be evaluated as a requirement of the World Bank and IMF but as a step for harmonization with the EU acquis. The Minister also underlined an issue that was still being discussed. He stated that:

> In order to prevent a situation that happened with the Customs Union, a temporary article was prepared. Turkey cannot enact laws as if it has been approved as a member state. If this is required, domestic investors would be aggrieved; that is why upon the membership of Turkey to EU, the articles in line with EU regulation will start to be enforced.[241]

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[240] Hurşit Güneş, "Sandık Hüsran Olacak", *Milliyet*, 26.10.2001, 8.

[241] "İhale Yasası Krizi Sürüyor," *Cumhuriyet*, October 26, 2001, accessed September 28, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0110/26/t/c1312.html.

The new law also initially made a distinction between foreign economic operators and domestic capitalist groups despite the international financial institutions. The independent authority was decided to be connected to the Ministry of Finance due to comparatively low share of the Ministry of Public Works and Settlement in pubic tenders.[242] As a result, the Minister of Public Works and Settlement started to insist on the extension of the deadline for the enactment of the law on 15th of October. According to him, timing can be prolonged due to the workload of the second legislation related with the law.[243] However the attempts of the politicians to interrupt the process drew negative reactions from capital groups. On the eve of the presentation of the law to the Council of Ministers, the strongest capitalist group, TÜSİAD, made the declaration on the urgent need to enact the Procurement Law. It said that the law was important to harmonize with EU regulation and the completion of structural reforms and to prepare the ground for the efficient use of public funds, to ensure public checking on the system, and to establish transparency through an independent and accountable Public Procurement Authority.[244]

In October 2001, the details of the draft Public Procurement Law took place in the media with its characteristic of large scope and limited exceptions. Initially, the draft law was appreciated in the media on the basis of the general principles of the law, establishment of efficiency,

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[242] "İhale Yasası Krizi Sürüyor," *Cumhuriyet*, October 26, 2001, accessed September 28, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0110/26/t/c1312.html; Top Bakanlar Kurulu'nda , *Milliyet*, 26.10.2001 states that the independent authority will be related to Ministry of Public Works and Settlement that the question on status of authority was ambiguous.

[243] "İhaleyi Liderler Çözecek", *Milliyet*, 26.10.2001, 8.

[244] "TÜSİAD:Yasa Hemen Çıkmalı," *Radikal*, October 27, 2001, accessed August 25, 2011.
http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=614052&Date=25.08.2011&CategoryID=101.

review of complaints by independent authority, and standardization in the field. The draft law was developed in line with the UNCITRAL principles and the general principles of EU procurement regulation. The draft law in question required budget allocation for initiation of the tender process in order to ensure efficiency in implementation. The law also introduced two types of protection for the domestic capital groups: the threshold values for the use of PPL[245] and the possibility of 15% price advantage for domestic tenderers. Furthermore, the new feature of the law was the establishment of an independent body that will be responsible for the correct implementation of the law by providing standard contract templates and review of complaints mechanism. Another measure taken against the bad implementations of the previous period was the strictly defined conditions for amendments in the contract.[246] While these were the features of the law to be conceptualized as a tool for combating h corruption, the law also drew reaction in the media due to the excessive IMF intervention in the preparation of the draft law. Moreover while the protectionist elements of the law were being underlined, on the one hand, the law was critically seen as promoting the opening of public tenders to foreign candidates especially in the contracts that have economically big value. The lack of trust on the politicians/bureaucrats and to their resistance to IMF demands constituted the background of this criticism. *Cumhuriyet,* the newspaper with nationalist and Kemalist tendencies, also had a protectionist tendency that it intensified its criticism to the opening of public tenders to foreign candidates. The paper claimed that the budget of the state will be used by the foreign investors to compete with the domestic

[245] The threshold levels (for good and service purchases: 180.000 for public institutions general and annexed budget and 280.000 for other public institutions; 7.4 million for work contracts) were perceived as tool of preventing foreign tenderers. İhale Yasası İmzada Tarihi İse Belli Değil, *Milliyet*, 02.11.2001, 9.

[246] "Kamu İhale Yasa Tasarısı TBMM'de," *Hürriyet*, November 21, 2001, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=38312.

entrepreneurs. Another point of criticism focused on the inherent relations between the state and international capital groups. The advantages for domestic tenderers (the price advantage and the indirect advantage of threshold values) would indirectly serve foreign economic operators if and when the public entities choose not to use these domestic advantages. The method of determining the threshold level also turned into a debate. The Ministry of Finance stated that it is the responsible organ for the determination of the threshold. This power of the Ministry was evaluated as allowing arrangements between the international investors, their representative IMF and MoF who may maintain the threshold in low values. The protectionist discourse revolved around the criticism against the PPL. The criticisms focused on the transformation of the state and the transfer of powers of audit and monitoring to the private sector from the public institutions through the PPL type of neoliberal laws. [247]

The discussions on the exceptions of the law were intense in the TGNA Commission. Article 3 of the draft law defines the exceptions of the law. According to this provision in the draft law, the procurement of items and service for the modernization of defense, security and intelligence was out of the scope of the law. Not only the opposition parties like AKP, DYP, and SP but also the MHP challenged this article. They suggested to the two coalition parties ANAP and DSP to include tenders operated by military and security entities within the scope of the law through appropriate measures. This very limited number of exceptions on defence related purchasing was justified by the situation in Germany since in 2001 defence was not yet included in EU procurement regulations. On the other hand, other exceptions defined in the draft law such as the purchases made by two public banks (Ziraat Bank and Halk Bank) and

[247] Oktay Ekinci, "İhale Yasası Tuzakları," *Cumhuiyet*, November 05, 2001, accessed September 28, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0111/05/t/c0413.html.

the leasing and buying of real estate activities of the state were repealed from the law in the first day of the meeting[248]. However, until the enactment of the law, the situation of the banks was revised continuously.

On the participation of NGOs and public servants, the Commission rearranged the exceptions by broadening them such that the purchases made by public banks (Ziraat and Halk Bank) and by those banks transferred to Saving Deposit and Insurance Fund (TMSF) were taken out from the scope of the law. This exception was justified by the statute of these banks as these were in the process of privatization. According to the Minister of Public Works and Settlement, keeping these institutions within the scope of the law would prolong the privatization process. The other exception stated in the law was a positive one in terms of mentality and protection of resources. The law exempted the purchases of goods and services of the State Supply Office. In contrast to the overall nature of the procurement law, through this exception, the public entities were given an option to use items produced by the state and not to buy goods and services from the private sector.

The concerns raised by the stakeholders in the Commission were mainly about protection of Turkish capitalists against the foreign investors. The business world demanded the revision of the threshold level with an increase to 11 million from 7 million and the extension of the tenders under restricted procedure.[249] For instance, the representative of Turkish Industrialists and Businessmen Association (TÜSİAD) proposed to increase the threshold levels to protect the domestic contractor.

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[248] "Kamu İhale Yasası Komisyonda," *Hürriyet*, December 25, 2001, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=44695.

[249] "IMF yasaları yetişmiyor," *Cumhuriyet,* December 21, 2001, accessed September 28, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0112/21/t/c0505.html.

Similarly, The Union of Chambers of Turkish Engineers and Architects (TMMOB) suggested the prevention of opening up of public resources to foreign entrepreneurs. With the same objective, TMMOB also suggested the extension of the scope of the law to the tenders funded by foreign credits. The TÜSİAD representative required taking measures to ensure the autonomy of the evaluation committee members. The TOBB demanded a clarification of the article that prohibits the participation to public tenders by the economic operators with premium debts to Social Security Authority for workers and tax debts.

According to the president of The Union of Chambers of Turkish Engineers and Architects (TMMOB), due to the lack of resources in public and private sector in Turkey, the competition objective cannot be achieved and the draft law, by trying to establish equality between the unequal parties, will further damage competition principle. The draft law according to him would not contribute to the development of human resources, growth of the country and domestic industry but contribute to the opening of the Turkish public market without any precondition and to exploitation. He continued that while the economic plans and development plans are based on the use of domestic resources, the draft law does not reflect this approach.[250] The lack of the draft law according to the representative of the Union was the principle of public interest and preference for the promotion of scientific and technologic capabilities of the state and development of industrialization.[251]

The Bar of Ankara on the other hand declared that they do not have support a law that is incoherent with national interests.[252] While the

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[250] "Sömürgecilik Yasası," *Evrensel,* October 26, 2001, accessed October 6, 2011, http://www.*Evrensel*.net/v1/01/10/26/ekonomi.html.

[251] "İhale Yasası IMF'nin ve AB'nin İstediği Gibi," *Evrensel,* October 29, 2001. accessed October 6, 2011, http://www.*Evrensel*.net/v1/01/12/29/politika.html#2.

private sector was promoting the protection of domestic capitalist groups, the public sector representatives were claiming their reasons to be out of the scope of the law.[253] When the law was being discussed in the Commission of TGNA, for the signature of a new stand-by agreement with IMF, a Letter of Intent was being prepared with the participation of the IMF mission. The Letter of Intent dated November 20, 2001 stated that the Public Procurement Law was a benchmark point and a measure for improvement of governance and attracting Foreign Direct Investment, thus:

> We have also observed three key structural benchmarks, namely the appointment of advisors to help develop the corporatization plan for Turk Telekom, submission to parliament of a Public Procurement Law strengthening transparency and efficiency and in line with EU standards, and accompanying the draft 2002 budget by accounts and financial outlook for the various public sector entities.[254]

Since it was stated as a priority in the Letter of Intent, Public Procurement Law and Public Procurement Contract Law were enacted on 04.01.2002. The main axis of the discussion regarding the law in the TGNA was corruption and the authorities of the PPA as an independent regulatory agency. The corruption issue was raised both by the in-power and opposition parties, and the law was both supported and criticized on the basis of the corruption issue. For instance, the opposition party representatives generally touched upon the articles of the law regarding how they may lead to corrupt activities. They criticized mainly the exceptions, direct purchases, and competitive negotiation method of procurement. The parliamentarians stated that the exceptions, lack of monitoring and abuse of the methods of procurement created the corrupt

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[252] Ibid.

[253] "İhale Yasasından Fon Bankaları Çıkarıldı," *Hürriyet*, December 26, 2001, accessed October 6, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=44892.

[254] IMF, Turkey- Letter of Intent, 20 November, 2001, http://www.imf.org/external/np/loi/2001/tur/05/index.htm.

activities under State Tender Act number 2886 and these need to be revised with the new law. As a result, the justification of the law was combating corruption and this discourse determined the main axis of the debate both for the in-power and opposition parties.

The other main debate was the authority of the PPA, which was criticized in terms of its autonomy and possibility of abuse of power with its endowed autonomy. In fact the debate around the independent agencies and the PPA was connected with their position of being away from any influence and control of state mechanisms and this issue was related to corruption and accountability. The response of the in-power party was within the mindset of the criticism that the PPA was said to be not an independent agency but an institution to review the complaints of tenders and its responsibility is not regulation of the field. Regarding the PPA the other issue that came to agenda was the nature of the Public Procurement Board that did not represent any engineer association and labour and employee association. In the TGNA also the law was criticized in terms of its enactment process and the speed of the government to pass the law under the pressure of the IMF and for creating advantages to the foreign economic operators.[255] Hence the law was supported in the TGNA in principle and the general agreement was that the State Tender Act created enormous corruption cases. The PPL was criticized in terms of being an IMF imposition and may not create the necessary change in the system in terms of combating corruption. During the discussion in the TGNA General Assembly, the draft law was amended in line with the demands that appeared in the media. Thus, the next day's news emphasized domestic protection. During the preparation of the draft law, the threshold level was changed more than few times with differing concerns, to make it compatible with either UNCITRAL, GPA or EU

[255] T. B. M. M. Tutanak Dergisi, 21th Parliament, 4th Judicial Year, 47th sess., Vol 82, January 4, 2002. http://www.tbmm.gov.tr/tutanak/donem21/yil4/bas/b047m.htm.

levels[256].Over these standards, the General Assembly determined the threshold levels as 750.000 for goods and services purchases for public institutions included in the general and annexed budget, 1 million for other public institutions, and 17.5 million for work contracts. Moreover the law stated that the price advantage of 15% will not be used by the companies having foreign partner. Also, the Banks in the process of privatization (Ziraat Bank, Halkbank and Emlak Bank) were subject to the law for work contracts they would sign. Associations, foundations and quasi companies established by the municipalities were not allowed to tender in public tenders. [257]Moreover, a special regulation was made for abnormally low and high tenders for their elimination in the evaluation process.[258]

In order to make a comparison with the previous regulation, the main points of the law shall be mentioned here. The scope of PPL was designed to be extensive as to cover all tender practices through only one single regulation. As a result, the scope of the law was defined to cover any procurement held by public entities and institutions governed by public law or under public control or using public funds, including the entities in utilities sector. .[259] In this context, in comparison with EU procedures,

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[256] "AB Değil Türk Standardı," *Radikal*, November 01, 2001, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=614581&Date=25.08.2011&CategoryID=101.

[257] "Kamu İhale Yasası TBMM'den Geçti," *Radikal*, January 05, 2002, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=620538&Date=25.08.2011&CategoryID=101.

[258] "İhale Yasası Tamam," *Radikal,* January 06, 2002, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=620562&Date=25.08.2011&CategoryID=101.

[259] Public administrations included in the general budget, and annexed budget, administrations with special budget, special provincial administrations and municipalities and their related revolving funds organizations, associations, legal

the exceptions of the law were regulated in a very limited manner in 2002. These were: Purchases of agriculture or livestock products made directly from the producer or its partners in order to process, utilize, improve or sell pursuant to the establishment purpose or regulations of such entities; procurement of items and services for the modernization of the items related with defence, security and intelligence. Procurements of goods, services or works, which are to be realized with foreign financing pursuant to international agreements, and in the financing agreement of which it is stated that different tender procedures and principles will be applied are excluded from the scope of the Law. Exceptions are defined for the purchases of some entities and for the specific purchases made from such specific entities.

The general principles of the PPL were designed in compatibility with the EU general principles. Accordingly, public institutions, and contracting authorities, were obliged in ensuring equal treatment, transparency, competition, public supervision, fulfillment of needs appropriately and promptly, and lastly efficient use of resources. All these objectives were compatible with the post-1980 management discourse in public administration. These abstract norms were attempted to be achieved through certain tools. For instance, to ensure the effective use of resources Environmental Impact Assessment was made an obligation for the relevant contracts. The division of procurement of goods, services or works into lots was restrained in order to prevent use of the threshold values to be out of the scope of the Law. The allocation of sufficient

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persons; State economic enterprises, including energy, water, transportation and telecommunication; Social security establishments, funds, legal persons that are established in accordance with special laws and that are assigned with public duties (except for professional organizations and foundation institutions of higher education) and institutions with independent budgets; and lastly any institutions, organizations, associations, enterprises and corporations which more than half of their capitals, directly or indirectly, together or separately are owned by those stated above.

budget for the initiation of procurement proceedings was also made obligatory to prevent incomplete investments.

Domestic tenderers were protected to some extent but the high value contracts, in which foreign tenderers would be more interested, were opened to all candidates from any nation. The crucial point here is that Turkey was not a party to international agreements, like GPA and therefore was not under obligation to open public tenders to other nations. Threshold values were defined. Under the threshold value, the contracting authorities would be comparatively free to apply the obligations of the Law, although they were bounded with the general principles. Threshold value in fact creates an advantage for domestic tenderers who are also awarded with 15% price advantage.

The law's open and restricted procedures were set as default procedures. Negotiated procedure and direct procedure were designed as flexible methods in terms of formalities. For instance, the contracting authority does not have to advertise the tender and receive any securities in conditional cases. However, these procedures would be used conditionally in cases defined in the law.

The institutional innovation of the PPL was the establishment of Public Procurement Authority as an autonomous regulatory body with public legal status, administratively and financially autonomous. The PPA was established as an independent body that no organ, office, entity or person can issue orders or instructions for the purpose of influencing the decisions of the Authority. PPA consists of the Public Procurement Board, the Presidency and service departments. The decision unit of the Public Procurement Authority is the Public Procurement Board. Initially the Board composed of ten members that were appointed by the Council of Ministers were as follow: two candidates proposed by the Ministry of Finance, three candidates proposed by the Ministry of Public Works and Settlement, and one candidate each proposed by the Presidency of the

Court of Accounts, Council of State, and the Ministry in charge of the Undersecretariat of Treasury, and one candidate each proposed among professional groups relating to public procurements by Turkish Union of Chambers and Stock Markets (TOBB) and Turkish Employers Union Confederation (TISK). The methods of appointment, the period of duty and possibility of reappointment affects the independence of the Boards which became a question within the Turkish bureaucracy. The duties of the PPA can be summarized as: reviewing complaints of violation of PPL from commencement of the tender proceedings to the signing of the contract; training activities for the contracting entities and private sector; preparing standard tender documents and guiding in the implementation of the law; gathering information about the tenders and publishing statistics; performing the advertisement of the tenders and award notices through publication of the Public Procurement Bulletin; keeping records of those who were prohibited from participating public tenders; and lastly, protecting the rights of the nationals who are prevented from participating in tender proceedings in foreign countries.[260]

In comparison to the previous law on public purchasing, the new law abolished the carnet system and the publication of the estimated value and award of contracts with reduction of prices from the estimated value. Furthermore, in the new system, the global price system was selected to be used rather than fee-based price system in order to guarantee the completion of tasks.

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[260] In cases where it is established that domestic tenderers are prevented due to unfair reasons from participating in tender proceedings taking place in foreign countries, to take relevant measures in order to ensure that the tenderers of those countries are prevented from participating in the tenders held under the scope of this Law, and to furnish proposals to the Council of Ministers in order to ensure that the necessary arrangements are made. (Article 53).

The law was approved by the President and published in the Official Gazette to be enforced by 01.01.2003. However, immediately after the law was sent to the Presidency, the IMF and the World Bank commented on the law and required the lowering of the threshold levels with the reason of these levels are beyond the threshold levels determined by the GPA. This demand found support from the Minister of Public Works and Settlement who expressed that the change in the draft law was made without the knowledge of the ministry during the enactment process of the law in TGNA. The ministry accepted that the threshold level should be lowered in line with the requirements of the international practices.[261] In line with this commitment, the Letter of Intent of 28 January 2002 was made reference to achieve public procurement and planned amendments on the law under the public sector reform title:

> To strengthen **expenditure efficiency**, we will improve procurement methods and rationalize the public investment program. The Public Procurement Law in line with UN standards (UNCITRAL) was adopted by parliament on January 4, 2002 (meeting a **prior action**). Following its adoption, we will immediately begin the work necessary to allow it to take effect by January 1, 2003, including establishing an independent procurement agency by end-March 2002 (**structural benchmark**), and changing laws and regulations to make them consistent with the new framework. To further improve the transparency and competitiveness of public procurement, we expect parliament to amend the Public Procurement Law by end-May 2002, to (i) bring the real value of the thresholds toward those in line with international best practice and (ii) extend the minimum time period for procurement applicable for cases below the thresholds (**prior actions for the second review**).[262]

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[261] "Chibber, İhalede rötuş İstedi," *Hürriyet*, January 26, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=50683.

[262] Turkey- Letter of Intent, 28.02.2002, http://www.imf.org/external/np/loi/2002/tur/01/index.htm; For summary of the Letter of Intent and how it has been presented in the Turkish media Please See: "Gelecek İpotek Altında," *Cumhuriyet*, February 06, 2002, accessed September 29, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-

This Letter of Intent closed the prior credit of SRF and adopted a new credit with medium term schedule for repayments[263] in order to relieve the pressure over markets due to the lack of business confidence and capital inflows after 9-11, stated the representative of IMF.[264]The expected economic impact thus could not be achieved through the previous measures taken under IMF guidance. Hence, the suggestions of the IMF, World Bank and EU troika made the realization of the common rules. The World Bank representative appreciated the measures taken in the public sector after the enactment of the law. Since according to him "the source of corruption is public sector"[265] and the states need public sector reforms and regulatory agencies "to ensure of the transparency and eliminate the economics from politics."[266] These words from the

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bin/sayfa.cgi?w+30+/*Cumhuriyet*/0202/06/t/c0605.html; "Çalışan Sayısı Azalıyor İkramiye Erteleniyor," *Milliyet,* 06.02.2002; "Yeni Stand-by Onaylandı," *Hürriyet,* February 04, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=52495; "İşte Niyet Mektubu," *Radikal*, February 05, 2002, accessed August 26, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=623354&Date=26.08.2011&CCategoryI=101 ; Taha Akyol, "Türkiye Nereye?," *Milliyet,* February 06, 2002, accessed September 23, 2011, http://www.*Milliyet*.com.tr/turkiye-nereye-/taha-akyol/siyaset/yazardetayarsiv/06.02.2002/45767/ default.htm ; "IMF İstedi Kapılar Açılıldı," *Cumhuriyet,* May 22, 2002, accessed September 29, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0205/27/t/c1303.html.

[263] SRF transmitted to SBA for Turkey; the financial terms make the difference between the SBA and SRF that a borrowing country has to start repaying a SBA after three and a quarter years and finish the payment after five years. Whereas, a SRF borrower coutry has to be start repayment in two years and finish it in two and a half years. For further explanation, Please See: Nouriel Roubini, Brad Setser "Bailouts or bail-ins?: responding to financial crises in emerging economies", NewYork, Institute for International Economics, 2004,121.

[264] Transcript of a Conference Call with Journalists on IMF Board Decision to Lend to Turkey Michael Deppler http://www.imf.org/external/np/tr/2002/tr020204.htm

[265] "Yolsuzluğun Kaynağı Kamu," *Radikal*, February 16, 2002, accessed August 26, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=624356&Date=26.08.2011&CategoryID=101.

World Bank representative Johannes Linn showed that the private sector which shares the equal responsibility with corrupt bureaucrats and politicians in the exploitation of the public resources and public interest for their self-interest, was not regarded as a responsible party in corruption. Further, the requirement of separation of economics and politics, which is an unnatural division, aimed to leave the ground to parties who were irresponsible for their acts of self-interest.

When the independent regulatory agencies were being promoted by the international organizations, these agencies were under criticism in the Turkish media and among the politicians due to differing concerns. In the next part on the status of regulatory agencies, this paper will discuss how they were conceptualized in Turkey and the status of the Public Procurement Authority within this general picture just after its establishment.

After the enactment of the law, the era of amendments was opened for the PPL. The objectives behind the amendments were in fact the clash of interests among the groups that affect political power. Until the Public Procurement Law entered into force in 2003, the law was amended twice. These amendments were intended to correspond with the requirements of the IMF and World Bank to open the Turkish procurement market to non-Turkish entrepreneurs. The changes in the government also triggered the development of the amendments in line with the program of the new government. Hence, the context of the newly established government and what AKP promised to the electorate to be elected need particular attention.

Upon the criticism of external actors, the Public Procurement Law was amended first in 2002, before its entry into force. The main aim of the amendment was the lowering of the threshold levels to make them comply with EU standards. When the draft PPL was presented to the

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[266] Ibid.

TGNA in 2001, the threshold levels were in compliance with the EU standards but they were increased to the level of World Bank standards in the TGNA Commission and were taken over by the World Bank standards in the General Assembly.[267] Through the amendment in 2002, the level of thresholds was lowered to 300.000 TL for goods and services purchases made by public institutions in the general and annexed budget, 500.000 TL for other public institutions, and 11 million TL for work contracts.[268] Beyond the lowering of threshold levels to the international best practices levels, the amendment aimed to regulate the variation procedures in the value of contracts. Accordingly this level was delimitated with 20 per cent for the tenders with design and 50 percent for tenders with preliminary and final design. The amendment also defined the procedures for Public Procurement Board members, the judicial remedy process after review of complaints by the Board, and time periods for reviews of complaints.. The advertisement period of the tenders under the value of threshold was extended to 25 days from 21 days.[269] The amendments started the wave of constraining the scope of the PPL and the institutions subject to the law. Accordingly State Economic Enterprises, institutions as well as their sub-institutions in the process of privatization with at least 50 % of their value, were taken out of the scope of the law. Accordingly, their purchase of services and goods would be made with the decision of Council of Ministers. As the law

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[267]"IMF İstedi, Kapılar Açıldı," *Cumhuriyet,* May 22, 2002, accessed September 29, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0205/27/t/c1303.html.

[268] "Mini Vergi Paketine Köşk Onayı Tamam," *Hürriyet*, June 22, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=80018.

[269] "Mini Vergi Paketi Meclis'te," *Radikal*, May 28, 2002, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=633755&Date=25.08.2011&CCategoryI=101 ; "Nereden Buldun Yok," *Cumhuriyet,* May 28, 2002, accessed September 29, 2011, http://garildi.*Cumhuriyet*.com.tr/cgi-bin/sayfa.cgi?w+30+/*Cumhuriyet*/0205/28/t/c1208.html

published in January 2002 regulated only the work contracts performed by the entities in privatization process,[270] this amendment filled the legal gap.

In 2002 the Public Procurement Board was established and the Public Procurement Authority established the secondary legislation in order to prepare a group for the implementation of PPL by 2003, the subsidiary legislation detailed the law: it abolished the carnet system and established the performance criteria. The contractors would be sought whether they had completed 70% of a comparable work and whether they were financially and technically competent. With these criteria, a Board member declared the bureaucrats would not be able to benefit from the proponents anymore. The value of contracts would not be amended without exceptional cases, the estimated value of the contracts would not be publicized in the tender forecast, and, rather than the cheaper value, the best value for economy would be sought.[271] The President of the PPB, Şener Akkaynak, stated that with the review of the PPA and the new law, the impact of the politicians on the public procurement market would be abolished. He, moreover, emphasized that institutions like associations or foundations related to public institutions would not be allowed to tender for their related institution and a condition of private possession of 51% share of the companies would be sought. The example given was Foot and Mouth Diseases Institute related to the Ministry of Agriculture. Akkaynak stated that "the medical industry is developed in Turkey but we still strive to use state resources and companies and prevent private

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[270] "Mini Vergi Paketine Köşk Onayı Tamam," *Hürriyet*, June 22, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=80018.

[271] "Hamili kart işsiz kalacak," *Radikal*, September 24, 2002, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=645864&Date=25.08.2011&CategoryID=101.

medical companies that can perform the work cheaper."[272] Hence, the public private law also performed the role of the minimization of the state by making the public entities leave their economic responsibilities related to production and employment. The president of the Board also emphasized the role of the PPA in giving an end to the influence of politicians on the procurement entities and corruption: "the objective of the law is prevention of financing the politics through public tenders"[273]. As an autonomous body, the financial independence of the PPA had to be established. The self-income of the institution would guarantee the independence of the institution. One source of the income was through the tenders that the PPA would receive 5 per ten thousand share of the contract value. This source of income was sued by the Ministry of Public Works and Settlement. According to Şener Akkaynak this litigation would be only matter for contractors rather than the Ministry.[274] The same case caused a dispute between the two institutions as the Ministry of Public Works and Settlement lost its task of providing carnet. The abolition of this system was profitable for both the Ministry and the staff of the Ministry.[275] As a result, while the Public Procurement Authority was justifying her status as a barrier to corruption, within the system, it started to become a party in disputes due to losses of old benefits.

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[272] "Bütçede Ödeneği Olmayan Hiçbir İhale Yapılamayacak," *Zaman*, September 28, 2002, accessed September 24, 2011, http://arsiv.*Zaman*.com.tr/2002/09/28/ekonomi/butun.htm.

[273] "İhale Kurumu İlk Semineri Ordu Mensuplarına Verdi," *Zaman*, November 26, 2002, accessed September 24, 2011, http://arsiv.*Zaman*.com.tr/2002/11/26/ekonomi/h2.htm.

[274] "2003 İhale Miladı Olacak," *Radikal*, October 28, 2002, accessed August 25, 2011, http://www.*Radikal*.com.tr/*Radikal*.aspx?aType=*Radikal*HaberDetayV3&ArticleID=649427&Date=25.08.2011&CategoryID=101.

[275] "İhale Kurumu Bakanlık ile Mahkemelik Oldu," *Zaman*, October 24, 2002, accessed September 24, 2011, http://arsiv.*Zaman*.com.tr/2002/10/24/ekonomi/butun.htm.

5.2.3. Political Context in Turkey in the Process of Enactment of the PPL and the Dissemination of Independent Regulatory Agencies in Turkish Bureaucracy

In the 2002 elections, AKP (Justice and Development Party) came to power with parliamentary majority in the wake of a profound economic crisis. The parliamentary majority enabled AKP to establish a single party government which had not been experienced in Turkish politics for more than a decade. The context that brought the AKP to power can be described as short term unstable coalition governments, economic crisis, and high inflation with which the country struggled. In addition, symbol politics triumphed with Islamist political parties who were suspected by the 'non-political' actors of the high politics; the military and the judiciary also indirectly contributed to moderation of the conservative Islamist oriented parties;[276] and, the change in rhetoric of the AKP led to its arise to power.

The 1990s thus witnessed the rise of identity politics in the form of Islam and nationalism in Turkey and the economic transformation of the country created by monolithic political parties in terms of their economic policies. This period witnessed the struggle between the economically liberal oriented conservative right and center-right parties. The rise of DSP (Democratic Left Party) in the post-1997 era can be assessed as an exception to the period but the economic policies under DSP government were not altered but rather strengthened. The other identifying feature of the period was profound economic crisis that the governments were under pressure to adhere to a strict monetary policy. During the 1990s, neoliberal policies continued to be introduced through the economic stability packages. These economic measures were said to be adapted under pressure of the international financial institutions. But this

[276] İhsan Dağı, The JDP: Identity, Politics and Discourse in *The Emergence of a New Turkey: Democracy and the AKP Party,* ed. Hakan Yavuz (Salt Lake City: University of Utah Press, 2006), 96.

argument is rather reductive since the domestic actors were in need of a reform in organization of the state and the economy. In this context, due to the economic bottleneck the country was experiencing, the discourse for globally hegemonic neoliberal policies and for a minimalist state was adopted without much questioning. The discourse was promising since the politics of the 1980s was identified with corruption and clientelism. Hence, in 2001 when the governing party was founded, the judgment on neoliberal policies was complicated since their promises for the elimination of corruption and introduction of transparency were contradicting the nationalist and protectionist reflexes of the parties.

The AKP came to power in 2002 within this political context. It benefitted from the rise of political Islam since the 1980s and the struggle between the two center-right parties which were contaminated by corruption and fraud scandals. The party which is embedded in political Islam, adopted a more moderate discourse with its establishment in 2001. Rather than reacting against West, AKP confirmed its affiliation to the Turkey's EU membership[277] and made commitment for the IMF leaded economic program[278] that consolidated the support of not only the conservative

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[277] Erhan Doğan,The Historical and Discoursive Roots of the Justice and Development Party's EU Stance, *Turkish Studies Vol. 6, No. 3, (September 2005):*429-430. And Menderes Cinar Turkey's Transformation Under the *AKP* Rule, *The Muslim World*, Vol 96., (July 2006),480-481.

[278] Metin Heper,"The Justice and Development Party Government and the Military in Turkey" *Turkish Studies*,
Vol. 6, No. 2, (June 2005):222. Neoliberal politicies are prevalent in the AKP party program, in pre-election discourse and the practices in power: "The neo-liberal, market-based approach that dominates party identity in economic preferences has been symbolized by the emphasis on 'making Turkey an international trademark', and in Erdog˘an's rather ambiguous description of his party's plan for transforming active politics into the 'politics of merchants'. Thus, regulations in the socio-economic sphere are realized on the basis of privatization, creating incentives for foreign investment and compliance with the criteria determined by the IMF." Please See: Simten Coşar and Aylin Özman, "Centre-right politics in Turkey after the November 2002 General Election: Neo-Liberalism with a Muslim Face", Contemporary Politics, Volume 10, Number 1, (March 2004):.63. and For the relationship between MÜSİAD and AKP and the neoliberal practices of the AKP government Please See: Mustafa Şen,

segments of the society but also the liberals. The AKP's coming to power benefitted from its Islamist identity as a moral feature that it has been regarded as a reason for keeping the party away from corruption and fraud.[279] Moreover, the economic and political affiliations of AKP with neoliberal policies and international actors were also responsive to its economically active conservative base, MUSIAD, which since Virtue Party, had evaluated the EU project and the Customs Union positively. Hence the neoliberal discourse for privatization and market economy was not just adopted rhetorically but with a commitment to efficiency and competition. Peter Mandaville identified which main segments of society voted for AKP in support of these policies:

> Those whose sense of public normativity was derived from religion but who had little interest in Islamist political order[…]The AKP victory, then, represented a clear mandate to redefine the political center in terms of societal values […] for many the AKP represented the possibility of reconciling economic liberalism with the traditional values of provincial populations who had been drifting into cities as urbanization and economic liberalization proceeded apace- a normative framework that had been gradually evolving within the upwardly mobile context of Nurcu network over a decade or more.[280]

When AKP came to power it was a pro-neoliberal party with the identity of conservative democracy and affiliated with creating a fresh image free from corruption. However, in the realization of policies, the discourse of 'Just Order' emerged from time to time that the enforced neoliberal policies had been resisted as long as they do not contribute to the new clientelist relations.[281] Hence, the contradictions of capitalism, namely

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"Transformation of Turkish Islamism and the Rise of the Justice and Development Party", *Turkish Studies Vol. 11, No. 1, (March 2010): 68-76.*

[279] Peter Mandaville, *Global Political Islam*, (Newyork: Routledge, 2007), 227.

[280] Ibid., 226.

the expectation for further transparency and competitive market contradicted with the demand for further profits. This created tension between the differing capital groups and it is under this tension that AKP formed its initial commitment to neoliberal policies.

With respect to public procurement regulations, by the end of the 2002 the postponement of the enforcement of PPL started to be discussed. The Ministry of Public Works and Settlement claimed the lack of regulations and suggested the postponement. In response, the PPA reacted against this attempt on the law by employing the discourse of combating corruption and emphasizing the prominent role of the PPL in preventing corrupt practices.[282] The postponement plans for the law brought forward the AKP's election campaign promises and the relation of these promises with her own proponents, the arising capitalist class. One of the campaign promises made by AKP was the construction of double roads immediately after it comes to power. Through the implementation of the previous law of numbered 2886, the General Directorate for Highways would be able to launch the operation of building of roads without showing the necessary budget and in line with the previous procedures of

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[281] Fuat Ercan, Sebnem Oguz, "Rescaling as a Class Relationship and Process: The Case of Public Procurement Law in Turkey", *Political Geography*, 25 (2006),652.

[282] "Kamu İhale Yasası Bir Yıl Erteleniyor," *Zaman*, December 12, 2002, accessed September 24, 2011, http://arsiv.zaman.com.tr/2002/12/12/ekonomi/butun.htm ; "Kamu İhale Kanununa Bir Yıl Ertelem," *Milliyet*, December 12, 2002, accessed September 23, 2011, http://www.milliyet.com.tr/kamu-ihale-kanununa-bir-yil-erteleme/ekonomi/haberdetayarsiv/12.12.2002/67838/default.htm ; "Şeffaflık Erteleniyor," *Radikal*, December 13, 2002, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=654230&Date=25.08.2011&CCategoryI=101 ; "Ergezen:İhale Yasası 8-9 ay Gecikir," *Radikal*, December 19, 2002, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=654876&Date=25.08.2011&CCategoryI=101 ; "Sözcü Ne Dediyse Odur," *Radikal*, December 20, 2002, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=654960&Date=25.08.2011&CategoryID=101.

procurement.[283] Moreover, a list of entities would be out of the scope of the PPL one year more, that they would be able to use public resources without auditing and mechanism of review for one more year in a period when new groups were clustering around the in-power party.

Thus, upon the publication of postponement plans, various segments including journalists and contractors argued against the postponement attempts. The Turkish Contractors Association declared that AKP came to power with the promise of fighting corruption, but trying to postpone the law serves corrupt practices:

> The launch for the double road project was declared as 15th of December. This is not ethical and a law preventing clientelism is now being prevented already. The postponement would create problems with the World Bank and IMF.[284]

A similar assessment made by the Turkish Construction and Installation Contractors Employer Syndicate (İNTES): "The law would contribute to government budget with the increase in savings but the government would have other calculations in preventing the law" the president of the association said.[285]The head of Social Transparency Movement Association claimed that this law would contribute to combating corruption in public entities' purchasing activities. The Association emphasized that in the eve of a new political period, politics should not have been hurt by the prevention of the law.[286] Similarly, the employers'

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[283] "Şeffaflık Erteleniyor," *Radikal*.

[284]"Şeffaflık Erteleniyor," *Radikal*; Oktay Ekşi, "Böyle mi Söz Vermiştiniz", *Milliyet*, 13.12.2002.

[285] "İhale Yasası İşi İrticaya Benzedi," *Hürriyet*, December 14, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=115477.

[286] "Yasa Tarihi Değişmesin," *Cumhuriyet*, December 24, 2002, accessed September 30, 2011, http://arama.yore.com.tr/sayfa.cgi?w+30+/cumhuriyet/0212/24/w/c1306.html.

associations reacted against a possible amendment in the law that Heads of TISK and TOBB evaluated the initiatives on PPL and the PPA as movements that can redound to instability, destroy the positive atmosphere of economics and politics, and increase the suspicions on the economic program[287]. To sum up, the suggestion of the AKP government to postpone the law was opposed by different sectors of the society, particularly by the business world.

The next move of the AKP government was the preparation of a new draft law in order to launch the building of double roads without the limitations of PPL. The draft law contained an exception to the article of PPL regulating the condition of 10% budget requirement for the launch of projects. With the draft law, the public entities would not be required to have the necessary budget in order to launch their projects and the government would keep her election promise for the construction of double roads that were launched on 15th of December 2002 as well as the implementation of the collective housing project. Beyond the scope of the law and before the enforcement of the law and the PPA applications, the government started to find ways of delimiting the PPA. Accordingly, the mandate of the PPA was to be delimited in the draft law by establishing the standard contracts and putting the secondary legislation for the approval of the Council of Ministers. [288] This draft law also underlined the suspicion on the government. The Turkish Construction and Installation Contractors Employer Syndicate (İNTES) expressed that this regulation, if enacted, would be a backward step. The draft law for amendment of PPL intended to delimit the scope of the law by

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[287] "TÜSİAD Yeni Mali Milat İstedi," *Radikal*, December 26, 2002, accessed August 25, 2011, 00http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=655547&Date=25.08.2011&CategoryID=101.

[288] "Duble Yolun Önünde Ödenek Engeli Kalmadı," *Radikal*, December 27, 2002, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=655642&Date=25.08.2011&CategoryID=101.

introducing a list of public entities that were to be exempted from PPL requirements.[289] Even the works/construction tenders initiated by the State Economic Enterprises and municipalities were attempted to be taken out of the scope of the law. The realization of this amendment would turn the law into a pointless regulation even before its enforcement. However, despite the personal initiative made by the Prime Minister to postpone and amend the law, due to the opposition from different sectors including the EU General Directorate, the amendments were postponed and the law entered into force on January 1 of 2003. [290]

5.2.4. The Reflexes of the Classical Turkish Bureaucracy- The Independent Regulatory Agencies

One of the most prominent features of the PPL was the establishment of an independent regulatory body for the public procurement market and public purchases. Not only in the implementation period but also during the enactment of the law, had this body created intra-bureaucracy conflicts. However, the analysis of struggle between particular Ministries and the PPA deserves a general framework on independent regulatory agencies. The IRAs were the concern of politicians and journalists more frequently after their establishment under a new structure in line with the international norms of 1990s.[291] The concern was over the extent of

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[289] "Akraba Kayırma Projesi," *Cumhuriyet*, December 27, 2002, accessed September 30, 2011, http://arama.yore.com.tr/sayfa.cgi?w+30+/cumhuriyet/0212/27/w/c0815.html; "İhale Yasında Duble Yol Engelleri Kaldırıldı," *Hürriyet*, December 27, 2002, accessed October 6, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=118148.

[290] "Erdoğan: Bu Hali Kötü," *Radikal*, December 28, 2002, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=655776&Date=26.08.2011&CategoryID=101. ; "İhale Yasası aynen Çıkıyor," *Radikal*, December 30, 2002, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=655948&Date=25.08.2011&CategoryID=101.

autonomy allocated to IRAs. A series of attempts were then made to cut their autonomy by the classical Turkish bureaucracy and the politicians. The last attempts were made in 2011 when the government was empowered with enacting a decree with the power of law. In 2011, the PPA particularly was made more dependent on the Ministry with which it is related.

In 2001, on the eve of the establishment of IRAs in the fields of banking, telecommunication, sugar, tobacco, electricity, petroleum, the politicians were in a dilemma of determining the extent of governmental power over the agencies. The dilemma was on either the establishment of an autonomous system or the maintenance of the traditional bureaucratic patronage within the new structure. In the political sense, the autonomy of an institution is an unfamiliar concept wherein the classical organization relations and hierarchical organizations are the common methods of organizations. As a result, the establishment of independent regulatory agencies was both embraced, for the sake of transparency and efficiency which are the notional claims of neoliberal and new public management approach, and also criticized. The criticism over the new institutions arose from the unfamiliarity with agencies and the incentive to keep the power of the existing public/bureaucratic entities rather than from suspicion of the possible future effects of the institutions on the welfare state and their role in strengthening the international capitalist groups. The struggle between the old and the new institutions is also explained by the struggle for the sake of power of the institutions and the incentive to have further power by one of the PPA experts. It is also possible to question why individual bureaucrats fight for the extension of the authorities of the institutions they are belong to. A possible response to this question leads us to face the neoliberal presumptions that individual bureaucrats benefit from the post they have. On the other

[291] The first IRA of the Turkish state was 1959 Sigorta Murakabe Kurulu, but by 1990s variety of IRAS have been established starting with Capital Markets Board of Turkey in 1981.

hand, the other side of the coin was emphasized by the experts in PPA. It has been stated that IRAs are being debated in academic circles as being the means of the capitalist structure. But the question that needs to be asked is whether the classical public organisations, such as ministries, are immune from preparing the ground for the development of capitalist relations. From this, the PPA expert states that capitalist relations would innovate differing structures and institutions in accordance with their needs in a particular time. The type of organization is not a matter of fact but a situational issue.[292]

The establishment of Independent Regulatory Agencies was certainly promoted by the international financial institutions in order to establish depoliticisation in the economic sphere through the introduction of transparent relations that provide a rule for any relations. However, from the beginning, politicians questioned these institutions in terms of their lack of accountability in comparison to elected politicians. In 2001, when the World Bank emphasized the need for the establishment of an autonomous institution for the regulation and monitoring of public purchases, the enactment of PPL was delayed since the draft law required a grant from the authorities to an independent agency.[293]Beyond these particular institutions, the criticism towards IRAs came up within general context in 2002. The Prime Minister Bülent Ecevit, at the time expressed his views on the regulatory agencies and privatization:

> We have gone overboard in agencies. Showing them as requirements of market economy, and IMF conditionality, governmental influence and control over public entities are removed. The agencies as a result become unconstrained entities.[294]

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[292] Interview with PPA expert employed in the institution between 8 to 10 years.

[293] İhale Özerkliğe Takıldı, *Milliyet.*

[294] Kurullara Tırpan Geliyor, *Milliyet*, 28.03.2002, 7.

This statement was the precursor of an attempt to delimit the IRAs. The Prime Minister justified his stand with the demands of businessmen and the functions of politics, by saying hypothetically:

> Businessmen prefer to find government as corresponding party [...] in some sectors the state is excluded totally, we can tolerate this situation but people cannot abide by it. Hence, a balance needs to be established between the functions of the politics.[295]

In his statement the Prime Minister mentioned the role of politics and accountability of politicians to the people, especially to the business sector. The emphasis over the accountability and responsiveness between the politicians and business sector, on the one hand, was a critic of the system that tried to distinguish politics from economics. On the other hand, this implied that the economic responsibilities of governments serve the business sector more than any other group of citizens. These arguments raised by the government, however, were opposed by some journalists. They viewed that pushing back the agencies could be regarded as an attack of the politics and politicians to protect the economic means they have.[296] In 2002, politics was already perceived as tainted with corruption and any measure that would reduce the level of intervention capabilities of politicians was more trusted.

The discussions over the statute of the agencies intensified following the elections and change of the government. Tayyip Erdoğan, before his election to the Prime Ministry, expressed his views about the need for restructuring of the economy. Along this line, some agencies would be closed down and the Banking Supervision and Regulation Agency would be restructured. Discussions on IRAs started on whether agencies such as the Turkish Sugar Authority were a necessity and whether a more flexible system would be possible by requiring each private bank to

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[295] "Kurullara Tırpan Geliyor," *Milliyet*.

[296] Mehmet Yılmaz, Sorun Özerklikte Değil Siyasette, *Milliyet*, 29.03.2002, 2.

process its own Banking Supervision and Regulation Agency. This view was opposed not only by the head of the Agency and the IMF authorities[297] who emphasized the role of the institution during the 2001 crisis but also by the authorities from the banking sector who emphasized the need to consider banking sector as public service. Opposing this proposed alternative model of regulation and control, the banking sector stressed on the needs of a state institution for the management of procedures rather than the privatization of these responsibilities within each bank.[298] The critics made the government step back, but the argument for strengthening of the controls, particularly financial controls over the IRAs was perpetuated.[299]

At the end of 2002, the new government was looking for measures to standardize the autonomy of the agencies and to clarify the limits of independence allocated to agencies. The proposal for standardization of processes for each independent regulatory agency was strongly resisted especially by the Banking Supervision and Regulation Agency and the Capital Market Board of Turkey. With respect to PPA, the government insisted on questioning whether the public procurement secondary law and the contracting institutions were ready for the PPL coming into force by 2003. The PPL entered into force due to the public discomfort but the government continued to work on a general framework for diminishing the capacities of the independent agencies. Meanwhile, a draft law was prepared to standardize personnel regimes, wages, and purchasing

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[297] "Düzenlemeler Gecikti 70 Milyar Dolar Gitti", *Milliyet*, 18.12.2002, 7; Fikret Bila, "Akçakoca'nın İtirazı",*Milliyet* , 9.11.2002, 16; "Siyaset Girmesin", *Milliyet*, 9.11.2002, 1.

[298] "BDDK'yı Düzenleyeceğiz...Yok yok, Dokunmayacağız", *Milliyet*, 9.11.2002,

[299] The same issue arise in the enactment of the law Public Financial Managemnt and Public Financial Control Law, which was also a condition of IMF funds and supported in OECD Sigma Reports later, put the IRAs under financial control for their expenditures. The draft law however perceived as a step to delimit the independence of the IRAs. Please see: "Özerk Kurullara Meclis Denetimi Geliyor", Mlliyet, 04.08.2002, 8.

system of all independent agencies. However, these regulations were evaluated as an attempt of government to delimit the independence of the agencies. The draft law required the agencies to transmit a certain share of their income to the state budget and to establish TGNA control over the budget of the agencies. These regulations, according to journalists, would guarantee the politicians' keeping an eye on the agencies.[300] On the other hand, the establishment of a general framework that would include all the agencies, was harshly opposed by the heads of the agencies.[301] The head of TOBB (Union of Chambers and Commodity Exchanges of Turkey), Rifat Hisarcıklıoğlu, as a significant representative of the Turkish industrialists stated:

> The irresponsibility of the government cannot be levelled against BDDK. EPDK cannot be charged with expensive energy agreements; the independent agencies shall not be abolished by politicians expressing views in line with a group of bureaucrats who noticed they are losing business of carnet system.[302]

The response of the Minister of the Industry was "There cannot be any other state within. There cannot be any other authority than political power".[303] As a result, the independent agencies kept the support of the large industrialist groups since politicians were seen to be the root of the corruption problem. On the other hand, the politicians aimed to keep the power of the politics extended.

Another draft law regarding the autonomy of the IRAs was prepared within the scope of Reform for Restructuration of Public Administration. It was designed to launch a standardized system for boards of IRAs, to

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[300] "Özerk Kurul Operasyonu", *Milliyet*, 10.04.2003, 7.

[301] "Hükümet Özerkliğe Dokunursa Deklarasyon Yayımlayacaklar", *Milliyet*,12.04.2003, 9.

[302] "Kurullara Dokunmayın, İhaleyi Sulandırmayın", *Milliyet*, 04.05.2003,7.

[303] "Kurullara Dokunmayın, İhaleyi Sulandırmayın", *Milliyet*, 04.05.2003,7.

authorize the Prime Minister with the right of veto the regulations prepared by the IRAs, and to rearrange the criteria for board memberships.[304] These regulations were opposed on the basis of the differences between the functions of the IRAs.[305] The consultation between the parties pruned the large authorities granted to the political power but the demand of the government for standardization in the structure of the boards was kept.[306] Accordingly, the compromised text enabled a degree of financial control over the IRAs. This general framework of struggle between the new institutions that were established on the basis of the new approach on state and public administration/management demonstrated that political power was not eliminated in the system but the intervention capacities of the executive had become firmer. On the other hand, the ground of struggle itself showed that depoliticisation was not a situation to be attained through diminishing of the intervention capacities of the politicians. While one group is leaving its responsibilities in a particular field, new power groups like new bureaucrats as well as business/capitalist class are taking power. Thus, the depoliticisation discourse of neoliberalism reverberates in any field of the organization of the state, but the discourse itself creates politicization in the field since the actors involved in the struggle are not apolitical in their stance.

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[304] "Kurullarda Tasfiye Yolu," *Radikal*, August 04,2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=678550&Date=25.08.2011&CategoryID=101; "Nerede Bizim Ordu," *Milliyet*, September 04,2003, accessed September 23, 2011, http://www.milliyet.com.tr/nerede-bizim-ordu-/ekonomi/haberdetayarsiv/04.09.2003/17433/default.htm.

[305] "Aynı Elbiseye Sığamayız," *Radikal*, September 05, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=682295&Date=25.08.2011&CategoryID=101.

[306] "Üst Kurullara Yargı Kılıcı," Radial, November 17, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=690344&Date=25.08.2011&CategoryID=101.

5.3. Revisions in Law

The amendments on the PPL started before it came into force in January 2003 and these continued afterwards. The determining feature of the post-2003 era was the intensity of the attempts to amend the law and delimit the autonomy of the PPA. The amendments in the law created an exceptions system that disrupted the aim of establishing a singular system to cover all classical public purchases. First, the public entities as contracting authorities were attempted to be taken out of the scope of the law. Second, the election promises of the politicians created an incentive to spread the exceptions system. These amendments that allow the public entities to be exempted from the rules of PPL either developed within the PPL or within the individual laws of the public entities. The exemption from the law was designed first for certain activities of the all public entities; and second, for all the purchasing activities of certain public entities. The public entities justified their demand for being exempted from the scope of PPL with the arguments that PPL could not able to respond the urgent needs of the public entities and also had too strict regulations that it caused inefficiency rather than effectiveness. Meanwhile, the business sector was critical of the amendments in the law. And due to the increasing number of claims around corruption and abuse of the PPL in the media, these developments were regarded as activities that prevent combat against corruption. It is crucial to underline that the PPL regulated the classical public purchasing activities of the public entities. The public private partnership type contracts of the public entities were not covered by the law from the beginning. The continuous increase of exemptions in effect diminished the role of the law. However, an expert from PPA stated in an interview that although PPL was designed with the plan of covering all entities in the public administration, it was not a text that could meet the needs of

the business type organizations in the state. The demand of public entities for exemptions therefore was only natural.[307]

Apart from amending the exemption system, the law was aimed to adapt the modern techniques of public purchasing into the PPL and to clarify the text and diminish its strict regulations by integrating the alternative-type tenders. Moreover, the amendments regarding the autonomy of the PPA continued to be enacted that neither political authority nor the differing business-capital owner classes allowed the public procurement market to be regulated by the PPA. Hence, PPA rather than being a regulatory agency, was turned into an entity for reviewing the complaints. In this context, this part of the paper will focus on the amendments in chronological order including the reactions of the non-state actors, the domestic and international capital groups, and the international finance institutions.

In the first year of its application in 2003, the public procurement law has been amended two times. These amendments increased the number of public entities that were not subject to the law. They prepared the ground for the realization of the election promises of the government through reformulation of the strict procedures. The amendments in Public Procurement Law also reflected how the government reformulated its policies in accordance with reactions of the domestic and international capital groups. In Ercan and Oğuz's assessment of the era, the amendments in the law represented the challenge of domestic capital to the dominance of global capital. Hence, the field was further politicized since the government tried to respond to different interest groups with the amendments.

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[307] Interview with the public procurement expert working at PPA for 8 to 10 years.

A study on the draft law for the amendment of the PPL was brought to the agenda at the end of 2002 and continued in 2003. The discussion revolved around the double road project of the government, which could only be started by 2003 if the PPL requirement to contemplate an appropriation of not less than 10 % of the project cost[308] would be abolished. The aim of the government was evaluated as to accelerate the double road constructions by taking this project under the force account (*emanet usulü*) and process the work of public entities by using subcontractors.[309]In this system, the contractor and the beneficiary would become a single entity. For example a municipality realizes the work with its own resources and uses subcontractors, if needed. The reason why the system was harshly criticized was that the procedure did not foresee the predetermined needs of a contractor who won the competition. Instead the system allowed the public entities to subcontract services without carrying out transparent procedures. As a result, this type of operation by the public entities was regarded as the award of contracts to proponents of those in power.

The draft law on PPL intended to reintroduce this procedure which was used to implement the State Tender Act. The procedure was frequently applied just before PPL entered into force in 2003. However, the use of this type of tendering had been conditional in that the State Tender Act provisions did not allow the use of force account procedure when the estimated value of the contract is over 750.000TL. When the estimated value of the contract is over 750.000 TL, an approval from the Court of Accounts and the Ministry of Finance must be sought and the tender is required to be published in the Official Gazette. In the 2002, when the AKP government came to power with the election promises of construction of double roads, it was claimed that the force account

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[308] Article 62 of Public Procurement Law, 2002 Official Gazette.

[309] "Şeffaf Değil Yandaş İhale", *Cumhuriyet*, 06.01.2003.

procedure was used very frequently through artificial splitting of contracts which is strictly forbidden both in the EU provisions and the Turkish law (in PPL and State Tendering Act as well). The intention of reintroduction of force account type of tendering under the PPL was evaluated by the media as an attempt to continue the old practices implemented for the double road projects. In the projects for the construction of roads between Aydın-Nazilli and Kulu-Şereflikoçhisar-Aksaray, six contracts with each having around 750 000 TL of estimated value were designed.[310] In the splitting the contracts, the approval of the Court of Accounts and the Ministry of Finance were not taken and the tender was also not announced in the official gazette. Şebnem and Oğuz claimed that in this implementation the government spoke to the support base of the AKP, the newly grown domestic capital groups.[311]

Apart from abolition of the 10% appropriation portion and the reintroduction of the force account procedure, the other possible articles in the draft law were in general delimiting the role and financial abilities of the PPA. The proposals included the Council of Minister's approval for the enforcement of secondary legislations which are originally under authority of the PPA. Another provision in the draft law was leading the PPA to lose her financial resources by revising the norm that allows the PPA to get a share from the public contracts.

The draft law containing the amendments discussed above evolved several times during the first half of the 2003 with the intervention of social partners such as TOBB, INTES, or Ministries, those with intensive relations with the international actors, as well as IMF and World Bank

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[310] "İhalede AKP Usulü Değişiklik," Radikal, January 06, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=656663&Date=25.08.2011&CategoryID=101

[311] Şebnem and Oğuz, 652.

representatives who warned not to reverse the law.[312] The other group that impacted over the character of amendment was the public entities.

In the first year of the implementation, the public entities harshly criticized the law and asked for exclusion from the law. One of the most criticized aspects of the law was the long tendering and implementation periods due to the advertisement of contracts. Another reason of criticism was the prevention of companies belonging to municipalities from tendering.[313] These critics also prepared a ground for the amendments in the PPL in line with the advantages of the domestic capital groups. As a result, prior to the amendment of the PPL in August 2003, PPL started to be changed since public entities started to be granted exclusion from the law. This act was the main diversion from the law which was designed to establish a standardized system for the all purchases of public entities. The utilities, particularly the energy enterprises of the public sector were excluded from being subject to the law. Hence, in the budget law for TEDAŞ, BOTAŞ, EİAŞ, and TEAŞ new procedures different from PPL norms were prepared.[314] While the deviations in the Letter of Intent were

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[312] "İhalede Yumuşama Sinyali," *Radikal*, January 12,2003, accessed august 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=657381&Date=25.08.2011&CategoryID=101 ; Vahap Munyar, "Sempatik Babacanla Ekonomi Kurtulur mu?," *Radikal*,24.01.2003.

[313] "Gürtuna da Kanuna Karşı," *Radikal*, January 29, 2003, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=659172&Date=25.08.2011&CategoryID=101; "İhale Yasasını Belediye Başkanı Tepkiyle, Müteahhitler Memnuniyetle Karşıladı," *Zaman*, February 20, 2003, accessed September 24, 2011, http://arsiv.zaman.com.tr/2003/02/20/akdeniz/h25.htm; "Yolsuzlukları Önleyecek Yasa vakıf Hizmetlerini Durdurdu," *Zaman*, April 05, 2003, accessed September 24, 2011, http://arsiv.zaman.com.tr/2003/04/05/haberler/h17.htm

[314] "Kamu İhale Yasası Delindi," *Radikal*, March 28, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=665054&Date=25.08.2011&CCategoryI=101 ; "Bütçe Sorun Çuvalı Oldu," *Radikal*, March 29, 2003, accessed August 25, 2011,

submitted to IMF for the fourth revision, the government declared that there would be no concessions from the implementation of the PPL and that will constitute an anchor in the fight with corruption and the implementation of public finance reform. Moreover possible changes in the law were said to be made in consultation with the experts from World Bank and IMF. [315]

The Bingöl earthquake in March 2003 accelerated the amendment preparations for the public procurement law. Since the public entities were complaining about the time consuming procedures of the law, the earthquake turned out to be a reason for enacting amendments and reintroducing exceptions provisions of the previous law. The reintroduction of force account procedure and price revision system (*keşif artışı*) after the signature of the contract and exemption from the PPL of a variety of public entities such as state economic enterprises, collective housing (TOKİ), telecommunication sector, energy sector and municipal incorporations were the main provisions of the draft laws.[316] The draft law was prepared in line with the concerns of the Ministry of Public Works and Settlement, which was trying to re-obtain the income from the

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http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=665180&Date=25.08.2011&CategoryID=101.

[315] "Niyet Mektubu Açıklandı," *Radikal*, 18.04.2003.

[316] "İhale Yasasından Kaçan Kaçana," *Cumhuriyet*, May 01,2003, accessed October 1, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/0305/01/w/c1203.html ; "Deprem Fırsatçılığı," *Cumhuriyet*, May 06, 2003, accessed October 1, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/0305/06/w/c0403.html ; "Bingöl İhaleye Bahane Yarattı," *Radikal*, May 07, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=669075&Date=25.08.2011&CCategoryI=97 ; "AKP'ye Deprem Bahane Oldu," *Radikal*, 08.05.2003; "AKP Niyeti Fena Bozmuş," *Radikal*, May 10, 2003, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=669407&Date=25.08.2011&CategoryID=101.

carnet system, and public entities especially the ones with grand budget that were seeking methods of exception from the law.

The preparation of the law amending the PPL proceeded with the participation of experts from ministries and excluded the PPA. Hence in 2003, the intra-bureaucracy conflict became apparent. It is possible to argue that the ministries previously powerful in the field tried to reestablish the system while bypassing the PPA. Since the amendments after the Bingöl earthquake were justified with the necessity of taking quick measures in the region, the draft law was finalized in a short time period. However, this approach in the draft law preparation was resisted by different parties. First, the Head of the PPA reminded that the law had procedures to quicken the process in case of public emergencies and natural disasters[317]; and the earthquake was exposed as the reason for the amendment and the law was alleged as ineffective and blundering, even if that was not the case.[318]Second, the approach of the government was also harshly criticized by the journalists particularly from the opposition journals. The argument was that the attempt of the traditional bureaucracy would revitalize the procedures of the previous system which led to the death of people in the earthquake.[319] Thirdly, the international financial organizations also intervened in the process that the draft law since the Letter of Intent dated April 5, 2003 regarding this amendment was sent to IMF and World Bank. The international organization not only intervened on the matter of the content of the law

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[317] Please See: Statements made by Sener Akkaynak in "Bingöl İhaleye Bahane Yarattı," *Radikal.*

[318] Please see: Minister of Justice Cemil Çiçek in "Deprem Fırsatçılığı," *Cumhuriyet*

[319] İsmet Berkan, "Bir Cinayetin Anatomisi", *Radikal*, 02.05.2003; Güneri Civaoğlu, "Yağma Hasan Böreği," *Milliyet*, May 07, 2003, accessed September 23, 2011, http://www.milliyet.com.tr/yagma-hasan-boregi/guneri-civaoglu/siyaset/yazardetayarsiv/07.05.2003/10176/default.htm ;
Funda Özkan, "AKP'ye Deprem Bahane Oldu," *Radikal*, May 08, 2003, accessed August 25, 2011,

but also warned that in the process of preparing an amendment law, the PPA must also be involved in any preparation.

It is important to underline that although the government was proposing changes in the PPL that would be rejected by the international financial organizations, the relationship cannot be assessed as antagonistic. On the contrary, a consent mechanism was continued and the stability of relations remained. For instance, regarding the autonomy of the PPA, changes in the PPL were foreseen in the draft law through temporary provisions. These were not shared with the authorities from PPA but with IMF. These temporary provisions aimed to regulate new procedures for the appointment and deposition of the members of the Public Procurement Board. The structure of the PPB would be shaped on the basis of the preferences of particular ministries.[320] And so not only the procurement related procedures were designed by the needs of the incoming party in power but also the bureaucratic structure of the Board was intended to be changed by the new party that would choose to appoint board members according to its state of mind. This proposal first tried to curb the independence of the PPA and strengthen the position of traditional bureaucracy as well as the government. These proposals can be evaluated therefore as attempts to repoliticise the field. However, even for this process an approval from the international financial organization was also sought by the government.

Regarding the content of the draft law, the comments of the IMF and World Bank were negative to the suggestions of the government. The AKP government stepped back from the broadening of the exceptions.[321] The draft law submitted to Commission of the Public Works of TGNA included the reintroduction of force account, exclusion of state economic enterprises from the law, broadening of the use of negotiation procedure,

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[320] "Yeni Kanuna Yeni Kurul", *Milliyet*, 17.05.2003

[321] "İhale Yasasında Uzlaşma," *Radikal.*

the strengthening of the power of Ministry of Finance over PPA by delimiting the income of the PPA and reintroduction of the increase of value of contracts. Some of these changes were not realized.[322] The approved draft in the Commission did not include the force account procedure since the experts from Ministry of State declared that there will be no prevention for the double road constructions within the existing law. On the other hand, some demands of the municipalities were approved with the abolition of the prevention of municipal incorporations from tendering in the municipal purchases. This issue was later brought to the fore in relation to corruption claims on the municipalities. Another exception issue that created conflict between the stakeholders and the public entities was that of exempting the contractors from some requirements in the purchases made by Ministry of Defence and the Army. On the basis of the security and effectiveness arguments, the representatives from the Ministry of Defence having military status, demanded abolition of public notary system for the contractors offering or contracting with the military. The argument was that the military purchases from foreign companies who do not stand at public notary anytime and the strict requirements over contractors prevent the army to make the necessary purchases on time. The Union of Notaries and The Union of Chambers of Turkish Engineers and Architects (TMMOB) opposed these two provisions structured in line with demands of the military and the municipalities.[323]

The PPL was amended with the approval of the draft law by the TGNA on July 31, 2003. In line with the draft accepted in the Commission, the

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[322] "İhale Yasasına 10 Delik," *Radikal*, 24.07.2003, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=677254&Date=25.08.2011&CategoryID=101.

[323] "Yolsuzluk Dönemi Geri Geliyor," *Hürriyet*, July 24, 2003, accessed October 9, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=161425 ; "İhale Yasasına Tırpan," *Radikal*, July 26, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=Radikal HaberDetayV3&ArticleID=677499&Date=25.08.2011&CategoryID=101.

state economic enterprises in the telecommunication, energy, water and transportation sector were allowed not to implement the procedures of PPL for their purchases of goods and services under the value of 2.3 million TL. These sectors were also totally exempted from implementing the PPL provisions until the specific regulations had been made for the utilities sector. Moreover "work increase" in the meaning of increase in the value of the contracts was reapproved. The municipality corporations were allowed to bid in the tenders of the municipality they belong to. For the collective housing and water projects, the entities were allowed to launch the procurement process without prior conditions of condemnation or melioration. For contracts valued less than 100.000 TL, the PPA restricted from charging the contractors. For specific purchases of public entities, the obligation of notary approval of the contracts was abolished. And for purchasing of drugs, a protocol system was introduced.[324]

From the comparison of the amendments with the demands and the privation that the public entities faced, it is clear that the aim of the amendments was to adjust the system according to needs of public entities who claimed they could not serve their functions. However, the criticism from the journalists was aroused due to the characteristics of the measures that destroyed the law and to the launching of the methods of the pre-2003 law which opened the ground to corruption. The approved draft was criticized for opening door to corruption[325], for delimiting the independence of the PPA,[326] and for the destruction of

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[324] "Bu da AKP Usulü İhale Yasası," *Radikal*, August 01, 2003, accessed August 25, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=678246&Date=25.08.2011&CategoryID=101.

[325] Mehmet Yılmaz, "Yolsuzluğun Yolu Aynı Sadece İsimleri Farklı", 24.07.2003,2.

[326] Statements made by Sener Akkaynak in "İhale Yasasına Tırpan," *Radikal.*

standardized system[327]. On the other hand, representatives from İSO, TÜSİAD and YASED supported the amendments especially since the definition of "local contractor" was broadened to include companies established in Turkey in line with Turkish laws with foreign capital.[328] This change in the definition of contractor in fact was a measure taken to respond the needs of the large companies in Turkey and would be positively assessed by international financial organizations. Hence on the one hand, the exemptions system was disseminated to several sectors of economy. On the other hand, the provisions were enacted to respond the needs of the international and comprador capital. Due to these amendments enacted in August 2003, the government faced EU criticism for non-alignment with the acquis and for widening the discrepancies between the acquis and the PPL. The focus of this criticism was the lack of equal conditions for the non-Turkish bidders. The EU Progress Reports evaluated the advantages for the domestic tenderers as a discriminatory conduct against the foreign bidders.[329] Other concerns raised by the EU regarding the 2003 amendments in PPL were the limitations in full transparency and competition by exemption of procuring entities from the scope of the law and reduction of bidding periods.[330]

Regarding the implementation and impacts of the PPL, it was claimed that the law was not being used appropriately due to derogations from some of provisions of the law in the first year of its implementation. The statistical data showed that the most tendering public entities were the Ministry of Defence and the municipalities. In terms of the value of

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[327] "İş *Dünya*sından İhale için Ortak Deklarasyon," *Hürriyet*, July 31, 2003. Accessed October 9, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=162466.

[328] Ibid.

[329] 2003 Regular Report on Turkey's Progress Towards Accession, 64.

[330] Ibid., 64.

contracts it was the Ministry of Health and Ministry of Education.[331] The value of the contracts awarded according to provisions of the PPL by the public entities was declared as 5.6 billion TL. However, this amount is said to be low since the Public Private Partnership methods, which tend to be used for the high value grant projects, were not under the provisions of any law.. Apart from that, in terms of types of contracts awarded, the statistics show that the public entities purchased services more than works and goods.[332] This is an important finding that the public was not investing in new establishments but in line with the spirit of the economy, it buys services in order to execute the classical obligations of the public entities. As a result, for the sectors that were not privatized, the market economy values were applied indirectly since the public entities performed their responsibilities by assigning personnel from the market and alternated its personnel with the public sector. This development also was criticized regarding the rights of the workers employed in the public entities through service contracts. Without appropriate regulation in the Labour Law, the workers employed in the public entities on the basis of the contracts awarded through PPL were devoid of their rights arising from the labour law.[333]

The PPL was a component in the transformation of the state and its responsibilities. Since the PPL led the public entities to compete in the market, the companies linked to state started to be closed down.[334] This

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[331] Güngör Uras, "Günde 140 yılda 35 bin İhale," *Milliyet*, February 29, 2004, accessed September 23, 2011, http://www.milliyet.com.tr/gunde-----yilda----bin-ihale/gungor-uras/ekonomi/yazardetayarsiv/29.02.2004/28033/default.htm.

[332] "İhalenin Çoğu Hizmet İçin," *Radikal*, March 24, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=702354&Date=27.08.2011&CategoryID=101.

[334] "Tarih Kurumunun Gelir Kapısı, İhale Yasasının Kurbanı Oldu," *Zaman*, October 24, 2004, accessed September 24, 2011,

development had a domino effect. It also made an impact over other public entities that use the production of closing entities. As more and more works started to be purchased from the market, the number of employees in the public decreased and a new personnel regime in the public entities was strengthened. Hence PPL by its nature was compatible with the norms of the market economy and neoliberal transformation.. However, in terms of implementation it could not create depoliticisation. It is because firstly, this type of transformation is not an apolitical act by nature since the market economy is being promoted in a political ground. Secondly, apart from the theoretical aspect, the parties involved sought their personal or class needs while trying to manipulate the law. Rather than result in depoliticisation, the field was further politicized in contrast to neoliberal argument.

The year 2004 witnessed the introduction of new exemptions to the Public Procurement Law and inconsistent reactions of the international financial organizations to the amendments. The other mainstream development was the heat up of the discussion over independent regulatory agencies, after the review and cancellation of tenders by the PPA. In the meanwhile, the PPA was proceeding in line with EU Directives for the EU accession negotiations. As one of the most prominent opponents of the provisions set by Public Procurement Law and authorities granted to Public Procurement Authority, the Ministry of the Public Works and Settlement started to prepare a new draft law in order to re-amend the PPL. The main target of the amendment was setting a system for determination of lower and upper threshold values, the system aimed to prevent offer of very low unrealistic bids. The other aim of the draft law was to abolish the confidentiality of the estimated value

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http://www.zaman.com.tr/haber.do?haberno=104866&keyfield=6B616D75206968616C65206B7572756D75 ; Yalçın Bayer, "Nasıl Battı Nasıl Satıldı," *Hürriyet*, June 02, 2004, accessed October 12, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=230356.

of contracts.[335] The justifications for the amendment was the lack of achievement in efficient and economic results with the implementation of the law, the slowing down of investments in the public sector[336] and the lack of efficiency in the system due to the inappropriate determination of the value of the contracts, without market research and with excessive reductions[337]. These criticisms were directly voiced by the Minister of Public Works and Settlement. Although a secondary legislation had been put into enforcement regarding the prevention of excessively low offers by the PPA[338], the Minister of Public Works and Settlement kept insisting on regulation of the issue by means of primary legislation.[339] The discussion on the provision left the content of the law and turned into a conflict between the high level bureaucrats such that the PPA was constructed as the "other" of bureaucracy, particularly by the Ministry of Public Works and Settlement and the government. On the other hand, similar criticism was widespread among the contractors and the public entities that the efficiency of the provisions set in line with neoliberal values was under

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[335] "İhale Yasası Yap Boz Tahtası," *Cumhuriyet*, December 29, 2003, accessed October 3, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/0312/29/w/c1314.html.

[336] Minister of State Mehmet Şahin in "Kamuda Yatırım Durdu," *Radikal*, July 07, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=715962&Date= 26.08.2011&CategoryID=101

[337] Zeki Ergezen in "Bürolarda İhale Fiyatı Dolaşıyor," *Radikal*, May 28, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=712182&Date=26.08.2011&CategoryID=101.

[338] "Düşük Teklif Sorgulanacak," *Radikal*, June 23, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=714707&Date=26.08.2011&CategoryID=101.

[339] "İhale Kanununda Zihniyet Tartışması," *Milliyet*, July 18, 2004, accessed September 23, 2011, http://www.milliyet.com.tr/ihale-kanununda-zihniyet-tartismasi/ekonomi/haberdetayarsiv/18.07.2004 /38992/default.htm.

suspicion, since they brought further re-regulation instead of deregulation.

Apart from these rearrangements of the procedures for making offer, a new set of exceptions from the PPL was also prepared with the draft law. The Directorate of Privatization Institution, one of the favorite institutions of the IMF, had been complaining about the consultancy provisions of the PPL as they are slowing down the process.[340] The IMF and the World Bank's approach for an amendment regarding the exemption of consultancy services from the PPL for particular public entities was positive in order to accelerate privatization. Taking into consideration the case of Telekom, which had been tried to be privatized, all the consultation procurements that would be launched by the Directorate of Privatization Institution were exempted from the PPL. The service tenders of the Turkish Airlines were also included for the exemptions with the approval of the amendment of the draft bill in April 2004.[341] To sum up, the most prominent advocates of the PPL and against the government,

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340 "IMF'de Özel Destek," *Radikal*, January 26, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=698425&Date=26.08.2011&CCategoryI=101 ; "İhalede Danışman Ayarı," *Milliyet*, March 17, 2004, accessed September 23, 2011, http://www.milliyet.com.tr/ihalede-danisman-ayari/ekonomi/haberdetayarsiv/17.03.2004/29532/default.htm.

341 "ÖİB ve THY'ye KİK Ayrıcalığı," *Radikal*, April 28, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=709223&Date=26.08.2011&CategoryID=101 and also Please see the complaints of the Ministers from the PPA as it has been regared as a barrier before the privatization: "AKP'nin Hedefi Yine İhale Kanunu," *Radikal*, April 09,2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=707238& Date=26.08.2011&CategoryID=100 ; "Marka Marka da Satarız," *Radikal*, April 15, 2004, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=707893&Date= 26.08.2011&CategoryID=101; The consultation tenders also emerged as a problem in the privatization of the İstanbul Stock Exchange,"Borsanın Özelleşmesi İhaleye Takıdı," *Zaman* July 25, 2004, accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno=73498&keyfield=6B616D75206968616C65206 B7572756D75.

shifted their position according to their priorities between the privatization and the implementation of transparent procedures in public procurement. Hence rather than the norms established for the public procurement field, the expectations for the economic transformation was defining the approach of the international financial institutions as well. As a result, the claim of intervening in the national economies for the sake of restructuring was a political act taken to increase the capabilities of certain capital segments. The intervention was not for the recovery of the institutions or depoliticisation of the system because similar clientelist relations were being developed both by the national government and the international actors.

On the other hand, while the exemptions from the PPL were becoming prevalent, the PPA was intervening in the field to standardize the system. After the 2003 amendment of the PPL, the utilities sector was exempted from the PPL and the control of PPA as well. Regarding the separate regulations for the utilities sector in the EU, the 2003 amendment cannot be assessed as a discrepancy from the EU acquis. However, since a universal system in which all the relations are standardized and transparent was being sought by the international financial institutions, a separate regulation for the entities in the utilities sector was needed. As a result, the PPA prepared a draft law regulating the purchases of goods, service and works of the utilities sector. The head of the PPA expressed his view that although the country was being privatized, the companies in the utilities sector would continue to serve the public and in the EU even if the sector is composed of private companies, the sector is under regulation.[342] The reasoning raised by the Şener Akkaynak was similar with the reason stated in the Directive 2004/17/EC. The PPA also introduced two new procurement procedures for the utilities sector: the

[342] "Özel Sektöre Kamu Mevzuatı," *Milliyet*, August 25, 2004, accessed September 23, 2011, http://www.milliyet.com.tr/ozel-sektore-kamu-mevzuati/ekonomi/haberdetayarsiv/25.08.2004/43865/ default.htm.

dynamic purchase procedure and the competitive negotiation.[343] The PPA kept adopting the EU directives to the public procurement system and attempted the broadening of the electronic procurement which was seen as the main tool to prevent corruption and to prevent the role of politicians in the system. Moreover the attempt to take these sectors under a standardized system was initiated since the country was preparing her justifications to take a negotiation date in the Brussels Summit of December 1, 2004.

Secondly, in 2004 the discussion over the authorities of the independent regulatory agencies heated up again following the PPA authorities' for review of the public claims on corruption and irregularity cases.. The year 2004 can be associated with two mainstream corruption or public inefficiency cases. The first was the case of the SSK hospital in Aydın, which awarded a contract with very high value for the purchase of a drug. It was later exposed that the same purchase was concluded with one fourth of value by a private hospital.[344] The case was criticized by the head of the PPA for the lack of coordination for mass purchases and also the lack of initiative of the public entities to investigate the market price.[345] On the other hand, the PPA was also blamed in the case as it required a lot of support documents for the tenders and this turned into a factor for the reduction of competition.[346]

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[343] "Beş KİT için Özel İhale Yasası," *Radikal*, September 15, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=722509&Date=27.08.2011&CategoryID=101.

[344] "SSK'ya Fahiş Fiyatla İlaç İddiasına İnceleme," *Radikal*, August 03, 2004, accessed October 12, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=246290.

[345] "Yasaya Göre Pazarlık Esas," *Radikal*, August 13, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=719400&Date=27.08.2011&CategoryID=97.

The other claim of corruption was related with the Ministry of National Education. To clarify the PPL procedures, it is important to point out that revisions processed by the PPA do not automatically mean the implementations were corrupted. The revision or cancellation could arise from a misapplication of procedure. However, revisions applied by the PPA to a great extent reflected in the media as corruption cases. When the PPA reviewed the tenders launched by the MoNE in 2004, PPA decided that some of the tenders were mistaken. Some conclusions were made without application of an objective evaluation. In accordance with the provisions, these files with misapplications were sent to Prime Ministry to be investigated.[347] This development regarding purchases made by the MoNE was reflected in the media as grant corruption case of the year that conflict between the public entities started. The Minister of the National Education declared that

> None of the tenders have been cancelled but some need to be investigated by the Prime Ministry. The process was started because of the claim that MoNE has calculated the estimated values high and since PPA took these claims seriously, they have intervened. The lowest tender cannot be awarded if the issue is the lives of children.[348]

Although a common procedure was accomplished by the PPA, the Ministry of Education and also later the Prime Minister reacted against

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[346] "Pahalı İlaç Sorunu Yed-i Vahitten Doğdu," *Milliyet*, August 13, 2004, accessed September 23, 2011,http://www.milliyet.com.tr/pahali-ilac-sorunu-yed-i-vahitten-dogdu/ekonomi/haberdetayarsiv/ 13.08.2004/42287/default.htm.

[347] "Sıfırcı Eğitim İhale Sınavında da Çaktı," *Radikal*, November 20, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=729246&Date=27.08.2011&CCategoryI=98 ; Yalçın Bayer, "440 Trilyonluk Okul İhalelerini Kimler Kazandı," *Hürriyet*, September 15, 2004, accessed October 12, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=257525.

[348] "Çelik Ucuz Etin Yahnisi Yenmez," *Radikal*, November 26, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=729837&Date=27.08.2011&CategoryID=97.

the PPA first and later to all other IRAs in the address to PPA. The Prime Minister criticized the way the independent regulatory agencies worked and he proposed curbing their independence. The Prime Minister stated that:

> When we asked for quickening of the processes they accept but later they go their own way. They are creating problem and delaying the works. They will be restructured and a body over all the IRAs will be established.[349]

As a result, on the government side the act of the PPA was taken as a reaction against the government and not only the PPA's but also other IRAs' autonomy was threatened. The polarization between the representatives of the IRAs and the government was also made public in the conference held with the participation of the IRAs where the head of the PPA declared that the autonomy of the institutions had been harmed financially and administratively. The former head of the Competition Authority as well claimed autonomy cannot be established if the financial control is being processed by the exterior authority other than defined in the law of the institution.[350] As a result, in 2004 the political authority disposed its stance in relation to independent agencies and in the following years the independence of these institutions were impeded either through the introduction of financial or administrative controls.

In terms of impact of the PPL over the state enterprises like the *Et Balık Ürünleri AŞ* (EBÜAŞ), the law let the company lose its entire market share

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[349] "Fatura Üst Kurullara," *Radikal*, December 30, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=733207&Date=27.08.2011&CategoryID=98.

[350] "Kurumlara tek tip elbise," *Radikal*, December 10, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=731271&Date=27.08.2011&CategoryID=101.

when the PPL introduced the principle that the public institutions that were previously required to buy from EBÜAŞ would have to launch tender for their purchase of meat. The company was originally established to protect and support stockbreeding. While the company started to lose her market share due to the law, some of its branches continued to be privatized. The company was labelled as incompatible with technological and labour expectations, and it existed solely for social reasons. It was decided to be quickly privatized.[351] The PPL was therefore also a means for the government to apply the economic program of privatization. However, with respect to the aforementioned institution an incompatibility in the supply and demands arose in the market within few years. In 2010, the high prices of meat and the reason for the price increases became a public discussion. Without directly linking the lack of an intermediary body of the state for the composition of a healthy market structure for stockbreeding, it can be argued that the policies in this field did not create optimum prices and social effects. However, the latest increase in prices also led the opening of the markets to external suppliers. As a result, PPL as part of a broad economic structure and mindset has made her contribution to the system.

The other significant development in 2005 was the launch of negotiations with the EU. Regarding public purchases and public procurement, it was stated in the Accession Partnership Document that the field needed revision to comply with the provisions of the acquis. PPA needed to be strengthened and the administrative capacity of the tendering public entities needed to be increased Lastly, the type and number of modern

[351] "Özelleştirmede Türk işi Operasyon Tamam," *Radikal*, October 07, 2005, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=759385&Date=26.08.2011&CategoryID=101.

tendering methods like electronic procurement needed to be increased in public purchases .[352]

The screening of the fifth chapter in the accession negotiations were completed by 2005 and the report dated 5 April 2006 pointed out the lack of legislation regarding the concessions and public private partnerships. Also noted were the usual and unusual exemptions from the PPL, the threshold levels that were set out differently than the Directives, the existence of limited number procurement procedures that lack competitive dialogue procedure, framework contracts, dynamic purchasing, and the lack of compulsory usage of CPV (common procurement vocabulary).[353] The areas to be legislated were determined as concessions and PPP, type of procedures, and the transparency and equal treatment principles referred to be developed regarding the threshold levels. The extending of time periods and the upgrading of the implementation capacity of the PPA were also required in the accession period.[354] The screening meetings demonstrated that the main issue of concern on the EU side was the extent of the opening of the procurement market to the international contractors. The procurement issue was thus discussed in terms of the share of foreign contractors in the public tenders. In this context, the last amendment in the PPL stated as derogations from the PPL and divergence from the acquis.[355]In this context the preferences system was stressed in the Screening Report

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[352] "Türkiye, Avrupa Birliğine Katılım Yolunda 230 Ev Ödevi Yapacak," *Radikal*, December 10, 2005, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID= 762732&Date=27.08.2011&CategoryID=100.

[353] Screening Report Turkey, Chapter 5 Public Procurement, 5 April 2006, 5.

[354] Screening Report Turkey, Chapter 5 Public Procurement, 5 April 2006, 10-11.

[355] "Kamu ihaleleri Zorlayacak," *Radikal*, November 08, 2005, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=762495&Date=27.08.2011&CategoryID=101

that: “Data for 2005 indicate that the share of public contracts open to foreign bidders has been 22%, corresponding to 49% of the total value of contracts.” [356] In response, the head of Public Procurement Authority argued that the price advantage for the domestic bidders and the high threshold levels do not constitute a discriminatory practice against the foreign bidders since in the implementation only in 2% of the tenders did the price advantage affect the award of the contract[357]. Considering the threshold levels and the international responsibilities of Turkey, the argument on the side of Turkey was that the threshold levels should not be lowered until the country would be granted with membership. Only at that moment the threshold levels can be equated.[358]Hence the EU continued with the similar criticism for the field on the basis of the domestic preference method and the diminishing of the PPL and capacities.

The second main criticism of the EU and the OECD Sigma reports was the dissemination of the exceptions from the law either through enactment of sector specific laws or through the activity based exceptions avoidance of the public entities from being subjected to the PPL. The Progress Report of EU in 2006 and the OECD SIGMA Assessments stated that the enactments regarding the procurement issue in Turkey were adding new derogations to the procurement market through the

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[356] Screening Report, 2006, 3 http://ec.europa.eu/enlargement/pdf/turkey/screening_reports/screening_report_05_tr_internet_en.pdf.

[357] “İhaleye AB düzeni Geliyor,” *Radikal*, November 16, 2005, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=763308&Date=27.08.2011&CategoryID=101.

[358] “İhale Kurumundan AB ye Uyum Tepkisi,” *Milliyet*, October 17, 2005, accessed September 23, 2011, http://www.milliyet.com.tr/ihale-kurumu-ndan-ab-ye--uyum--tepkisi/ekonomi/haberdetayarsiv/17.10.2005/131467/default.htm

legislation of sectorial laws instead of transposition of the Directives.[359] Even in the most intensive period of negotiations with the EU political authority did not act according to the priorities suggested by the EU. In the 2006 Progress Report of the Commission, it was apparent that in order to ensure a consistent policy in the field the EU Commission started to seek a single authority for the negotiations. It was expressed that:

> The PPA is not in a position to ensure a consistent policy in all areas related to public procurement, nor does it effectively steer the implementation of the procurement legislation. Progress is needed in setting up an organization for procurement to ensure a coherent policy in all areas related to public procurement, establishing a comprehensive strategy as well as amending the scope of legislation to ensure that all relevant areas are covered.[360]

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[359] In the SIGMA reports the discrepencies from the EU Directives have been detailed as:
• the manner in which the PPL defines the scope of application – contracting entities covered by the PPL are determined by the funding source and the PPL does not use the definitions in the EC Directives (e.g. utilities are exempt);
• exemptions (types of contract not included);
• the need to justify the use of restricted procedure;
• the prior approval conditions for application of negotiated procedures and direct procurement;
• methods for estimating the value of contracts and for aggregating contracts;
• technical specifications and standards;
• publication of procurement notices;
• procedure and criteria for qualification of participants;
• procedure and criteria for contract award (selection of the best tender);
• the existence of national preferences and restriction of participation of foreign companies.
Threshold levels and formalism of the procurement procedures are repeated as barriers before the foreign bidders. Please See: Turkey Public Procurement System Assessment June 2006, SIGMA Support for Improvement in Governance and Management A Joint Initiative of the OECD and the European Union, principally financed by the EU,3, ttp://www.bumko.gov.tr/TR/Genel/BelgeGoster.aspx?F6E10F8892433CFFA79D6F5E6C1B43FFBB89BF54D3DDD6B9

[360] Commission Staff Working Document, Turkey 2006 Progress Report, Brussel 08.11.2006,36, http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/tr_sec_1390_en.pdf.

Although the Commission had been commenting positively on PPA both in terms of its administrative capacity, functions, and cooperation with the institution and while the Commission was underlining the requirement of independence of IRAs in the Accession Partnership Document, the aforementioned expression shows that the Commission was looking for a political authority that is more powerful in terms of having control and coordination with other public entities that have the power and means to submit a draft law for legislation.

Meanwhile, the public procurement field and regulations in the field continued to be intervened by multiple actors. In the establishment of the new institutions, new exemptions were created like what happened with the legislation for the Regional Development Agencies.[361] Although this is not an unlawful act, discussion for introducing exemptions for any public entity led to questioning of the accountability of the political authority in terms of altering the law to prepare a flexible ground for the award of contracts to the supporters of the political authority.[362] Second, the preparation of draft laws by the differing public entities caused harm to the autonomy of the PPA. However, these developments not only in the EU but also in the Turkish media led questioning of the politicization of the public procurement market. The study on a draft law conducted by the Ministry of the Transportation (without the participation of the PPA) aimed to curtail the long time periods on the basis of the EU directives, but the draft law also contained delimitations in the responsibilities of the Public Procurement Board. However, the reformulation of the

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[361] "Türkiye Genelinde 12 Kalkınma Ajansı Kurulacak," *Hürriyet*, February 08,2006, accessed October 14, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=3904335 ; "Yatırım Destek ve Tanıtım Ajansı Kuruluyor," *Hürriyet*, July 04, 2006, accessed October 13, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=4695162

[362] Metin Münir, "Ver Bir Pide Arası İhale AKP'li Olsun", *Milliyet*, February 17, 2006, accessed September 23, 2011, http://www.milliyet.com.tr/ver-bir-pide-arasi-ihale--akp-li-olsun/metin-munir/ekonomi/yazardetayarsiv /17.02.2006/146605/default.htm

boundaries of the PPA in terms of its review capacities coincided with the rumors in the journals that the PPA reviewed around 300 public tendering processes conducted in Hatay.[363]

The discussion was turning around the corruption and irregularity claims which were taking place every day in the newspapers. The government was allegedly trying to amend the law in order to purify itself by preventing the claims made in public. The draft law on the Public Procurement Law this time turned into amendment in the status and authorities of the Board and the PPA. The draft contained the provisions that the PPA will be limited with the subject of the complaint in its reviews, while all aspects of a case would have been reviewed in the previous practice. A change in the composition of the Board membership was suggested to decrease the number from ten to seven. The removal of the restriction for appointment to the Board on past political experience had intensified the debate on the extent of autonomy and the impartiality of the institution. Secondly, the provision for the appointment of the Board members by the Council of Ministers without the suggestions of the Ministries was also evaluated as to be decreasing the influence of non-political actors in the institution and increasing that of the executive power.[364] Moreover, it was decided that the Board could not review the cases without an application and beyond the subject matter of the complaints. In the Commission of the TGNA these provisions of the draft law were opposed by the RPP members of the Commission for reasons of politicization of the Board and opening of road for any kind of appointment in line with the demands of the political authority. The

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[363] "İhale için Garip Taslak," *Radikal*, September 25, 2006, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=792680&Date=27.08.2011&CategoryID=101.

[364] "KİK'te Acil AKP Operasyonu," *Radikal*, February 24, 2007, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=806860&Date=27.08.2011&CategoryID=101.

existing provision that required 12 years of experience in public service for Board membership was abolished. Hence the amendment was evaluated as a way to government to set its cadres in the Board and prevent the board from investigating the claims of irregularity that can open the road to corruption. [365]

While the government was being blamed for the limitation of the authority of the PPA, in the secondary legislation enacted by the PPA, the conditions for the complaint were redefined and complaining for the tender documents was prevented after submitting an offer on the basis of the tender document. Complaint against more than one tender was also forbidden.[366] As a result Both the PPA and the government with different approaches then intended to reregulate the complaint review procedures. The high number of complaints led the public authorities to take measures. At the beginning of the implementation of the system, the international actors underlined the complaint review system as a positive development. In the process, however, the high percentage of complaints started to be also complained. The Sigma Report of 2007 stated that:

> The high number of complaints in the procurement system generates a serious burden for the contracting entity and end-users as well as potential serious delays in the acquisition, delivery, and implementation of projects. Some authorities consider that the complexity of the law and its difficulty of

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[365] "Kamu İhalelerine AKP Perdesi," *Cumhuriyet*, March 15, 2007, accessed September 24, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/cumhuriyet2007/0703/15/t/c0410.html+kamu+ihale+kurumu ; "CHP'de Ali Dibo Uyarısı," *Radikal*, March 15, 2007, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=808593&Date=27.08.2011&CategoryID=1010:00.

[366] "İhaleyi Şikayet Eden İnceleme İstemeyecek," *Zaman*, June 22, 2007, accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno=554739&title=ihaleyi-sikayet-eden-inceleme-istemeyecek& haberSayfa=1.

> application lead to complaints, while others feel that suppliers abuse the complaint process.[367]

On the other hand, the OECD reported the increase of the role and responsibilities of the PPA for the prevention of corruption claims. It reported that

> there is no formal mechanism for cooperation between the PPA and the Competition Authority, although there is formal liaison. The Competition Authority agreed that risks of corruption could be reduced if the PPA had a post ad hoc inspection role.[368]

Although this suggestion was made for the prevention of the corruption and irregularities and although complaints do not directly mean a case of corruption but a kind of irregularity and discrepancy from the law, the OECD reports required the strengthening of the PPA. Rather than delimiting the PPA, upgrading her role in the system in order to guide the public entities and ascertain the irregularities was suggested. As a result, by 2007 through the amendments in the law after the financial curbing of the autonomy, the responsibilities and tasks were amended when the political authority was questioned about its affairs with the capitalist groups. These did not mean that the PPA lost its power over the field but rather its utility was delimited and its manoeuvre capacity was diminished.

The year 2008 was when the most extensive changes were made regarding the PPL and the authorities and functions of the PPA through the enactment of the draft law in preparation since 2006. Interestingly, against the common practice when the law was on the eve of enactment,

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[367] SIGMA Turkey Public Procurement System Assessment June 2007, SIGMA Support for Improvement in Governance and Management A Jjoint Iinitiative of the OECD and the European Union, principally financed by the EU,7.

[368] SIGMA Turkey Public Procurement System Assessment June 2007, , SIGMA Support for Improvement in Governance and Management A Jjoint Iinitiative of the OECD and the European Union, principally financed by the EU, 5-6.

it was supported by the head of PPA, Hasan Gül. The aforementioned draft laws were enacted. Thus, the complaint authority of the PPA was revised, measures were taken to reduce the number of the complaints by increasing the payment rates for application of complaints, the introduction of new procurement procedures was introduced by harmonizing the domestic procedures with EU Directives, such as framework contracts, dynamic purchasing, electronic reducing of prices or extension of the use of restrictive procedure. The justification made for the amendment was the harmonization of the PPL with regard to the complaint mechanism of the PPA, that is whose authority was cut beyond the expectations of the institution. Regarding review of complaint and dispute settlement mechanism, the provisions developed in the draft law by the services of the Prime Ministry was in a more extensive way delimiting the complaint mechanism. Accordingly, the application for complaint shall be made only by the one whose rights were possibly violated; in line with this provision the PPA was prevented to act herself ex officio taking into consideration the news to review a case for being irregular; furthermore, the authority of the PPA to review complaints was abolished in case of cancellation of a tender.

Regarding the abolition of the authority of the PPA to review the complaints on cancellation of the tenders by public entities, the head of the PPA stated that one third of the complaints were for the cancellation of tenders. As a result, the review mechanism on cancellation of the tenders function for preventing arbitrary decisions of the public entities, like favoring contractors, and cancellation of the tenders when their favored contractor cannot be awarded.[369] The response here of the Minister of Public Works and Settlement was based upon the liabilities of the public entities towards each other. The Minister underlining the

[369] "Hükümet Kamu İhale Kanunda AB'yi Takmadı, Yine Bildiğini Okuyor," *Radikal*, June 09, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=882329& Date=27.08.2011&CategoryID=101.

status of the PPA stated that a public entity cannot control the others' act when they are in the same status. On the other hand, this provision was opposed by the TGNA, the EU Affairs Commission, and the head of the Commission who was an AKP acting party, deputy. As a result, rather than opinion of the shareholders, the directly responsible Commission of TGNA had power on the provisions of the law. Moreover, the debate around this amendment showed that in the eyes of the politicians the PPA did not have a special status as an independent authority but it is a co-equal public entity.

In terms of abolition of the duty of the PPA to review the irregularity claims ex officio, the head of the PPA made an unexpected declaration that "I do not consider when I notice corruption." He declared that the Public Procurement Authority did not have a mission to fight with corruption. He stated that the function of the institutions was to look up whether the procurement documents were proper and to control the consistency of the implementation with the procedures to find out irregularities in case of use of the complaint mechanism. The head of the institution stated that there were other institutions before the establishment of the PPA aimed to fight with corruption. The PPA did not have an authority to influence the result of the irregularity or corruption. Rather, its role is to inform the related audit departments of the ministries in finding of irregularity or a prosecutor in finding of a crime.[370] While the institution and the political authority were challenging each other and one of the main justifications for existence of the institution was to combat corruption, the head of the PPA shifted its discourse to a closer base of the government.

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[370] "KİK Başkanı: Yolsuzlukla Mücadele Misyonum Yok", *Milliyet*, May 16, 2008, accessed September 23, 2011, http://www.milliyet.com.tr/kik-baskani--yolsuzlukla-mucadele-misyonum-yok/siyaset/sondakikaarsiv /16.05.2008/ 545079/default.htm ; "Kamu İhale Yasası Değişiyor," *Zaman*, May 16, 2008, accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno=690349&title=kamu-ihale-yasaai-degisiyor &haberSayfa=2.

Regarding the reactions of the stakeholders from the business circles to the amendments for diminishing the autonomy and the authorities of the PPA, the amendments were opposed by the large industrialists. The head of the TÜSİAD, Arzuhan Doğan Yalçındağ, evaluated the new policies of the government as populism, rather than efforts to increase the wealth in the midst of a global economic crisis. She continued that the populist policies would us lead to lose more than we gain.[371] One of the populist policies of the government that she had mentioned was the amendment of the PPL. A similar warning on economic policies came from the head of TOBB, who criticized the slowing down of the economic reforms and asked for regulations in the taxation, reform in public administration and prevention of destroying the PPA which was intended to fight corruption and waste of public resources.[372] The main points that the industrialists dealt with were stabilization and regulated economy rather than opening the door to unregulated and stabilized economic waves. The intention of the government to pay price changes to the contractors and extension of this policy to differing sectors was also regarded as a move of the government to protect certain contractors in the market. Particularly, the law was evaluated as a measure to protect the contractors of TOKİ (Housing Development Institution of Turkey) and mainly the banks from whom guarantee letters were received without interest.[373] Although this

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[371] "Patronlarla Hükümetin Popülist Tartışması," *Radikal*, May 27, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=879915&Date=27.08.2011&CategoryID=80.

[372] "TOBB: Yanlış Gündemle Çok *Zaman* Kaybettik", *Radikal*, June, 01, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=880889&Date=27.08.2011&CategoryID=101 ; Please See "Önlem Alınmazsa 2009'da Kriz derinleşecek," *Cumhuriyet*, December 20, 2008, accessed September 24, 2011, http://www.cumhuriyet.com.tr/?hn=24638 ; for the use of %15 price advantage which is stated not be operated frequently is demaded by the Machine Industry Sector Platform in order to stand against the global economic crisis.

implementation was not regulated within the PPL, it was directly related with the law and public procurement implementation and it revealed the approach of the government in terms of clientelist relations with differing sectors of business.

The year 2008 saw the intensification of the indicators about the creeping global economic crisis. The Turkish industrialists started to seek for protectionist implementations and state intervention for the establishment of regulations in favour of domestic industrialists through incentives in line with the needs of the private sector. The reflection of these new priorities in the provisions of the PPL was also part of these demands. [374]When the draft law started to be discussed in the TGNA, TÜSİAD declared the amendments were not in line with the EU requirements. In order to launch negotiations with EU on the fifth chapter, the amendment of the PPL was necessary but the draft law rather contained provisions that were drawing the PPL away from the EU provisions further. The large business groups claimed that diminishing the authority of the PPA to intervene irregularities would open the door to abuse of the system and allowing Board members' commercial activities would bring the transparency and equal treatment principles into

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[373] "TOKİ Müteahhitlerini ve Faizsiz Bankaları Kurtarma Operasyonu," *Radikal*, June 05, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=881713&Date= 27.08.2011&CategoryID=101 ; This amendment has been become a law, Please see: "Kamu İhale Sözleşmesi Kanunda Değişiklik Mecliste," *Dünya*, July 10, 2008, accessed October 4, 2011, http://www.dunya.com/kamu-İhale-sözleşmesi-kanununda-değişiklik-mecliste_14928_haber.html ; "Hükümetten Müteahhide Fark," Rdaikal, July 11, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaber DetayV3&ArticleID=887821&Date=27.08.2011&CategoryID=101.

[374] "Piyasa Denetim ve Gözetim uygulamaları Geliştirilmeli," *Hürriyet*, September 11, 2008, accessed October 14, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=9876557 ; "TOBB 'dan Değerli YTL Uyarısı," *Radikal*, September 12, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=898271&Date=27.08.2011&CategoryID=101.

disrepute. In this context, TÜSİAD asked for provisions in line with EU regulations and the strengthening of the competition principle.[375] Similarly, TMMOB representatives also gave voice to similar concerns, mentioning that the engineering and architectural services would be retreated from public, labour security would decrease further, and by weakening the PPA, irregularities and unfair competition would become widespread.[376]

Despite the oppositions from the private sector, the law was approved on 19 November 2008 in the TGNA. Apart from the aforementioned elements of the draft law, it included the shortening of advertisement periods by the use of electronic public purchasing platform. It also introduced new exemptions such as High Election Authority and new procedures besides the review of complaint mechanism which was aggravated for the applicants since the complaining was charged with higher monetary values.[377] The exemptions include certain purchases from certain contractors such as purchases from State Supply Office, Meat and Fish Authority and machine and chemical institute.[378]

On the other hand, representatives from professional chambers like TMMOB and HKMO declared against the continuous amendments in the

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[375] "Kamu İhale Kanunu Değişikliği Rekabet Anlayışına Aykırı," *Dünya,* November 14.11.2008, accessed October 4, 2011, http://www.dunya.com/"kamu-İhale-kanunu-değişikliği-rekabet-anlayışına-aykırı"_27934_haber.html.

[376] "TMMOB İhale Yasası Değişikliğine Karşı," *Milliyet*, November 18, 2008, accessed September 23, 2011, http://www.milliyet.com.tr/tmmob--ihale-yasasi-degisikligine-karsi-/ekonomi/haberdetayarsiv/18.11.2008 /1017435/default.htm.

[377] "Kamu İhale Kanunu Değişti," *Cumhuriyet*, November 20, 2008, accessed September 24, 2011 , http://www.cumhuriyet.com.tr/?hn=18372.

[378] "Yeni Kamu ihale Kanunu," *Dünya*, November 21, 2008, accessed October 4, 2011, http://www.dunya.com/yeni-kamu-İhale-kanunu_28560_haber.html.

market. It was claimed that the 15 times amendment on the PPL could not be explained via technical reasons or public interest. The amendments according to professional chambers were shaped in line with the needs of the industrialists and engineers.[379]

The introduction of framework agreements in the PPL with the 2008 amendments was also analyzed in the context of constant irregularities and the inability of the PPA to intervene[380]. Framework agreements were discussed as a means of exclusion of certain companies and prioritization of others. As the procedure was designed to be used for repetitive works, certain number of pre-determined companies for a specific work would be contracted for four years period. Hence, this type of procurement was argued as an indirect means to prevent the entrance of other companies to the market and a cause for diminishing competition in the market.[381]The decisions of the PPA and the impacts of the amendments were analyzed by taking for granted the unethical behaviour of the politicians and the politicization of the PPA members from both sides of the politically polarized parties. The claims of irregularities or abuses were frequently brought into question regarding negotiated tendering procedures and application of 21.b of the PPL.[382] A high number of

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[379] "Patronlar İstedi, Yasa 5 Yılda 15 Kez Değişti", *Evrensel*, November 20, 2008, accessed October 6, 2011, http://www.evrensel.net/v2/haber.php?haber_id=40823.

[380] "İhale Yasası Tırpalandı, Usulsüzlük Şikayetleri Artık Kapıdan Dönüyor", *Radikal*, March 09, 2009, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID= 925242&Date=27.08.2011&CategoryID=101.

[381] "İhale Kanunu Delik Deşik: Aynı Firmayla Dört Yıl," *Radikal*, March 06, 2009, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=924782&CategoryID=101.

[382] Article 21. B allows public entities to purchase good or service directly without tendering in case of natural disasters and for urgent and unpredicted cases. The frequent use of the procedure lead claims of corruption in order to

awards given to companies of municipalities[383] were blamed on the party in power as an effort to create a capitalist group of her proponents. Regarding the irregularity and corruption issue, the media also adopted discourse similar with the internationally hegemonic one. Clientelist relations were evaluated in the same basket as corruption and opponent media groups tried to show the clientelist relations between the politicians and the capital groups. For instance, *Zaman* brought forward the cancelled tenders after the PPA reviews in order to mention the irregularities the municipal authorities from opponent political party had committed.[384] The PPA had been directly blamed with politicization in the tender of İzmir Municipality,[385] which is identified as an opposition to the party in-power. Hence, the PPL and PPA became tools for showing corruption or justification of self-positions. Thus, despite the depoliticisation claims of procurement reform, the main actors in the

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blame the municipal authorities by benefitting to their proponents, Please See: "Muratlarına Erdiler," *Evrensel*, September 26, 2008, accessed October 6, 2011, http://www.evrensel.net/v2/haber.php?haber_id=37879 ; "İkramlı İnternetli İETT Otobüsünde Damat Sorusu," *Radikal*, October 18, 2008, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=903907&Date=27.08.2011&CCategoryI=98 ; "Acele Giden Otobus İhale Kurumuna Çarptı," *Radikal*, February 14, 2009, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=921689&Date=27.08.2011& CategoryID=77.

[383] "Gökçek'e İhale Eleştirisi," *Milliyet*, February 17, 2009, accessed September 24, 2011, http://www.milliyet.com.tr/melih-gokcek-e--font-color--red--ihale---font-elestirisi/siyaset/haberdetayarsiv/ 17.02.2009/1060595/default.htm

[384] "Kamu İhale Kurumu, CHP'li Beledyelerin 46 İhalesini Usulsüzlükten İptal Etmiş," *Zaman*, March 27, 2009, accessed September 24, 2011 , http://www.zaman.com.tr/haber.do?haberno=830634&keyfield=6B616D75206968616C65206B7572756D75.

[385] "İzmir'e KİK Freni," *Milliyet*, November 30, 2009, accessed September 24, 2011, http://www.milliyet.com.tr/metro-karari-siyasi-mi-/ege/haberdetayarsiv/27.11.2009/1166937/default.htm ; Hamdi Türkmen, "KİK'e Suçüstü," *Milliyet*, December 02, 2009, accessed September 25, 2011, http://www.milliyet.com.tr/Yazar.aspx?aType=YazarDetay&ArticleID=1168949&AuthorID=206.

field turned into tools of the discourse of politicization. In the meanwhile, protectionism, which is a sign of establishment of particular demands as it is for liberalization of the market, was demanded by differing sectors in 2008. Hence the domestic capital groups increased their power over the government.[386]

One of the benchmarks established in the screening meetings with EU was met with the approval for the Ministry of Finance to coordinate the negotiations with EU under Chapter 5, public procurement, in 2009. The setting up of an organization to ensure coherence in all procurement and public purchasing related issue was required from Turkey in 2006 and this necessity was repeated in the latter years. Although Public Procurement Authority had a special feature in the field and authority for secondary legislation, the authority of the PPA was limited with the classical public purchasing methods. In other words Public Private Partnerships and concessions through which the governments can make enormous investments were not subject to PPL or any other particular law for designed for PPAs. Similarly, due to the amendments in the PPL in 2005, the utilities sector was taken out of the scope of the law. Although the PPA had submitted a separate draft law regulating the utilities, the draft waited in the Ministries that had the force to bring the laws to the agenda of TGNA. As a result, apart from the traditional public purchasing part, the field was kept unregulated.

The appointment of the Ministry of Finance as the negotiator and coordinator body was thus a benchmark required by the EU. But on the other hand, the act itself implied that the intension of the political authority was to keep the procedures fragmented in public purchasing and to limit the authorities of the PPA within classical public procurement field. The authorization of the Ministry Finance for the

386 "İnşaat Sektörü İlk Üç Yıl Korumacılık İstiyor," *Milliyet*, April 09, 2009, accessed September 24, 2011, http://www.milliyet.com.tr/insaat-sektoru-ilk-uc-yil--korumacilik--istiyor/serpil-yilmaz/ekonomi/yazar detayarsiv/09.04.2009/1081030/default.htm.

negotiation of the fifth chapter led to comments related to autonomy of the PPA. These comments had been rebutted by the head of the PPA.[387] The claims that the PPA had turned into a subsidiary institution of the Ministry of Finance was rejected. On the other hand, the head of the PPA agreed that the field lacked monopole authority for the regulation of the field and the existence of a political but more authorized institution for policy making in the field was required. Another interpretation of the regulation was that the appointment of the Ministry of Finance did not affect the situation of the PPA, but the other public entities such as State Planning Agency and Treasury would not be allowed to prepare law or regulations on public purchasing anymore without the approval of Ministry of Finance.[388] The amendment and strengthening of the Ministry of Finance was thus declared as an indirect contribution to the status of the PPA with the decrease of the fragmentation in the field.

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[387] "KİK, Bağımsızlığını ve Özerkliğini Koruyor," *Cumhuriyet*, July 24, 2009, accessed on September 25, 2011, http://www.cumhuriyet.com.tr/?hn=70944

[388] "Kamu İhale Kurumunun Özerkliği Tırpanlandı," *Milliyet*, July 24, 2009, accessed September 24, 2011, http://www.milliyet.com.tr/kamu-ihale-kurumu-nun-ozerkligi-tirpanlandi/ekonomi/haberdetayarsiv/ 24.07.2009/1120876/default.htm ; For differing views on the case please also see: "Kamu İhale Kurumuna Gece Yarısı Operasyonu", *Evrensel*, July 28, 2009, accessed October 3, 2011, http://www.evrensel.net/v2/haber.php?haber_id=55206 and Yalçın Bayer, "İhalesiz İhale," *Hürriyet*, July 29, 2009, accessed October 14, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=12168043 ; the claims of political partisanship by eliminating the regulatory power of the PPA has been mentioned by the words of Head of Chamber of Civil Engineers. The point mentioned by Nevzat Ersan was to some extent valid that when the decisions of PPA need to be approved by the Ministry of Finance, the situation not necessarily but conceivably turn into diminishing the autonomy and monopoly of the PPA in the field. The Ministry of Finance rejected the claims of diminishing of administrative and financial autonomy arising from PPL 4734. In the declaration of the Ministry of Finance none of the activities of the PPA can be required for approval of Ministry of Finance; the authority of the MF is composed of determination of general policies in the field in line with the economic policies and strategies of the government and coordination in preparation of draft laws in the field, Please see: "Kamu İhale Kurumunun Yetkileri Değişmedi," *Dünya*, July 30, 2009, accessed October 4, 2011, http://www.dunya.com/"kamu-İhale-kurumunun-yetkileri-değişmedi"_55627_haber.html

Towards the end of the 2009, the PPA submitted the draft law for the harmonization of the Turkish public purchasing regulations with EU Directives. The head of the PPA explained the initiation of the harmonization with the intention to comply with the National Action Plan submitted to EU. The draft law completed the harmonization with EU principles by lowering the threshold levels, allowing more flexible procedures in line with EU implementations, abolishing the exemptions and creating on of ground to allow the foreign contractor to bid in the tenders. On the side of the PPA, the intention to regulate the field and create a more systemic structure for investments distant from the political influences e continued. The provisions of the aforementioned draft law prepared by the PPA in line with the EU directives started to be discussed in the media at the end of 2010. The provisions on expanding the use of negotiation procedure[389], lowering of the threshold level that prevented the foreign bidders, introduction of competitive negotiation procedure[390]; lowering of the price advantage for the domestic bidders

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[389] The estimated value between 50.000- 100.000 TL for goods and services purchasing and between 50.000 and 1 million TL for works contracts, at least 3 candidates will be invited to submit an offer and bid. Those who are technically compliant will be invited to offer their last bid. Purchasing below 50.000 TL and for entertainment expenses for the official representatives will be subject to direct purchasing procedure. Series of service purchasing include accomodation, rail and water transport, legal consultancy services, training and vocational training services, health and social services, services related to entertaintment, culture and sports, and personel and security services, Please See: "Kamu İhale Sürecinde Önemli Değişiklik," *Hürriyet*, September 29, 2010, accessed October 14, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=15893226 ; "Kamuda 50 bin liraya Kadarki Alımlar, İhale Dışına Çıkarılıyor," *Milliyet*, September 29, 2010, accessed September 24, 2011, http://www.milliyet.com.tr/kamuda-50-bin-liraya-kadarki-alimlar-ihale-disina-cikariliyor/ekonomi/sondakikaarsiv/29.09.2010/1295140/default.htm ; "Kamuda 50 bin Liraya Kadar Alımlar, İhale Dışına Çıkarılıyor," *Zaman*, September 29, 2010, accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno=1033565&title=kamuda-50-bin-liraya-kadar-alimlar-ihale-disina-cikariliyor&haberSayfa=2.

[390] The PPL currently requires the award of contract to the lowest offer, if it is not extremely lower which is a reason of question and if the public entity is not satisfied with the clarification made by the candidate, that offer can be failed.

from 15% to 10%, and lastly categorization of exemptions from the PPL[391] found a place for public discussion. Regarding the draft law, the head of the PPA stated that they would focus on large scale procurements, and for small scale works secondary legislation could regulate the procurement market.[392] The e-procurement system was launched for the public tenders with the expectation of high saving rates and decrease of formalism and criticism of corruption. The system by producing all the tender documents in an electronic environment was one format expected to achieve standardization and full control over the tender formats. This law was expected to be enacted in the upcoming year to continue with the accession negotiations with the EU. Since eight chapters of negotiation were suspended and almost all other chapters had been completed, the fifth chapter was one of the last chapters that could be open to negotiation.

Apart from the harmonization of the Turkish public procurement law with the acquis, other benchmarks for the start of negotiations had been completed. Once the National Action Plan on Public Procurement was

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With the competitive negotiation procedure, however, best value for money has become a criterion of award of contracts instead of lowest price. Please See: "Kamu İhale Sürecinde Önemli Değişiklik," *Hürriyet,* ; "Kamuda 50 bin liraya Kadarki Alımlar, İhale Dışına Çıkarılıyor", *Milliyet*; "Kamuda 50 bin Liraya Kadar Alımlar, İhale Dışına Çıkarılıyor," *Zaman.*

[391] The exemptions have been designed under two categories: permanent and temporary exemptions. Permanent exemptions are those classical exemptions regarding security, intelligence secvice, employment contracts, purchases for establishment of public telecommunication services. On the other hand, many other exemptions established since 2003 have been put under temporary exemption to be put under the scope of the PPL by 2014, including purchases conducted by TPAO, Fish and Meat Agency. Another group of exemptions will be kept on until the membership to EU. Please See: "Kamu İhale Sürecinde Önemli Değişiklik", *Hürriyet*; "Kamuda 50 bin liraya Kadarki Alımlar, İhale Dışına Çıkarılıyor," *Milliyet*; "Kamuda 50 bin Liraya Kadar Alımlar, İhale Dışına Çıkarılıyor," *Zaman.*

[392] "Kamu 50 bin liraya Kadarki Alımları İhalesiz Yapacak," *Milliyet*, September 30, 2010, accessed September 24, 2011, http://www.milliyet.com.tr/kamu-50-bin-liraya-kadar-alimlari-ihalesiz-yapacak/ekonomi/haberdetay arsiv/30.09.2010/1295415/default.htm.

approved by the EU, the expectation was that the enactment of the draft law, which waited at the Ministry of Finance since 2009, would also respond to some other complaints voiced by PPA as well as by other international actors. One of them was the formalism of the PPL, which was not only criticized by the EU constantly as a reason of discrimination against foreign bidders, but also by the contractors and the liberal wing journals who blamed the PPA in terms of partiality in the review of complaints and for deciding on the side of the public entities. [393]

Similarly, the report on the activities of PPA prepared by State Supervisory Council touched on the difficulties in the implementation of the public procurement law and the structural problems within the PPA. The report suggested that frequent change in the legislation concerning public procurement (including the other laws that caused changes in the PPL in order to establish exemptions) was destroying the uniformity of the public procurement legislation. As a result, the exemptions would be reviewed and some of them would be abolished. Public procurement legislation would be harmonized with the EU acquis by bringing the draft law prepared by the PPA to the agenda of TGNA. Concerning the PPA, the establishment of stricter supervision on the PPA, particularly on expenses of the institution, was suggested.[394] Formalism and constant amendments in the law were therefore regarded as a means for arbitrary purchasing implementations by the public entities and the strengthening of the PPA by diminishing the role of politicians continued to be suggested after eight years of implementation of the PPL.

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[393] Murat Yülek, "Kamu İhale Kanunu Ne İşe Yarar?," *Dünya*, June 28, 2010, accessed October 4, 2011, http://www.dunya.com/kamu-hale-kanunu-ne-ie-yarar-_42_92583_yazar.html?.

[394] "Kamu İhalelerindeki Gereksiz İstisna Hükümleri Ortadan Kaldırılmalı," *Cumhuriyet*, March 23, 2010, accessed September 24, 2011, http://www.cumhuriyet.com.tr/?hn=124550.

Turning back to the struggle over the market share between the differing segments of capital, since 2008 the demand for protectionism increased and strengthened in the discourse of some Ministries. The PPL at the beginning was imposed upon by the international actors to enforce competitiveness in the public procurement market. The representatives of large companies in Turkey also supported the enactment and later the status of the law. However, in 2010 when the industrialists started to pressure for protectionism in the public procurement field, the related Ministry positively responded and initiated steps in order to meet the public entities with the domestic contractors. The Ministry of Industry emphasized the significance of putting into use the price advantage for domestic candidates, especially for the small enterprises.[395] The Minister expressed the initiatives of the government for the promotion of the use of domestic products. One of the measures proposed was an amendment in the PPL through which domestic bidders will be promoted with further advantages on the condition that they produced the offered goods in the country. Apart from the realization of this policy, the PPL stayed to be seen as a tool for policy making for the intervention of the government in the economy in order to respond the demands of particular capital groups. .

In 2011 two mainstream changes were made in the PPL and structure of the PPA. One is the introduction of new exemptions for the PPL for purchases of the General Directorate of Turkish Coal and TOKİ. There was also expansion of the exemptions in PPP investments. The

[395] "Kamuda Yerli Malı Dönemi Başlıyor," *Radikal*, October 11, 2011, accesse August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleID=1023148&Date=27.08.2011&CategoryID=101 ; "Bakan Ergün: Kamu İhale Kanunu'nda Değişiklikler Yapacağız," *Zaman*, December 07, 2010, accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno=1062167&title=bakan-ergun-kamu-ihale-kanununda-degisiklikler-yapacagiz&haberSayfa=1 ; "Kamu İhale Kanununda Değişiklik Yapacağız," *Dünya*, December 07, 2010, accessed October 4, 2011, http://www.dunya.com/kamu-İhale-kanununda-değişiklik-yapacağız_107996_haber.html.

purchasing of consultancy services for the projects conducted with PPP model of public purchases was taken out from the scope of the PPL[396]. In fact the procedures of PPP were not conducted in accordance with PPL, which concerns the classical public purchasing. PPPs were conducting the main field of exception from the PPL.

As a modern method of public procurement, PPPs were being implemented in Turkey but they were not standardized under a universal law. In the common implementation of this procedure the burden of the work is transferred to the contractor and the contractor processes the work with a risk factor for a future benefit gained from the customers-citizens. In its implementations in Turkey the state was engaged with the risk factor more than in the common implementation in that it both created a market for the contractor and also took over the risk of the project which is contradictory to the nature of the procedure. For instance, through the omnibus bill a guarantee of future demand of customers was given to the contractors. As a result, the burden of the contractors was lessened. If the rationale of using the PPP method is not to make the state pay the service, the provision of demand guarantee has an inner paradox. Through the use of PPPs in fact the state makes the citizens as consumers and the company assigned with the work encashes the cost of the work from the citizens that use the service. The state, by binding itself with demand guarantees, has lost her initial aim which is not to pay for a service directly.

The second, indirect change in the law was made through a statutory decree numbered 649 and published on Official Gazette on 17 August 2011. The decree made an amendment in Article 19 of the 27/9/1984 dated 3046 numbered law. With the amendment, the ministers were authorized to supervise/audit all the activities and operation of their related, relevant and affiliated bodies. The administrative audits of the

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396 "Torba Kanunun 7 Maddesine İtiraz," *Milliyet*.

IRAs were given to the political authority.[397]The provision was evaluated as the destruction of the independence and autonomy of the IRAs, as well as Public Procurement Authority which is an affiliated body of the Ministry of Finance. The interviewed PPA experts stated that the amendment made the autonomy of the PPA highly debatable, if not directly diminished. First, the administrative control of the Ministry of Finance over the PPA constituted a ground for the intervention abilities of the political authority. Second, the change in the appointment procedure of the members of Public Procurement Board increased centralization according to the expert from the PPA because the private sector and other public entities would not be able to suggest a member for the Board anymore, and that only the seven candidates suggested by the Ministry of Finance would be appointed as Public Procurement Board members by the Council of Ministers. Furthermore, referring to the debates in the literature, the expert from the PPA stated that the introduction of reappointment to the Board is an element of curbing the autonomy of the Board members and the institution. Also to guarantee their reappointment, individuals would tend to act in line with the demands of the political authority.[398]

On the other hand, regarding the arrests on February 13, 2012 in PPA with the claim of corruption, it has been stated the system is being managed by a computer system within the PPA that experts would not be

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[397] "Üst Kurullar AKP'nin Elinde," *Cumhuriyet*, August 23, 2011, accessed September 24, 2011, http://www.cumhuriyet.com.tr/?hn=271434; "Kurulların Özerkliği Kaldırıldı," *Milliyet*, 22.08.2011; Güngör Uras, "Bağımsız Kurumlar 'Baş ağrıtıyordu (!)' Müjde: Kurtulduk", *Milliyet*, August 22, 2011, accessed August 24, 2011, http://ekonomi.milliyet.com.tr/bagimsiz-kurumlar-bas-agritiyordu--mujde-kurtulduk/ekonomi/ekonomiyazardetay/22.08.2011/1429705/default.htm ; Erdal Sağlam, "Üst Kurullar Artık Bağımlı", *Radikal*, August 20, 2011, accessed August 27, 2011, http://www.Radikal.com.tr/default.aspx?aType=*Radikal*Yazar&ArticleID=1060647&CategoryID=101&Date=11.08.2011&Yazar=ERDAL.

[398] Interview with public procurement expert working at PPA for 3 to 5 years.

able to review particular procurement and complaint dossiers. To sum up, the 2011 amendments drove a wedge between the Ministry of Finance and the PPA. The PPA authorities underlined that their autonomy is being curbed and the Ministry of Finance is not taking the necessary steps in the EU negotiations in the public purchasing field.[399]

5.4 Implementation of the Law

After the enactment of the law, the main criticism against it made by the contracting authorities, the public entities, focused on the complexity of the law and the lack of institutional capacity of the public entities to implement the law. That is why the Public Procurement Authority took the responsibility to provide training for the procedures related to issues of public purchasing and legal remedies in cases of conflict. Apart from the trainings, the Public Procurement Authority also functioned for gathering and publishing data on the public procurement market, the budget size of awarded contracts, type of contracts, the prohibition from participating in public procurement and the number of complaints to the Public Procurement Authority. Accordingly, the number of complaints and use of legal remedies continued to increase that even at the beginning this was appreciated by the European Commission. In due course, however, the issue turned out to be a problem due to the over use of the remedies. The explanation made by the bureaucracy was the abuse of the system by the companies in order to prevent contracting when their tender lost to other candidates. As pointed out above regarding this issue, the complaint mechanism was tightened through the law number 5812 which removed the PPA's practice of independently taking an action without a complaint on the basis of the decision of the Public Procurement Board to 'examine the claims' in public. Not only the capacities of the PPA to take an independent action were removed but

[399] The speech of senior official from PPA given at Yeşil Alım Konferansı, 28.11.2011, Ankara.

also the cost of complaint mechanism was increased. Moreover the PPA decided to examine only the complaint issue in a dossier rather than the whole case. In the interview with Public Procurement experts regarding their workload it was gathered that the institution was responding to the complaints in a very quick way despite the high number of complaints. In comparison to EU members, the experts underlined the complaint mechanism was very inexpensive that the mechanism was facilitated in Turkey and became open to abuse since groundless claims turned into complaints[400].

Regarding the complaints in media, what became public was the politicization of the decision mechanisms on the public procurement. Cases related with municipalities and public entities were debated in relation to irregularities and even corruption. The cases most debated in the media often exposed the link between the political power and the irregularity. The parties often blamed each other by claiming the politicization of the Public Procurement Authority or the Public Procurement Authority was appreciated since it could expose the irregularities in the tenders by cancelling the procurement decisions or referring them to the prosecutor. As a result, in either scenario the Public Procurement Authority stood in the middle of a political debate.

Firstly, the legal remedies in Turkey were regulated in the Turkish procurement system between the Article 54 and Article 57 of the PPL. Accordingly;

> The candidates, tenderers or potential tenderers who claim that they have suffered a loss of right or damage or likely to suffer a loss of right or damage due to unlawful procedures or actions within the process of the tender may file a

[400] The approximate number of complaints in a week is stated as between 90-100 in the interview in March 2012.

> complaint and appeal in line with the procedures and the principles of this law.[401]

The path of complaint is a mandatory process before filling a lawsuit. The law requires the submission of complaint applications to the contracting entity and to the PPA in determined time periods and with the realisation of certain conditions in each step. The candidates, tenderers or potential tenderers who have exhausted the complaint application step to contracting authority and have found the decision of the contracting authority as inappropriate may file an appeal to the PPA within certain time periods. The contracting entity or the PPA upon complaint shall review the case and determine one of the following decisions: reject the complaint letter, order the termination of procurement proceedings in case of violation of law or determine a corrective action. The final decision of the PPA with regard to the complaints is under the jurisdiction of the courts.[402] As a result, the decision of the PPA or the contracting entities to cancel the tender proceedings is due to the: "violation of law which would constitute an obstacle for the continuation of the tender proceeding and which cannot be remedied by taking corrective measures."[403] Hence it may be difficult to label each case as corruption. Moreover, it is also possible to execute corrupted public proceedings by fully implementing the PPL provisions on paper.[404] The decisions of the PPA may mislead one to assess the cases as corrupted. However they give an idea about the violation of the law.

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[401] Article 54 of the PPL.

[402] Artcile 54-57 of the PPL.

[403] Article 54 of PPL.

[404] "KİK Başkanı, Yolsuzlukla Mücadele Misyonum Yok," *Milliyet*; "Ali Diboyu Ciddiye Aldık," *Hürriyet*, January 15, 2006, accessed October 13, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=5377915.

In 2010, the cancellation decisions constituted ten per cent of all the decisions taken by the PPA, including the rejection decisions.[405] For the cases that came up as corruption in the media, the PPA constantly underlined that it is responsible with the determination of irregularities but in order to confirm corruption cases a more comprehensive approach is needed beyond the review on paper, though the cases on media cannot be assessed as corruption directly.[406] However, the authority of the PPB to take an independent action for the corruption cases would be an efficient mechanism to relieve public consciousness for specific cases had been removed with the law number 5812.

Apart from statistics, debates on the media revealed that despite the neoliberal restructuring of the state through transparency, efficiency and good governance principles, the aim of combating corruption t in order to introduce the neoliberal reforms in the structural adjustment was not achieved. The state entities were restructured and particularly the procurement market was designed according to international norms to a large extent but the corruption debates on which the reforms have been justified remained.[407] Although there were claims based upon charges

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[405] Kamu İhale Kurumu, KAMU ALIMLARI İZLEME RAPORU, 2010,Dönem 01.01.2010-31.12.2010, p. 58. http://www.ihale.gov.tr/ihale_istatistikleri-45-1.html (Access date 28.01.2012).

[406] Kamu ihale Kurumu Basın ve Halkla İlişkiler Danışmanlığı,Kamu İhale Kurumu'nun Hatay ilinde Yapılan Bazı ihalelere Yönelik Gerçekleştirdiği İncelemeler İle İlgili Açıklaması, 15.12.2006

[407] The most prominent cases debated on public procurement market in relation to political actors and the independence of the PPA can be listed as Tender for İzmir Underground, Adana Metropolitan Municipality, İstanbul Metropolitan Municipality, Ankara Metropolitan Municipality, Ministry of Energy and Natural Resources, Ministry of National Education, Hatay Municipality, and Ministry of Health. Please see debates on media: "İzmir Metrosunda Çıkış Görenmez Oldu," *Radikal*, February 14, 2010, accessed August 26, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalEklerDetayV3&ArticleID=980299&Date=26.08.2011&CaCategory=42 ; Okulda İhale Hatalı Çıktı," *Milliyet*, November 20,2004, accessed September 23, 2011, http://www.milliyet.com.tr/----okulda-ihale-hatali-cikti/guncel/haberdetayarsiv/20.11.2004/250546/default.htm ; "Bakan

that the public entities were preparing the ground for award of contracts on the basis of patron-client relations the Public Procurement Agency came out with bribery cases in February 2012 for which number of staff

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Çelik'ten KİK'e Dava Sinyali," *Radikal*, November 21, 2004, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType= RadikalHaberDetayV3&ArticleID=729328&Date=27.08.2011&CategoryID=98 ; "AKP'den Ali Dibo Yasası," *Milliyet*, January 04, 2007, accessed September 23, 2011, http://www.milliyet.com.tr/akp-den-ali-dibo-yasasi/siyaset/haberdetayarsiv/04.01.2007/183988/default.htm ; "Dört Yıldır Aynı Ali Dibo," *Radikal*, June 25,2006, accessed August 27, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3& ArticleID=784239&Date=27.08.2011&CategoryID=97 ; "145 ihale Mevzuata Aykırı," *Milliyet*, December 12, 2006, accessed September 23, 2011, http://www.milliyet.com.tr/----ihale-mevzuata-aykiri/siyaset/haberdetayarsiv /12.12.2006/181460/default.htm ; "Üniversite Olimpiyatları İnşaatında Yolsuzluk İddiası," *Milliyet*, August 27,2005, accessed September 23, 2011, http://www.milliyet.com.tr/universite-olimpiyatlari-insaatinda-yolsuzluk-iddiasi/ekonomi/haberdetayarsiv/ 27.08.2005/128855/default.htm ; "Kamer Genç: İstanbul Soygun Alanı Gibi," *Cumhuriyet*, March 30, 2010, accessed September 26, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/cumhuriyet201 0/ 1003/30/t/c0608.html+kamu+ihale+kanunu ; "Kadir Topbaş'a Çifte Salvo," *Radikal*, February 04,2009, accessed August 28, 2011, http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetayV3&ArticleID=920 083&Date= 26.08.2011&CategorCat=77 ; "Bir Cepten Diğerine," *Cumhuriyet*, February 05, 2009, accessed September 26, 2011, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/cumhuriyet200 9/0902/05/t/c0504.html+ kamu+iihal+kanunu ; "Acele Giden Otobüs İhale Kurumuna Çarptı," *Radikal*, Kapı Sorunu Çözüldü Metrobüsler Yola Çıkıyor, *Hürriyet*, April 25,2009, accessed October 14, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=11509364 ; "Muratlarına Erdiler," *Evrensel*, "İkramlı, İnternetli İETT Otobüsünde Damat Sorusu," *Radikal*, "Ak Ellerim Kalem Tutar Yazar 'İhale Kanunu, kanunu' Diye," *Milliyet*, December 19,2008 accessed September 23, 2011, http://www.milliyet.com.tr/-/metin-munir/ekonomi/yazardetayarsiv/ 09.12.2008/1026170/default.htm ; "İhalelerde Baskı Yapılıyor Mu?," *Cumhuriyet*, October 04,2010, accessed September 24, 2011, http://www.cumhuriyet.com.tr/?iysform=arama&aranan=kamu+ihale+kurumu &tip% 5B%5D=2&tip%5B%5D=4&sure=&hk=hk&ilk=100 ; "Herşey Kitabına Uygun Yapılıyor," *Evrensel*, June 17,2009, accessed October 6, 2011, http://www.evrensel.net/v2/haber.php?haber_id=52794 ; "Türkiye Taş ömürü Kurumu'nda Armut Piş ağzıma Düş Oyunu," *Radikal*, February 12,2008, accessed August 26, 2011 , http://www.radikal.com.tr/Radikal.aspx?aType=RadikalHaberDetayV3&ArticleI D=840024&Date=26.08.2011&CCategoryI=101 ; "Kamu İhale Kurumu, CHP'li Belediyelerin 46 İhalesini Usulsüzlükten İptal Etmiş," *Zaman*, March 27, 2009 , accessed September 24, 2011, http://www.zaman.com.tr/haber.do?haberno =908126&keyfield=6B616D75206968616C65206B7572756D75

and business men were arrested.[408] As a result, the debates on corruption and irregularity cases led to constant revisions in the Public Procurement Law and its secondary legislation that turned the system further complicated in some respect due to the attempts for e-procurement for simplification. This increase in regulation and formalism are signs of how the deregulation claims of the neoliberal agenda have become inapplicable in reality. Second, the justification for restructuring of the state bureaucracy and the procurement market with the aim of prevention of corruption and irregular acts was constituting a debatable ground in terms of achieving the aim because the terminology of corruption was extended from its classical definition to relation between the state and business, which is extensive and inherent in any capitalist country. As a result, the justification for the reforms in the procurement market was revised and the President of the Boards accentuated the benefits of the competition secured through the PPL and how state purchasing costs had become less than expected amount.[409]

5.5. Evaluation

The neoliberal opening in Turkey was initiated at the end of 1970s with the abolition of the import substitution industrialisation model. The country entered a new phase by 1989 with the full capital account liberalisation in 1989 in which the Turkish economy was exposed to capital inflows and financial instability. Öniş observed a gradual

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[408] "KİK'te operasyon: 23 kişi gözaltında", Cumhuriyet, February 14, 2012, accessed February 22, 2012, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/cumhuriyet2012/1202/14/t/c0803.html+kamu+ihale+kurumu; "Cebimizin Isınması Lazım",Cumhuriyet, February 18, 2012, accessed February 22, 2012, http://garildi.cumhuriyet.com.tr/sayfa.cgi?w+30+/cumhuriyet/cumhuriyet2012/1202/18/t/c0711.html+kamu+ihale+kurumu

[409] Kamu İhale Kurumu Başkanı Dr. Hasan Gül'ün Bütçe Sunuş Konuşması, 25 11.2008; "Elektronik İhale için Geri Sayım," *Hürriyet*, October 23,2005, accessed October 13, 2011, http://hurarsiv.hurriyet.com.tr/goster/ShowNew.aspx?id=3425752.

approach characterised the Turkish experiment of neoliberal transformation rather than a shock therapy.[410] As a result the, state while taking steps for encouraging foreign investment and liberalisation of trade, the policies implemented in the period deviated from the orthodox liberal values. This is because the state in order to convert the economy into an export-oriented one, provided exclusive trading rights to large scale companies and kept its status in the economy as the main actor of investment[411] during the 1980s. Hence, the first phase of the neoliberal transformation in Turkey was associated with the period where the neoliberal values were not fully respected while growth in economy was engendered. On the other hand, this period was followed by a period in which the state dissolved its experiment with heterodox instruments and fully committed to neoliberal reforms.[412] However, the full commitment led to the outbreak of financial crisis which could not have recovered with an increase in employment, export rates and growth or decrease in inflation. By the 1990s, with the capital liberalisation Turkey experienced successive economic crisis. The explanation made for the crisis also constituted a justification for the second step of the neoliberal reforms.[413] The reason for the crisis was shown as lack of regulation of the financial sector and the unstable economic conditions of the state,[414]

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[410] Ziya Öniş, "Varieties and Crises of Neoliberal Globalisation:Argentina, Turkey and the IMF", *Third World Quarterly*, Vol.27, No:2, (2006): 244.

[411] Ziya Öniş, *Political Economy of Turkey in 1980s Anatomy of Unorthodox Liberalism, State and Markt: the Political Economy of Turkey in Comparative Perspective*, (Ankara: Faculty of Economics and Administrative Sciences Department of Economics, 1998), 184-187.

[412] Ziya Öniş and Fikret Şenses, "Rethinking the Emerging Post-Washington Consensus", *Development and Challenge*, 36, 2, (2005): 271.

[413] 2003 Yılı İhale İstatistikleri, 2004 Yılı İhale İstatistikleri,Kamu İhale Kurumu(KİK) 2005 Yilinin 9 Aylik Dönemine İlişkin İhale İstatistiklerini Açikladi, 26.10.2005 ; Kamu İhale Kurumu(KİK)2006 Yili İhale İstatistiklerini Açikladi, 15.04.2007, http://www.ihale.gov.tr (Access Date : March 2011)

[414] Ziya Öniş and Fikret Şense, The New Phase of Neoliberal Restructuring in Turkey: An Overview, Turkey and the Global Economy:Neoliberal Restructuring and integration in the post-crisis era, Ziya Öniş and Fikret Şenses, eds, London

while as a general principle the neoliberal economy should promote deregulation and free market. As a result, the deregulation discourse of the neoliberalism did not aim to reduce the regulation in the economy. On the contrary, a specific type of regulation was promoted.

As a result, the second phase of neoliberalism in Turkey has initiated as a response to the financial crisis that the regulation attempt of the state was started in collaboration with the establishment of independent regulatory agencies which was coherent with the neoliberal depoliticisation discourse. Hence, the deregulation demand of the neoliberals converted to demand for regulation and intervention of the state as arbitrator in order to establish the norms of the market and to secure the market for investors. The Public Procurement Law and the Public Procurement Authority were suggested by the international actors within such a context and they turned into a field of conflict between politicians, bureaucrats, international financial organisations, and representatives of capitalist class. During the enactment of the law, the main arguments of the IMF, OECD and the EU were the prevention of corruption, and the establishment of free trade norms that would ensure transparency and state dispositions. On the other hand, the main aim of the international actors was the opening of the procurement market for the multinational companies since they pushed for this specific provision more than any other point.

Regarding the impact of the domestic forces over the field, the change in government during the enactment of the law allowed the political power holders to deviate from the law and amend it according to the needs and the expectations of its support base. As a result, the amendments in law presented not only a common intra bureaucracy conflict within the state apparatus but also a conflict to meet the expectations of the emerging

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and New York: Routledge, p.1; Ziya Öniş, "Varieties and Crises of Neoliberal Globalisation",250; Ziya Öniş and Fikret Şenses, Rethinking the Emerging Post-Washington Consensus, *Development and Challenge*, 36,2, (2005): 270.

capitalist base of the political parties. Hence the conflicting objectives of the international actors and the government constituted the phases of the enactment of the law and the implementation process which led to a series of amendments. Ercan and Oğuz argued on the enactment and amendment processes of PPL considering the impact of capital in the core and periphery, and state that:

> The relationship between core and periphery is essentially a spatial relationship, and not a scalar one. However it is this spatial relationship that shapes the rescaling processes within particular formations. The reciprocal movement of capital between the core and peripheral regions shifts the scale of accumulation between the global-national and local levels within the core spaces as well as peripheral ones. […] the movement of capital is not one directional but reciprocal. Thus, it is not uneven development but uneven and combined development of capitalism that forms the spatial aspect of rescaling processes within both core and peripheral spatial configurations. Therefore, a new approach is needed that rearticulates the relationship between over-accumulation strategies in the core with new accumulation dynamics in the periphery.[415]

The enactment of the law was a phase of allowing the global capitalists to enter in procurement market in Turkey in alliance with internationalised domestic capital.[416] However, in the next period, domestic capital groups set up new alliances that enforced for the modifications in the law in order to reestablish the privileged position of the domestic capital groups. The state in this process was not a neutral actor but an arbitrator between the differing capital groups.

Secondly, during the enactment process of the law the most underlined feature of the procurement market in Turkey was its corrupt character with an ill-equipped structure that is open to political influence. Hence, the introduction of the PPL was justified by both the head of Public

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[415] Fuat Ercan and Şebnem Oğuz, 645.

[416] Fuat Ercan and Şebnem Oğuz, 648.

Procurement Authority and the importers and exporters of the reform with the argument of combating corruption. The method for this was the establishment of a system that is depoliticized through a settling of a system that is transparent, free from political impact in tendering and monitored. Hence the aim was depoliticising the field. On the other hand, the neoliberal reforms in the field have not directly eliminated the corruption and irregularity cases; on the contrary, the legal remedies were increasingly used with these claims. This would be interpreted as a success for the system since it allows the dissemination of remedies in breach of the rule; however, the increase in the complaints also led the law makers to furnish the law with technical details that caused the establishment of stricter rules on the one hand, and flexible practices defined for the public entities on the other hand. However both of these measures cultivated further the irregularity suspicions in the system. As a result, first, the deregulation claim of neoliberal political agenda was challenged with the series of amendments and formal requirements that turned the system to a complex mechanism without flexibility. Second, the depoliticisation attempts of the economic field did not initiate a depoliticised character since the system was mainly supported by the international financial organizations and the core capital class in the Turkish economy in the first instance. Later this field in which the state continued to be a regulator aimed to promote differing segments of the capital. Hence, the depoliticisation claim in the field was not supported with a policy that is completely free from clientelist relations and the clientelist policy making also continued to determine the character of the field during the implementation of the law. It is crucial to state that this failure was not due to the content of the reform but to the expectation of the neoliberal approach to separate politics and economy and expect the state to act as a neutral actor.

CHAPTER 6

CONCLUSION

On the basis of the analysis of the neoliberal restructuring of the Turkish public procurement process, this thesis has argued that the neoliberal argument for depoliticisation and separation of economic and political fields has specific political underpinnings. For this has practically meant enhancing the command of globally mobile capital on public procurement processes at the expense of less competitive small and medium scale enterprises in particular, and the people in general. Furthermore, the neoliberal policies in public procurement has had also implications on the North-South relations. The critical look at the very practices of the imposition of procurement reforms in the South by the financial leading organisations like IMF, World Bank, a question which have been problematized in this thesis by focusing on the Turkish case, easily reveals the politicized nature of the project. For even though state/business collaboration in differing forms is a common characteristic of both Northern and Southern political economies, it is tried to be contested in the Southern countries in the name of depoliticisation. In the international area, the issue has been promoted in relation to the question of efficiency while the same sort of phenomena have been associated with clientelism, translated as corruption in the South. This preference has helped delegitimize the existing forms of state/business collaboration in the South while keeping the similar relations in the North intact.

The attempt to delegitimize all sorts of business/state collaboration in the Southern countries is a strategy to open the relevant state procurement markets to the Western firms on equal grounds with the domestic firms. As a result, the discourse around corruption and

efficiency for the neoliberal public procurement policies has mainly attempted to create new profit opportunities for internationally mobile capital.

This global capitalist strategy, which has been legitimated through efficiency or productivity based neoliberal arguments, has not been adapted by Southern states easily. As discussed in the thesis, AKP government in Turkey, squeezed in between its own political base and international financial organisations, has both initiated and deformed the reform process in the public procurement field. On the one hand, the government has appeared to take the international standards on public procurement as starting points without any criticism in order to ensure the financial and political support of relevant international institutions. It has however also aimed to keep the support of the medium and small-scale entrepreneurs on the other hand by promoting various protective practices in the implementation of the procurement legislations as well as by amending them.

The case study for public procurement reform in Turkey has identified three main tendencies in the implementation of the neoliberal reforms. First, the reforms have been initiated with the demand of internal stakeholders as well as with the suggestion of international financial organisations. The most influential institution was the IMF in 2002, while the EU has become much more effective after then. The reform process has led an intra-bureaucracy conflict between the ministries and the Public Procurement Agency, which was established upon the reform suggestions of the international financial organisations. This conflict was not only one between the new class of experts and the traditional bureaucrats, but also a conflict between the politicians and the autonomous agencies. The traditional structures are political entities due to their direct link to Ministers who hold their seats as members of a political party in general; while the independent regulatory agencies are expected to have depolitical character by being free from any impact over

their decisions. The IRA literature, which is based on neoliberal presumptions, has also emphasized the autonomy of the agencies from the political pressure. The public procurement reform process despite the intervention attempts of the executive has not been a process that has been shaped by of the executive. The Public Procurement Authority in Turkey has become the main actor for the development of the secondary law in the field as well as for the remedies and the increase of knowledge on the issue in the contracting public entities. However, the borders of the authority of the PPA have been determined in the process by the executive power.

Apart from the conflict among the institutions, the other debate was related with the extent of opening of the procurement markets. The EU accession and IMF credit releases have been made conditional on the establishment of an autonomous agency that ensure a competitive market in the procurement field and open the market to foreign consultants. However, the Turkish government has frequently used the protectionism card, which has indeed become the dominant tendency in the Northern countries after 2008 global economic crisis.

The other theme in the public procurement field has been the conflict among the stakeholders; the PPL has been amended several times, a variety of discrepancies from the EU directives have been established, and the coverage of the law has been diminished. However, the developments in the EU accession negotiations show that the discrepancies between the EU public procurement procedures that have escalated in ten years will be recovered with the adoption of a new draft law that is written in accordance with the EU directives. Because of the amendments in the law since 2002, the public procurement law currently deals with the traditional public purchasing activities rather than public-private partnerships (PPP), which is a comparatively new method of contracting out. The PPPs have a special place for the neoliberal implementations since in this method of public purchasing, states

transfer the risk of management to the private companies and the private companies commercialize the service. As a result, different from the traditional purchasing activities of the state, in the PPPs the citizens are not allowed to use the services of the state directly and free but become the clients of the services provided. These types of contracts that burden the cost of the services directly to the citizens are not in the scope of the Public Procurement Law and the field continues to be managed without detailed regulations consistent with the international and national norms. Despite their increasing share, the PPPs in Turkey remain to be under regulated. The new draft laws and the accession negotiations with the EU require the regulation of these procedures and diminishing of the exceptions in the system in order to secure the risk transfer from the state to private contractors. A possible inclusion of these procedures within the scope of the law will increase possibly the role of the Public Procurement Authority. On the other hand, as one of the interviewed public procurement experts stated the EU also promotes the role of state institutions and cooperation between the state institutions as long as private initiatives do not take over the role that is being transferred over them in the current system. Hence both in the EU system and Turkey, the public purchasing policy is being shaped under the impact and needs of the capital owners.

The public procurement reforms in Turkey have arguably aimed to depoliticise the procurement field through the establishment of Public Procurement Agency as the independent regulatory agency. In accordance with this target, the nomination process of the Board members has been freed from political interventions even though the recent changes have been interpreted as diminishing of the independence of the PPA. On the other hand, it is difficult to argue that the establishment of an independent body in the procurement field is really a means to depoliticise the field. In fact, this process has served to transfer the responsibilities of the state to private companies in order to create more profit opportunities for capital. Furthermore, as long as the

procedures have become stricter and detailed with formalism, obeying them has become almost impossible. As a result, every case has somehow turned into a corrupt practice so that outstanding numbers of application have been made by the unsatisfied parties for legal remedies and the question of which of these would be identified as corrupt has become a political choice used by the PPA. The responsibility of the PPA to determine the irregularities in the procurement procedures has also led a political debate around the PPA. As a result, the attempt to arguably depoliticize a highly political process through firmer and firmer regulations indeed created some counter products that have led to further politicization in the public procurement.

This conclusion is important for the neoliberal public procurement reforms have been proposed to developing states such as Turkey in relation to claims on corruption legitimating interventions to set good governance practices. The economic bottleneck has been explained through bad state expenditure policies and import substitution policies, which have been linked to cliental and corrupted relations.

Even though the same set of public procurement policies have been initiated in the North however, the emphasis for reform has been made there on 'competition' rather than corruption. The determinant stress on "competition" in debates among developed capitalist countries in relation to public procurement is simply missing or highly underestimated in the reform discourse used towards Turkey. This difference in argumentation is problematized in the thesis in relation to the fact that neoliberal reforms in public procurement have required developing states to liberalise their trade relations for the sake of the profits of multinational companies. The emphasis on corruptions has helped to curb the power of the opposition against public procurement reforms. Hence, the highly technical and professional language of the IMF, EU, OECD and/or WTO has to be rethought as political expression. When put in this way, it becomes possible to read the reform demands of these organisations as

clientelistic demands aiming to enable more profit opportunities for powerful MNEs in the public procurement market.

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APPENDIX

TEZ FOTOKOPİSİ İZİN FORMU

ENSTİTÜ

Fen Bilimleri Enstitüsü	[ ]
Sosyal Bilimler Enstitüsü	[x]
Uygulamalı Matematik Enstitüsü	[ ]
Enformatik Enstitüsü	[ ]
Deniz Bilimleri Enstitüsü	[ ]

YAZARIN

Soyadı : Gönül
Adı : Hande
Bölümü : Uluslararası İlişkiler

TEZİN ADI: A Critical Analysis of Public Procurement Legislation and Practices in the 2000s: Comparing The North and South through the Turkish Case

TEZİN TÜRÜ : Yüksek Lisans [x] Doktora [ ]

1.	Tezimin tamamından kaynak gösterilmek şartıyla fotokopi alınabilir.	[x]
2.	Tezimin içindekiler sayfası, özet, indeks sayfalarından ve/veya bir bölümünden kaynak gösterilmek şartıyla fotokopi alınabilir.	[ ]
3.	Tezimden bir (1) yıl süreyle fotokopi alınamaz.	[ ]

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