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Contractual stability and its relationship with the political process of law-making: An analysis of Peru's public procurement and the principles of the Agreement on Government Procurement with the World Trade Organization

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This paper develops an analysis of the impacts of the Agreement on Government Procurement's (GPA) Principles and Rules on the Peruvian Public Procurement regulation, and the Peruvian participation in the process of international standardization of Public Procurement through signing different kinds of free trade agreements (FTAs).

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Contractual stability and its relationship with the political process of law-making: An analysis of Peru's public procurement and the principles of the Agreement on Government Procurement with the World Trade Organization

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1. The WTO and its work in the context of Public Procurement

Public procurement is an economic activity of great importance to any State, no matter how big or small is the subject of procurement. The countries' wellbeing depends to a great extent on the success in fulfilling their functions towards their citizens and this is largely due to the success of their public procurements and the efficient management of public funds. We are referring specifically to efficacy and efficiency when generating the will to contract.¹

Nowadays, when speaking of public procurement, we not only refer to the relationship that may exist between a State and an individual, but also of the relationship established between one State and another State. It is correct to say that the nature of Public Procurement is that of a simple commercial relationship. Whether it is a State-Individual or a State-State relationship, we are basically in front of commercial relationships between two or more parties.

These commercial relationships regulated by the State due to their public nature, as in the private sector, require an adequate regulation, not only at the contractual level (private sphere), but also at the policy level (public sphere). It is also no news that the referred commercial relationships of public connotations go beyond the territories of our countries; on the contrary, it is very common to identify commercial relationships of a public international nature. All this, understandably, greatly justifies the existence of an institution such as the **World Trade Organization (WTO)**. Nowadays, public procurement proves to be an opportunity for foreign investment.

This paper begins with a brief introduction about the World Trade Organization (WTO); which will not only allow us to know its dynamic as an institution, but will

¹ Peruvian legislation (Law N° 30225 – Public Procurement Law), establishes these principles. “Article 2, Principles governing procurements. f). Effectiveness and Efficiency. The procurement process and the decisions adopted in it shall be oriented towards the fulfillment of the Entity's purposes, goals and objectives, prioritizing those over non-essential formalities, guaranteeing the effective and timely satisfaction of the public purposes so that they have a positive impact in the living conditions of people, as well as the public interest, under quality conditions and with the best use of public resources...”.

also help us understand this institution's great importance when discussing the topic of International Public Procurement. We will expressly refer to the plurilateral agreements negotiated within the WTO, namely: the **Agreement on Government Procurement (GPA)** and the **Revised Agreement on Government Procurement (rGPA)**; we end this section addressing the role of Peru in these Agreements.

Then, we will mention all the Trade Agreements in which Peru has participated, with regard to Public Procurement, or at least those that involve public procurement. The list comprises a period of approximately 20 years: agreements in force, agreements whose entry into force is pending and agreements under negotiation. Among these Agreements, Free Trade Agreements (FTAs) stand out, which are a tangible sign of Peru's trade policy.

Finally, we will address the principles of Public Procurement that are established in Peruvian legislation; and analyse if there is any relation between them and the principles enshrined in the WTO **Agreement on Government Procurement (GPA)** and the **Revised Agreement on Government Procurement (rGPA)**.

I. The role of the World Trade Organization (WTO) and public procurement

To begin with, we shall note that, although it may seem easy to establish a specific role concept of the WTO in the international regulation of public procurement; in practice, however, this is not true. We say this, considering that its purpose, in this case trade, is a highly complex topic.

Knowing the WTO perspective, in the long term, as organization is a good way to begin to understand what the WTO is. To this end, we believe it is appropriate to quote the **OVERVIEW**² of the **WTO**.

“...The World Trade Organization — the WTO — is the international organization whose primary purpose is to open trade for the benefit of all...”.

Indeed, the idea that a fair and responsible trade is synonymous of development for those who participate in it is not new. That being the case, it is almost an obligation for every country to guarantee that their nationals are able to carry out commercial activities not only within the country, but also anywhere in the world. Following this logic, the membership of a country in the WTO constitutes a major progress with regard to development and the increase of the commercial relations of our nationals. Whether we find ourselves as suppliers or purchasers, trade openness will always be synonymous with progress and economic growth for any country.

In light of the **OVERVIEW** of the **WTO**, it is also noted that said international

² See: https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm

organization contributes significantly to reducing the barriers in international trade. Similarly, through its different activities, it aims to ensure equal conditions for its members.

When reviewing the different documents of the WTO, the constant reference to three concepts that inspire its work stands out: fluidity, predictability and freedom. Everything occurs in the context of the improvement of trade between member countries.

Multiple activities are conducted within the framework of the WTO. Among them, the following should be highlighted:

- a) Forum for trade negotiations³.
- b) Possesses a legal and institutional framework for implementing and monitoring agreements.
- c) Offers mechanisms to settle disputes that may arise from the interpretation and implementation of agreements⁴.

The **WTO** allows and/or enables its members to conduct commercial activities in the best possible conditions⁵. This role of enabler of world trade, is possible thanks to the stability and predictability provided by the legal and institutional framework for implementing and monitoring its agreements.

For the purposes of this research paper, it is important to mention that **Public Procurement**, is a particularly important topic among WTO activities. Its importance lies in the fact that Public Procurement represents an extremely wide market and constitutes a significant aspect of international trade.

According to the information on the website of the WTO, public procurement accounts for an average of 10-15% of the Gross Domestic Product (GDP) of a country's economy. Furthermore, in the case of Peru, the market of **public purchases**⁶ amounts to almost 10% of the country's GDP⁷. In order to present more accurate information, we will refer to the **MONTHLY REPORT OF**

³ It is important to note, that currently there are 18 trade agreements within the WTO framework: 16 different multilateral agreements (applicable to all WTO Members) and two different plurilateral agreements (only applicable to some WTO Members).

⁴ As indicated by Carmen OTERO GARCÍA-CASTRILLÓN, in "El arbitraje en el sistema de solución de controversias de la Organización Mundial del Comercio"; ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES, 2010; citing J.C. Fernández Rozas, *Sistema de Derecho económico internacional*, Madrid, Thomson-Civitas, 2010, No. 80-81: "...1. The World Trade Organization (WTO) dispute settlement system is unanimously considered an essential instrument to the functioning of this international organization, in addition to being a particularly effective unique model within the framework of inter-state relations...".

⁵ According to figures from the WTO, there are 164 Members since 29 July 2016, considering the date of accession to the WTO.

⁶ "...Public procurement refers to the contracting and acquisition of goods and services by the State, in order to comply with the objectives that society has entrusted them...". In: "COMPRAS PÚBLICAS E INNOVACIÓN: Coordinación y Competencia". LUIS GIL ABINADER (Researcher of the WTO Chair at FLACSO Argentina). WTO | FLACSO CHAIRS PROGRAM.

⁷ See: <http://gestion.pe/economia/nueva-ley-contrataciones-estado-promueve-acceso-mypes-compras-publicas-afirma-osce-2104097>.

PUBLIC PROCUREMENT JANUARY-OCTOBER 2015⁸

“As of 31 October of this year, the State of Peru has performed procurements for a total of S/. 20 733.0 million through 68 227 selection processes, 70 304 purchase orders and 1 242 exemption. 40.1% of the awards corresponds to services procurement, while 30.6% corresponds to goods acquisition and 29.3% to the execution of construction works. However, there are ongoing processes amounting to S/. 13 046.1 million in SEACE⁹, 50.8% of which corresponds to the execution of Works...”.

The quotation above is a strong evidence of the importance of Public Procurement in the case of Peru. This situation “forces” the Peruvian government to give special treatment to the topic of Public Procurement.

Regarding the topic of **Public Procurement within the framework of the WTO**, we must point out that with the aim of guaranteeing open, equal and transparent conditions of competition in public procurement markets, the WTO has functioned as a forum to the conclusion of the **Agreement on Government Procurement (GPA)**¹⁰. It should be noted that not all WTO member states are parties to the referred Agreement¹¹.

As indicated by the WTO itself¹²: “...The fundamental aim of the GPA is to mutually open government procurement markets among its parties...”. As expected, all this has allowed better conditions for the Suppliers of the Parties to the Agreement, to offer their goods, services or construction services; in the context of a healthy international competition.

⁸ The reader should know that, although the quote dates back to 2015, however this is the latest report published by the Ministry of Economy and Finances of Peru. See: https://www.mef.gob.pe/cont_estado/estadisticas/Informe_ene_oct_2015.pdf

⁹ Public Procurement Electronic Service (known by its Spanish acronym SEACE)

¹⁰ “...the first agreement on government procurement (the so-called “Tokyo Round Code on Government Procurement”) was signed in 1979 and entered into force in 1981. It was amended in 1987 and the amendment entered into force in 1988. Parties to the agreement then held negotiations to extend the scope and coverage of the agreement in parallel with the Uruguay Round. Finally, a new Agreement on Government Procurement (GPA 1994) was signed in Marrakesh on 15 April 1994 — at the same time as the Agreement Establishing the WTO — and entered into force on 1 January 1996.

Within two years of the implementation of GPA 1994, the GPA parties initiated the renegotiation of the Agreement according to a built-in provision of the 1994 Agreement. The negotiation was concluded in December 2011 and the outcome of the negotiations was formally adopted in March 2012. Instruments of acceptance, often based on the completion of domestic ratification procedures, had to be submitted by two-thirds of the GPA parties in order for the revised Agreement to enter into force 30 days later. This requirement was fulfilled on 7 February 2014, with the tenth instrument of acceptance of the Agreement being deposited by Israel.”. See: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

¹¹ “...The Agreement on Government Procurement (GPA) consists of 19 parties covering 47 WTO members (counting the European Union and its 28 member states, all of which are covered by the Agreement, as one party). Another 29 WTO members and four international organizations participate in the GPA Committee as observers. 10 of these members with observer status are in the process of acceding to the Agreement...”. See: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

¹² See: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

Given that the WTO is an international organism that pursues open trade for the benefit of all; it was, therefore, its responsibility to promote agreements regarding Public Procurement. Such purpose can be found in the body of the **Revised Agreement on Government Procurement**¹³:

“...*Recognizing* the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade...”

It should also be noted that a **GPA** not only allows us to talk about efficiency in public procurement, but also enables a substantial improvement of the commercial interests of the suppliers of the State parties to the agreement.

In relation to the above, the information provided by the news agency **EFE** should be mentioned¹⁴:

“According to WTO figures, in the European Union public procurement amounts to 17 per cent of the Gross Domestic Product (GDP), a percentage that stands at 2,64% at the global level.

The WTO put the figures on the table in order for the Governments involved in this negotiation to recognize the implicit benefits: if the BRICs (Brazil, Russia, India and China) signed the revised GPA, market access commitments would generate between 233.000 and 596.000 millions of dollars a year.

If the 111 Member States of the World Trade Organization who are not parties to this agreement joined it, this number would be between 380.000 and 970.000 millions of dollars per year...”

We are of the opinion that the numbers referred to in the previous paragraph are only a small sample of the benefits that the countries subject to the GPA might have. It is not surprising that it is suggested that the accession of big economies such as Brazil, Russia, India and China will have a significant impact in the public purchases market.

Having reached this point, all that remains for us is to ask one question: **Is Peru a party to the GPA?** The answer is a simple and categorical no.

It is a well-known fact that Peru is a member of the WTO since 1 January 1995; however, we are not party to the GPA. It is clear that, despite all of the above, signing the referred plurilateral agreement has not been a priority for the Peruvian Government (trade policy).

Although there is no written document explaining the reasons why Peru is not a party to the GPA, despite meeting all the conditions required, we believe that

¹³ Entered into force on 6 April 2014.

¹⁴ See: <http://www.vanguardia.com/actualidad/mundo/135578-cerrado-un-nuevo-acuerdo-en-la-omc-sobre-contratacion-publica-acp>

Peru's decision is based on a strategy from less to more. In the following paragraph we will further explain this.

Peru is a small economy at global level; which in the last 22 years has been working to emerge from an enormous economic lethargy, as a result of terrorism and the economic crisis of the 80s. Thus, a strategy that generates conditions for a continuous and sustained progress should not be surprising. The GPA means, in substance, having first world countries as counterparts, whose economies have been strong for many decades. This situation requires caution from any economy, whether it is big or small. We talk about a strategy from "less to more", because in recent years Peru has been signing numerous FTAs with many countries of the world.

They are essentially bilateral agreements, which allow a more direct and not so complex negotiation in contrast with an agreement with the characteristics of the GPA. We believe that the above is only one of the reasons why Peru is not currently a party to the GPA.

Regarding this topic, mention should be made of what has been indicated by **Ricardo Rozemberg and Romina Gayá¹⁵**:

"...The GPA is the main instrument regulating this topic within the WTO. Nevertheless, it is a plurilateral agreement in which few countries participate, none of them is Latin American. Some economies in the region have opted for negotiating the liberalization of public procurement in their RTAs. The most active countries in this respect are Chile, Mexico, Central Americans, Dominican Republic, Colombia and Peru..."

Finally, it should be noted that Peru, as a member of the WTO, is part of the Working Group on Transparency in Government Procurement.

II. Trade Agreements to which Peru is a party with regard to Public Procurement

Like any other country in the world, Peru will always need to provide businessmen and/or suppliers a legal framework that offers clear and safe conditions for their commercial activities. This legal certainty, for this case in particular, is intended to be achieved by signing different types of **Trade Agreements**. The formal guarantee is a form of compliance, but not a guarantee per se.

The Trade Agreements signed by Peru address different topics: National Treatment and Market Access, Customs Administration and Trade Facilitation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, among others. As expected, Public Procurement is also included in the abovementioned agreements.

Peru has signed a series of Trade Agreements that include Public Procurement

¹⁵ "La Dimensión Internacional de la Contratación Pública". 17. ICT4GP Program. Working Paper Series. October 2012. Pp. 25.

as one of their topics. We refer to 13 (seventeen) trade agreements in force, 3 (three) whose entry into force is pending; and 1 (one) undergoing negotiation. In total, there are **17 (seventeen) Trade Agreements; and 1 (one) undergoing negotiation**, in which the topic of Public Procurement is present.

The trade agreements referred to in the previous paragraph, are described below:

Agreements in force:

- 1) **Asia-Pacific Economic Cooperation (APEC).** Peru is a member since the year 1998.
- 2) **Andean Community.** Decision 439 of 11 June 1998 (article 4).
- 3) **The United States-Peru Trade Promotion Agreement.** Signed in Washington D.C. on 12 April 2006; and in force since 1 February 2009.
- 4) **Canada-Peru Free Trade Agreement.** Signed in Lima on 29 May 2008; and in force since 1 August 2009.
- 5) **Peru-Singapore Free Trade Agreement.** Signed in Lima on 29 May 2008; and in force since 1 August 2009.
- 6) **Free Trade Agreement between Peru and the EFTA (European Free Trade Association) States.** Signed in Reykjavík on 24 June 2010 and in Lima on 14 July 2010; The FTA entered into force with Switzerland and Liechtenstein on 1 July 2011 and with Iceland on 1 October 2011. The Free Trade Agreement with the Kingdom of Norway Entered into force On 1 July 2012.
- 7) **Peru-Korea Free Trade Agreement.** Signed on 21 March 2011 in the city of Seoul – Korea; and in force since 1 August 2011.
- 8) **Agreement between the Republic of Peru and Japan for an Economic Partnership.** Signed on 31 May 2011 in the city of Tokyo-Japan; in force since 1 March 2012.
- 9) **Peru-Panama Free Trade Agreement.** Signed in the city of Panama on 25 May 2011, ratified by Peru through Supreme Decree N° 009-2012-RE, published on 9 March 2012, and by means of Supreme Decree N° 008-2012-MINCETUR published on 6 April 2012, the implementation and entry into force since 1 May 2012 were indicated.
- 10) **Trade Agreement between Peru and Colombia, and the European Union and its member states.** Signed on 26 June 2012 in Brussels, Belgium. The Peru-European Union Trade Agreement entered into force on 1 March 2013.
- 11) **Peru-Costa Rica Free Trade Agreement.** Signed in the city of San

Jose, Costa Rica on 26 May 2011; and entered into force on 1 June 2013.

12) Pacific Alliance. In the year 2011, the Declaration of Lima was signed.

13) Peru-Honduras Free Trade Agreement. Signed in the city of Lima on 29 May 2015; and entered into force on 1 January 2017.

Agreements whose entry into force is pending

1) Peru-Guatemala Free Trade Agreement. It was signed in the city of Guatemala on 6 December 2011.

2) Trans-Pacific Partnership Agreement (TPP). It was signed on 4 February in the city of Auckland (New Zealand).

3) Trade Economic Strengthening Agreement between the Republic of Peru and the Federal Republic of Brazil. It was signed in the city of Lima on 29 April 2016.

Agreements undergoing negotiation

1) Peru – El Salvador Free Trade Agreement. Negotiations between the Parties started on 8 November 2010.

While every Trade Agreement, in the chapter regarding Public Procurement, has its own particularities, after the investigation conducted, it can be concluded that certain topics are always present in all of them. Some of the topics are stated below:

- a) Definitions.
- b) Scope of application.
- c) General Principles.
- d) Valuation.
- e) Tendering Procedures.
- f) Conditions for Participation.
- g) Publication of information about public procurement.
- h) Selective tendering.
- i) Technical Specifications and Tender Documentation.
- j) Direct contracting, among other topics.

For more than 20 years Peru has negotiated and signed trade agreements. It is clear that we are facing an important trade policy of the Peruvian Government. The list of Trade Agreements mentioned above shows that Public Procurement is a priority for our country.

Finally, it should be noted that many of the principles included in the texts of the Trade Agreements signed by Peru, are also present in Peru's national legislation. In the next section, and in order to support the previous statement, we will introduce the **principles of Public Procurement** enshrined in the

current national regulations of **Peruvian Public Procurement**.

III. The principles of Public Procurement in Peruvian Public Procurement Laws

Firstly, the principles regulating Public Procurement in Peru are used as criteria or parameters for the implementation, interpretation and integration of procurement laws. Specifically, the principles constitute the “ratio legis” or “raison d’être” of the referred legislation.

The laws that regulate public procurement in Peru, in recent years, have been modified with relative frequency¹⁶. Nevertheless, some principles of public procurement have persisted in spite of those changes.

The regulations that will be examined, in order to support the paragraph above, are the following:

- 1) **Law N° 30225¹⁷. Public Procurement Law.** This law contains all the provisions and guidelines which Public Sector Entities must observe during tendering procedures for goods, services or constructions and regulates the obligations and rights resulting from them.
- 2) **Legislative Decree N° 1224¹⁸.** Legislative Decree on the Framework for the Promotion of Private Investment through Public-Private Partnerships and Projects in assets.

In first place, we will set out the principles established in **Law N° 30225 – Public Procurement Law**:

| PRINCIPLE | LAW N° 30225 |
|--|--|
| Free concurrence. Art 2, paragraph a) | a) The Entities promote free access and participation of suppliers in the procurement processes that they carry out, avoiding expensive and unnecessary formalities. Practices limiting or affecting free concurrence of suppliers are prohibited. |
| Equal treatment. Art 2, paragraph b) | b) All suppliers shall have the same opportunities to submit their offers, the existence of privileges or advantages and, in consequence, overt and covert discriminatory treatment are prohibited. This principle requires that similar situations shall not be treated differently and that different situations shall not be treated identically, provided that there is an objective and reasonable justification for such treatment, encouraging the development of an effective competition. |

¹⁶ This statement will be addressed in detail in the following section.

¹⁷ The Law N° 30225, published in the Official Journal “El Peruano” on 11 July 2014, entered into force on 09 January 2016. In addition, by Legislative Decree N° 1341: “Legislative Decree amending Law N° 30225, Public Procurement Law”, the referred law was amended. The Legislative Decree N° 1341 was published in the Official Journal “El Peruano” on 07 January 2017 and entered into force on 03 April 2017.

¹⁸ Legislative Decree N° 1224, published in the Official Journal “El Peruano” on 25 September 2015.

| | |
|--|---|
| | |
| Transparency. Art 2, paragraph c) | c) The Entities provide clear and coherent information so that all the stages of procurement are understood by suppliers, ensuring free concurrence, and that the procurement is held on the basis of equal treatment, objectivity and impartiality. This principle respects the exceptions established in the legal system. |
| Publicity. Art. 2, paragraph d) | d) The procurement process shall be subject to publicity and dissemination in order to promote free concurrence and effective competition, facilitating monitoring and control of procurements. |
| Competition. Art 2, paragraph e) | e) Procurement processes include provisions that enable the establishment of conditions for effective competition and the obtainment of the most advantageous answer for the public interests underlying the procurement. The adoption of practices that limit or affect competition is prohibited. |
| Effectiveness and efficiency. Art 2, paragraph f) | f) The procurement process and the decisions adopted during its execution shall be oriented towards the fulfilment of the Entity's purposes, goals and objectives, prioritizing those over non-essential formalities, guaranteeing the effective and timely satisfaction of the public purposes so that they have a positive impact in the living conditions of people, as well as the public interest, under quality conditions and with the best use of public resources. |
| Technological Validity. Art 2, paragraph g) | g) Goods, services and constructions shall meet the quality and technological modernity conditions needed to fulfil effectively the public purpose for which they are required, for a specific and predictable duration, with the possibility of being adapted, integrated and updated if necessary, with scientific and technological advances. |
| Environmental and social sustainability. Art 2, paragraph h) | h) During the design and execution of the public procurement, criteria and practices that contribute to both the environmental and social protection and to human development are taken into account. |
| Fairness. Art 2, paragraph i) | i) The benefits and rights of the parties shall keep a reasonable relation of equivalence and proportionality, without prejudice to the powers corresponding to the State in the general interest management. |
| Integrity. Art 2, paragraph i) | j) The participants' behaviour in any stage of the procurement process is guided by honesty and veracity, avoiding any inappropriate practice, which, in the event that it occurs, shall be directly and timely informed to the competent authority. |

Similarly, we will present the principles established in the Legislative Decree N° 1224 (Article 4):

| PRINCIPLE | LEGISLATIVE DECREE N° 1224 |
|-------------------------|--|
| Competition | Paragraph a). The processes of promotion of private investment promote the search for competition, <u>equal treatment</u> ¹⁹ between the bidders and prevent anti-competitive or collusive behaviour. |
| Transparency | Paragraph b). All the quantitative and qualitative information used for the adoption of decisions during the evaluation, development, execution and accountability of a project carried out within the framework of this Legislative Decree is made public, under the principle of publicity established in article 3 of the Ordered Unified Text of the Law N° 27806, Transparency and Public Information Access Law, approved by Supreme Decree No 043-2003-PCM. |
| Results approach | Paragraph c). Public entities when performing their functions implement actions for the timely execution of private investment, as well as identify and inform the |

¹⁹ Bold and underlining added.

| | |
|------------------------------|---|
| | existing obstacles that affect the development of projects regulated under the present Legislative Decree. |
| Planning | Paragraph d). The State, through the Ministries, Regional Governments and Local Governments, prioritizes and guides the organized development of Public-Private Associations and Projects in Assets according to national, sectoral, regional and local priorities, taking in consideration to this effect the country's decentralization policy. |
| Budget Responsibility | Paragraph e). The State's ability to pay shall be taken in consideration when undertaking, both firm and contingent, financial commitments, arising direct and indirectly from the performance of contracts celebrated within the framework of this Legislative Decree, without compromising the short, medium or long-term, the budgetary balance of public entities, the sustainability of public finances or the regular provision of public services. |

After the presentation and in a preliminary manner, it is possible to state that Peruvian legislation on Public Procurement is in line with Trade Agreements and other countries' regulations. The abovementioned principles cover a series of topics that facilitate Peru's trade expansion.

Among the principles of public procurement referred to, and considering their significance, we consider that 2 (two) should be highlighted:

- a) Principle of Equal Treatment; and
- b) Principle of Transparency.

The **Principle of Equal Treatment**; establishes the idea of having suppliers and/or contractors with the same opportunities to submit their offers. Its sole mention entails the express prohibition of privileges or advantages in favour of any party participating in the Public Procurement process. This principle is expressly established in both the Law N° 30225 (Article 2, paragraph b)) and the Legislative Decree N° 1224 (Article 4, paragraph a)).

The so-called **Principle of Transparency**; represents the right of every supplier to access clear and coherent information during all the stages that constitute a public procurement process. The simple fact of having quantitative and qualitative information of the process, allows a Provider to conduct an adequate decision-making process.

As can be seen, Peruvian Public Procurement regulation mandates that every Public Procurement shall be conducted under conditions of equal treatment, objectivity and impartiality.

At this point of the research, it should be noted that **the Principles of Equal Treatment and Transparency, are also enshrined in the Trade Agreements signed by Peru.** The following charts prove the previous statement:

| PRINCIPLE OF EQUAL TREATMENT | |
|------------------------------|----------------|
| PERÚ – US FTA | PERÚ KOREA FTA |

| | |
|---|---|
| <p>PREÁMBLE</p> <p>ESTABLISH clear and mutually advantageous rules governing their trade.</p> | <p>PREÁMBLE</p> <p>AVOID distortions to their trade</p> |
|---|---|

| PRINCIPLE OF TRANSPARENCY | |
|---|---|
| PERÚ – US FTA | PERÚ KOREA FTA |
| <p>PREÁMBLE</p> <p>PROMOTE transparency and prevent and combat corruption, including bribery, in international trade and investment</p> | <p>PREÁMBLE</p> <p>PROMOTE transparency and prevent and combat corruption, including bribery, and human rights violations-related rackets in international trade and investment</p> |

By way of conclusion, it should be indicated that Peruvian Public Procurement legislation, both at the national and international level, for a long time has been in line with other legislations in the world. A proof of the above can be found in the Free Trade Agreement between Peru and Korea:

“...REAFFIRM their consent to strengthen and enhance the multilateral trading system as reflected by the World Trade Organization; and REAFFIRM their commitment to the “Bogor Goals” of free and open trade and investment of the Asia-Pacific Economic Cooperation;...”.

With the aim of showing that Peruvian Public Procurement legislation is indeed in accordance with what has been established by the WTO, the relevant part of the **Revised Agreement on Government Procurement (GPA)** will be quoted:

Principle of Equal Treatment

“Article IV — General Principles

Non-Discrimination

1. With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to:
 - a. domestic goods, services and suppliers; and
 - b. goods, services and suppliers of any other Party...”

Principle of Transparency

“Article IV — General Principles

4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
 - a. is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;
 - b. avoids conflicts of interest; and
 - c. prevents corrupt practices...”.

Finally, all that remains is to note that the current virtues of Peruvian public procurement regulation are the result of the effort of several governments; which under the same trade policy have achieved a result that we consider optimal and in accordance with the expectations of a country that strives for a rapid and sustained economic growth.

2. Public Procurement in Peru

This section of the paper is not intended to explain each and every one of the regulations regarding the various forms of public procurement, but to address the general framework that regulates the State of Peru’s contractual activities.

As has been mentioned in the previous section, Public Procurement is vital for a country’s development. Procurement allows a State to fulfil its functions and satisfy social needs. Nowadays every nation requires procurement, since it cannot exercise the function of producing goods or services. In this sense, the State contracts with individuals or other states to satisfy the nation’s needs. These days, the State no longer purchases machinery to directly perform tasks, but rather hires an individual to carry out the work in exchange for money. Without a doubt, this has generated economic growth in the private sector.

Peru is no stranger to this modernization tendency and since the 90s the legislation on public procurement has rapidly evolved in response to public needs, but has been excessively manipulated by politics in some occasions.

i) Public Procurement Laws and public procurement systems

In Peru, there is no definition of public contract as well as no general regulation on public procurement, in contrast with other countries such as Spain, in which the Public Sector Procurements Law, approved by Royal Legislative Decree 3/2011²⁰, regulates all forms of public procurement.

In particular, according to jurist Jorge Danós²¹, the first attempts of government procurement in Peru were entrusted to the Finance and Trade Ministry by Supreme Decree dated 3 February 1950 and to the Ministry of Development and Public Works by Supreme Decree dated 23 February 1950. The

²⁰ <https://www.boe.es/buscar/doc.php?id=BOE-A-2011-17887>

²¹ DANÓS ORDÓNEZ, Jorge, “El régimen de los contratos estatales en el Perú”, in “Derecho Administrativo Contemporáneo. Ponencias del II Congreso de Derecho Administrativo”, Lima, Palestra Editores, 2007, p. 64-69.

construction of large school units was undertaken during the government of President General Manuel A. Odría, a de facto government.

The 1950 legislation was governed by a series of principles that currently regulate “military acquisition”, in other words, procurement regulations of that time were based on the principles of secrecy and absolute discretion of senior arms official.

This crucial moment of Peru’s public procurement history undergoes a radical change with the approval of Law Decree No. 22056. Following the entry into force of the referred Law Decree, a different logic is applied to procurement. A review of the referred Legislative Decree shows the intent to establish a public supply system, in order to unify, rationalize and provide efficiency to the technical processes of goods and services procurement, under the principles of morality and austerity.

A second important moment goes back to the entry into force of the 1979 Constitution. Article 143 of the Constitution²² introduced public procurement as a State obligation when acquiring goods, services and supplies. This procurement obligation should be in accordance with the principles of efficiency and protection of the public resources use.

According to Danós, the referred constitutional provision was the fundamental basis for the development of special rules on procurement such as the Tenders and Public Works Contracts Regulation, known as RULCOP, approved by Supreme Decree N° 034-50-VC for public works procurement; the Acquisitions Regulation, known as RUA, which was approved by Supreme Decree N° 065-85-VC for goods, services and supplies acquisition, and Law N° 23554 on consulting activities procurement and its general Regulation, known as REGAC–, whose main objective was to simplify goods, services or public works acquisition processes.

However, despite the legislative progress during this period regarding services, construction and goods procurement, the legal framework for concessions did not experience major changes; on the contrary, their regulation focused exclusively on concessions to exploit natural resources, which were regulated by sectoral laws that remain in force to date.

Before the decade of 1990, Peru faced one of the most difficult economic declines and this situation significantly influenced government policies concerning the State’s business activity inefficiency. On this basis, the change in the economic policy reshaped the role of the State.

²² 1979 Political Constitution of Peru

Article 143. Procurement with public funds of constructions and supplies as well as the acquisition or sale of goods shall be conducted through public tender. A public tender should be held in case of procurement of services and projects, whose significance and amount is established in the budget law. The law establishes the procedure, exceptions and responsibilities.

A privatizations process²³ was carried out, which constituted a key component in the State's structural reforms agenda and the modernization of Peru's economy. This change in the model was also a result of international policies which already influenced national legislations.

According to Ariela Ruiz, the results of these structural reforms were, among others, transparency towards the private sector, through privatization processes (sale of assets and shares), of the ownership of state-owned companies, which, up until then, exclusively managed the production of goods and provision of services; and, the granting of concessions to private companies for the provision of activities which are legally considered public services and for the exploitation of public infrastructure works²⁴.

Regarding goods, services and construction procurements, the 1993 Constitution²⁵, like its predecessor, the 1979 Constitution, established a frame of reference for the acquisition of goods, services and supplies and construction procurement by administrative bodies; whereas, the change towards the establishment of a procurement system took place with the unification of the existing regulations (RULCOP, RUA and REGAC).

Nevertheless, in July 1997, the Public Procurement and Acquisitions Law –Law N° 26850 was enacted, which intended to integrate the framework applicable to the procurement processes of all State entities, including its companies. The referred law essentially regulated the phase of contract formation, namely, the contractors' selection procedure (contests, tenders and other identified in it) and established few provisions, in quantitative terms, applicable to the contract performance phase.

One of the contributions of the enactment of Law N° 26850, was the creation of the Procurements and Acquisitions High Council – CONSUCODE (currently named the Supervisory Agency of Public Procurement – OSCE) as the lead and supervisory agency of the public procurements conducted within that legal framework.

Lastly, a modern phase of public procurement legislation is the enactment of the Legislative Decree 1017, Public Procurement Law, and its recent amendments which reflect the principles of transparency, public expenditure efficiency and pacific settlement of disputes. It should be noted that Peru is one of the few countries with mandatory arbitration.

²³ RUIZ CARO, Ariela. "El proceso de privatizaciones en el Perú durante el periodo 1991-2002". In: Gestión Pública. Series No. 22. Latin American and Caribbean Institute for Economic and Social Planning - ILPES. Santiago de Chile, July 2002.

²⁴ Ibid.

²⁵ 1993 Political Constitution of Peru:

Article 76. Public works and acquisition of supplies with public funds or resources are compulsorily based on contracts and public bidding, as are the acquisition and sale of assets.

The contracting of services and projects, which relevance and amount are determined by the Budget Act is done by public bidding. The law sets forth the procedures, exceptions and respective responsibilities. (Official translation)

However, in spite of the great progresses achieved at legislative level regarding public procurement, some weaknesses remain which cause certain problems in relation to contractual predictability and, while the principles of public procurement are complied with on a formal level, such as those established by the World Trade Organization, their application substantially affects the procurement system.

Weaknesses of the Public Procurement laws

As mentioned before, there is a lack of contractual predictability. Yet, public procurement laws have complied with the standards required by international organizations on a formal level. Nevertheless, apart from the formal compliance, there would be an alleged breach of clear procurement rules. In other words, the constant manipulation and amendment of public procurement legislation –or at least the Public Procurement Law- allows us to establish that clear and immutable contractual conditions are undermined.

As will be stated in the following paragraphs, after the entry into force of regulations on public procurement, they were –and are- subject to constant modifications.

Constant legislative amendments

The approval of the Legislative Decree N° 1341, which amends the Law N° 30225 on Public Procurement, shows the absence of clear procurement rules. In Peru, it has been and is considered almost necessary to amend public procurement regulations when there is a change of government. For example, during the government of Alan García Pérez (2006-2011) not only the public procurement law was exhaustively modified, but also special regimes were approved by Supreme Decrees, which led to the rapid selection process for the construction of the famous “emblematic schools”, among other constructions.

Since 1997 to date, the Public Procurement Law has been enacted or amended 6 times. These amendments do not exactly answer needs or efficient expenditure policies, nor do they facilitate the performance of contracts. Most of the time, if not all of the legislative amendments, the changes concerned contractual conditions which directly affect the predictability of contractual rules.

The stages of public procurement

The public procurement process in Peru is generally divided in three stages. The first stages is called the phase of contract formation or preparatory acts. The second stage is the performance of the contract and, the last one, post-contractual.

When forming its will to contract, the Peruvian State conducts certain preparatory acts. All the Peruvian procurement legislations since 1950 have regulated this stage in relation to the public financial system regulations. Therefore, before the beginning of the selection process, entities anticipate their

needs and reflect them in their budget request for the next year, which is later approved by the Congress once a year in the month of December.

The process for the approval of public budget is also public expenditure control, therefore the Congress requires that the executive, through the Ministry of Economy, substantiates the expenditure. After the public budget has been approved and the resources have been assigned to each Entity, each sector executes the budget according with the Annual Acquisitions and Procurements Plan (AAPP). This AAPP contains the list of all the procurements programed for the budget year.

Once the execution is decided, the Entity begins the invitation to participate in the selection process in accordance with the special procedures established for each procurement. One of the characteristics of the selections process that should be highlighted is its specialization. In our opinion, the specialization of the selection process has notably evolved since the 50's until today. During the military governments, purchasing pens had the same procurement procedure than the construction of bridges or highways. In this sense, the specialization of the selection process is one of the advantages of the current public procurement legislation, which enshrines and applies the principles of procurement recognized internationally even by the World Trade Organization.

Despite the minimum legislative amendments of the selection process due to policy changes or immediate needs which impact the flow of national economic growth. The stage that requires our greatest attention is the general conditions established in procurement laws and their strictly mandatory nature.

General conditions of public procurement

The conditions of contract in the case of public procurement are established by law. In other words, the obligations of the parties to a contract, whether it is a purchase or a services contract, are previously established and are immutable.

The State and contractors do not have the power to modify the conditions of contract in essence and are only able to modify the quantity or percentage, but not to establish different obligations. From the point of view of minimum conditions, the regulations have compensated for the lack of guarantees. But these minimum conditions affect the execution of the contract because they do not offer flexibility for the parties to comply with their obligations. Thus, the lack of flexibility of conditions, in Peru, has had a negative impact in the increase of disputes and arbitrations, which indirectly affects the efficiency of procurement and public expenditure.

Another problem in the conditions of contract that we have identified is the constant legislative amendment. The exercise of legislative power refers in general to the power of the Congress or the executive through amendments.

The constant legislative amendment on public procurement and the lack of a general procurement regulation result in the unpredictability of conditions faced

by contractors. The constant legislative activity regarding public procurement generates regulatory instability, weakening procurement standards.

Although Peru has minimum regulations on public procurement and contractual activity, the constant amendment of the conditions and procedures undermines their clarity.

For instance, since 1997, 6 public procurement laws have been approved and each one of them has been modified at least once. In this sense, although Peru formally respects the establishment of public conditions of contract conditions, the lack of stability and continuity of the conditions allows us to conclude that there is a weakness in the public procurement system.

To this end, it should be noted that when the amendments of public procurement regulations involve substantive conditions and not procedural issues such as deadlines or percentages, they cause confusion among contractors and instability in the conditions, even increasing disputes or problems in the process to award the contract²⁶.

For instance, the previous Public Procurement Law provided that the disputes arising from the execution of the contract should be settled by ad hoc or institutional arbitration. However, the executive branch instituted in 2016, following the legislative powers granted by the Congress, issued the Legislative Decree N° 1341, by which institutional arbitration was established as the only option for dispute settlement. But the Congress²⁷ through the **Draft Law N° 1206/2016-CR**, approved by the Plenary of the Congress the past May 4, proposes to derogate the amendment of article 45.1 of the **Public Procurement Law**, which was a significant step in the fight against corruption.

Even though the amendment does not exactly relates to a condition of contractual execution, the dispute settlement mechanism certainly has special significance, since the mandatory nature changes the predictability of disputes regarding the parties, the rules, and the procedures to trigger the arbitration mechanism.

After the variations in these mechanisms, there is no doubt of the existence different regimes or types of arbitration and that the legislative amendments significantly affect the conduct of the parties and arbitration actors. For example, if the parties, the State and the contractor, signed a contract when the law established institutional arbitration as the only means to settle disputes, they should abide by particular rules of arbitration, which are different than the previous ones.

In addition, we can ascertain that political powers, in absence of stability or control mechanisms, substantially affect the contract.

Types of public procurement

²⁶ The award of the contract refers to awarding the winner of the public tender and future contractor, party to the contract with the State.

²⁷ Decision of the Constitution and Regulation Commission of the Congress

The State, despite having regulated the public procurement of goods and services, has not yet consolidated all the existing types of procurement. In this sense, numerous regulations concerning the different forms of concessions remain dispersed, which are subject to a different and special public legal framework.

While establishing the legal nature of these contracts escapes the scope of this work, it should be noted that they are known as State Contracts or Public Administration Contracts and are defined as “the agreement between two or more parties to create, regulate, modify or extinguish a legal relationship, in which at least one of the parties is a state entity”.²⁸

The Special Procurement Regimes are compound by various regulations scattered throughout our legal system. They respond to the particularities of the object of the contracts and in some cases, do not require direct disbursements of public resources such as concessions or the execution of public works for tax deductions.

Legislative diversity resulting from political processes.

As has been stated above, Peru has great diversity of regulations as a result of several political processes²⁹ that it has experienced. In the last 45 years, Peru has had military dictatorships, de facto governments and constitutional governments. Similarly, we have been bound by three constitutions: the 1933 Political Constitution; the 1979 Constitution for the Republic of Peru; and the 1993 Political Constitution. Throughout these years, as might be expected, countless legislative changes have taken place, in different fields and/or subjects.

This legislative diversity has also affected the field of **Public Procurement**. In the last 20 years, **6 (six) laws** have been enacted, which have amended the Peruvian government procurements and acquisitions legislation. As expected, this does not contribute significantly to the long-awaited contractual certainty and predictability.

²⁸ SALAZAR CHÁVEZ, R., “La contratación de la Administración Pública en función a los intereses involucrados en cada contrato”, in: *Derecho & Sociedad*, N° 23. (Available at <http://blog.pucp.edu.pe/blog/derysoc/2008/09/10/la-contratacion-de-laadministracion-publica-en-funcion-a-los-intereses-involucrados-en-cada-contrato/>; fecha de consulta: 22.11.2016). In a similar vein, MARTIN TIRADO, R., “El laberinto estatal: historia, evolución y conceptos de la contratación administrativa en el Perú”, in: *Arbitraje PUCP*, N° 3, 2013, page 42

²⁹ “...c) Political Process. The characteristic of a political process is the confrontation and adjustment of interests around a public policy under debate. In the same manner that the process to develop alternatives shows, more repeatedly, a group of specialists having a more active role, political processes are preferably dominated by those who actively participate in networks of power and influence government decisions. They are actors that hold positions of power within the State and who, in exercising their roles, must be engaged in tackling public problems and formulating public policies, pressure groups, political parties, opinion leaders, citizen movements and the like...”. In: “Conceptos Básicos en el Análisis de Políticas Públicas”. Mauricio Olavarría Gambi. Working Paper N° 11. Public Affairs Institute (INAP). Governance and Public Management Department. University of Chile. December 2007. Pp. 64.

A **Summary-Table** is presented below, which shows each of the public procurement laws that have been in force in Peru since 1997 to date.

Summary Table - 1

| YEAR (Entry into force) | LEGISLATION | TITLE |
|-------------------------------|-------------------------------|--|
| 1997 | Law N° 26850 | Public Procurement and Acquisitions Law |
| 2004 | Law No 28267 | Law amending Law N° 26850 |
| 2009 | Legislative Decree N° 1017 | Public Procurement Law |
| 2012 | Law N° 29873 | Law amending Legislative Decree N° 1017 which approves the Public Procurement Law |
| 2016 | Law N° 30025 | Public Procurement Law |

Many arguments, but mostly pretexts, have been raised to justify the changes in Peruvian public procurement legislation. Usually, 2 (two) types of messages have been communicated: (a) there is need for more dynamic procurement processes; and (b) it is imperative to combat or fight against corruption³⁰.

We are of the opinion that, while public procurement legislation has been frequently amended, however, this often involves simple drafting changes; or, at best, the changes are not very significant or substantive. We will prove the above using a simple example:

Summary Table - 2

³⁰ These news dates from 11 June 2014; and was disseminated through the web page of Radio Programas del Perú: "...During the speech delivered in the ceremony marking the 118th anniversary of the National Society of Industries (NSI), Humala indicated that these measures will focus on the modification of the tax system and the promotion of investment in sectors that generate growth and employment, such as mining, hydrocarbons and telecommunications, among others.

In addition, they will seek to reduce cost overruns by simplifying procedures and eliminating perverse incentives when sanctions are applied.

Humala also noted that **proposals to amend the Public Procurement Law will be included in order to speed up public procurement processes, promote competition and reduce the risks of fraud and corruption...**. See: <http://rpp.pe/politica/actualidad/humala-paquete-de-medidas-economicas-impulsaran-crecimiento-noticia-699423>

Even the government of the current President of Peru (Pedro Pablo Kuczynski), has already made their changes to the Procurement Law: "...**The Executive Branch** amended the **Public Procurement Law**, thanks to the legislative prerogatives granted by the **Congress of the Republic**. The purpose of these amendments is to modernize, automate and energize the public administration as well as the fight against corruption...". This information dates from 8 January 2017. See: <http://larepublica.pe/politica/837790-los-principales-cambios-en-la-ley-de-contrataciones-del-estado>

| Ley Nº 30025 | Decreto Legislativo Nº 1341 |
|--|--|
| f) Effectiveness and Efficiency. The procurement process and the decisions adopted in it shall be oriented towards the fulfilment of the Entity's purposes, goals and objectives, prioritizing those over non-essential formalities, guaranteeing the effective and timely satisfaction of the public purposes so that they have a positive impact in the living conditions of people, as well as the public interest, under quality conditions and with the best use of public resources. | f) Effectiveness and Efficiency. The procurement process and the decisions adopted in it during its execution shall be oriented towards the fulfilment of the Entity's purposes, goals and objectives, prioritizing those over non-essential formalities, guaranteeing the effective and timely satisfaction of the public purposes so that they have a positive impact in the living conditions of people, as well as the public interest, under quality conditions and with the best use of public resources. |
| h) Environmental and social sustainability. During the design and execution of the public procurement processes, criteria and practices that contribute to both the environmental and social protection and to human development are taken into account. | h) Environmental and social sustainability. During the design and execution of the public procurement processes , criteria and practices that contribute to both the environmental and social protection and to human development are taken into account. |

It is regrettable to say that there are many cases similar to the one we have presented. It is also clear that many of these changes or legislative amendments are nothing more than the result or the product of the work of individuals and/or institutions who ignore the real dimensions of the field of Public Procurement in our country.

We believe that the constant legislative changes we have experienced in Peru, are a direct consequence of a series of wrong decisions. Many times, the presidents of the republic of Peru have promised to achieve deep and substantive changes in the country, through simple legislative amendments. This is always based on the wrong and often tested assumption that a new Law can solve the country's problems.

Like any country in the world, Peru aims to maximize its economic resources; even more so in the case of a small economy like ours. Every news or proposal to improve Peru's economy will always be well-received by the community; including those that do not have enough technical foundation. It is hard to recognize this, but it is absolutely true.

The field of public procurement has not been immune to this way of thinking either. We can ascertain that the commitment to carry out amendments to the Public Procurement Law has been a constant feature of almost all the presidents of Peru.

Although the following could be considered ironic, we believe that every President of the Republic "needed" their own Public Procurement Law. What

has been stated in the previous paragraph is shown in the following **Summary Table**:

Summary Table - 3

| YEAR (Entry into force) | REGULATION | GOVERNMENT |
|--|-------------------------------|---|
| 1997 | Law N° 26850 | President of the Republic: Alberto Fujimori Fujimori |
| 2004 | Law No 28267 | President of the Republic: Alejandro Toledo Manrique |
| 2009 | Legislative Decree N° 1017 | President of the Republic: Alan García Pérez |
| 2012 | Law N° 29873 | President of the Republic: Ollanta Humala Tasso |
| 2016 | Law N° 30025 | President of the Republic: Ollanta Humala Tasso |
| 2017 | Legislative Decree N° 1341 | President of the Republic: Pedro Pablo Kuczynski |

The statement made in the previous paragraph can be easily verified in this chart. The number of amendments to the Procurement Law is almost equivalent to the number of Presidents of the Republic. Peru is a clear example of a country subject to continuous legislative diversity in the field of public procurement.

3. The process of international standardization of Public Procurement

i) The role of Treaties in Public Procurement: Predictability and Stability

Since the dawn of times, all those participating in a commercial activity have always sought the most stable and safe conditions possible for their transactions. Such safety was originally translated in the respect of the given word, or of what has been established in a simple paper. We are referring to the “genesis” of contract law. Over the years, contacts and/or trade agreements have become more sophisticated. This is due to the fact that trade relations are always undergoing constant change and require regulatory instruments that could satisfy their regulatory needs. Similarly, different types of dispute settlement mechanisms have appeared, among which **Arbitration**³¹ stands out as the favourite method to settle disputes of a commercial nature.

³¹ The reader should know that in Peru, Arbitration is a widely used dispute settlement mechanism both at the private and public sphere. In the particular field of Public Procurement, arbitration is a mandatory dispute settlement mechanism during the phase of implementation of the contract. Usually Arbitration is the preferred mechanism to settle differences. “Law N° 30225 – Public Procurement Law. **Article 45. Mechanisms to settle disputes arising during the**

Every Investor, Supplier and/or Contractor, whether national or foreign, will always seek **stability and predictability** when signing a contract. The higher the degree of legal certainty offered by a country, the higher the probability of investment and supplier participation. Nobody, in their right mind, invests money if there is a chance that, in case of non-compliance, their rights might not be respected or asserted.

The longed-for predictability and stability of trade relations; finds their most important ally in the Law. Following this logic, the Law must be understood as the set of rules and principles that helps and safeguards the development of commercial activities both at the national and international level. At this point, the following concept should be mentioned: **Legal Certainty**³².

Precisely, **Legal Certainty** allows commercial transactions to take place within a framework of greater predictability and stability. Problems or contingencies are not eliminated, but the possibility of failures or non-compliance during the performance of contracts is reduced. Having regulations and/or treaties which are in a position to provide for different situations, is something that usually every country pursues. A judge or an Arbitrator require rules that are clear, coherent and capable of settling the different types of controversies that may arise.

It should not be forgotten that commercial activities, particularly in recent times, is characterized by being subject to almost constant changes. A clear example of this can be found in the transactions of computer products. Today we contract a computer model and next week we can find another one with better quality at a lower price.

A State, just like an individual, will always want to conduct commercial activity with the highest possible level of legal certainty. It should not be forgotten that we are talking about public resources management; indeed the money of an entire country will be invested in the acquisition of a good, contracting a service or executing a construction³³.

Public Procurement, like any other form and/or type of contracting, will always “search” for Legal Certainty. Such “search”, results in the development of

execution of the contract. 45.1 The disputes arising among parties about the execution, interpretation, resolution, non-existence, inefficiency, nullity or invalidity of the contract shall be settled through conciliation or arbitration, as agreed on by the parties. Disputes about the nullity of the contract shall only be subject to arbitration...”

³² “... Legal certainty is a determining factor for economic development. This assertion is not in dispute...”. In: SEGURIDAD JURÍDICA Y DESARROLLO ECONÓMICO. Fernando Vives. Lawyer, PhD in Law. Managing Partner of Garrigues, Legal and Tax Services Firm. Pp. 75

³³ The ideas presented in this paragraph allow us to discuss the concept of **Public Procurement System**. From our point of view, a **Public Procurement System**, is any set of principles and rules on public procurement which articulates the work of public sector Entities in topics such as planning, programming, budget, contracting, controlling, managing and executing the procurement of goods and services as well as in the execution of public works carried out with public funds. Every system requires rules that are capable of achieving and/or help achieving the desired objectives.

legislation and regulations in accordance with the changes taking place at the national and international levels.

It should be noted that currently every regulation regarding **Public Procurement**, usually establishes mechanisms to combat the scourge of **Corruption**³⁴. Corruption should not be understood as an isolated event that only affects the parties intervening in it, but rather as something that concerns the entire community³⁵.

The abovementioned ideas allow us to recognize the great importance and relevance for a Country of the signing of an **Agreement on Government Procurement**³⁶. We are talking about promoting, creating and strengthening commitments or legal obligations for 2 (two) or more countries.

In the case of Peru, signing FTAs constitutes a simple and clear way to show the rest of the world, that we are in the capacity to provide stability and certainty to their investments. Signing FTAs with U.S., Japan, among other economies, is a clear proof of what has been stated to this point.

As with the **globalization**³⁷ phenomenon, it is evident that we are moving towards **International Standardization of Public Procurement**. It is not news

³⁴ "...When analyzing national administrative legislations and practices on public procurement in Latin American countries the main conclusion reached is the similarity between them, which stems from regulations recently enacted or reformed in the majority of systems and from concerns, challenges and objectives in this area which are common to every State and coincide with the Spanish and European ones¹, such as the fight against corruption and the necessary modernization of public procurement in order to realize the principles of efficiency, integrity and good administration as well as the implementation of electronic means in public procurement procedures...". In: "Panorama comparado de la Contratación Pública en América Latina". JOSÉ ANTONIO MORENO MOLINA. Observatorio - Contratación Pública. See: <http://www.obcp.es/index.php/mod.opiniones/mem.detalle/id.183/relcategoria.121/re/menu.3/chk.9c44b3c71a7a23ca52f818dee2903807>

³⁵ "States allocate approximately 70% (1) of their national budgets to some form of contracting or procurement. As a result of the presence of corruption in these processes, the public resources needed for a country's economic development, to combat poverty and for its citizens to access basic rights such as education or health end up in the pockets of certain government officials. Citizens are not the only ones to be affected. The private sector is also greatly affected by it since the companies that participate in public tenders walk into a context of unhealthy competition, which can cause inefficiencies in the market functioning...". In: "Contrataciones Públicas en América Latina: Instituciones, prácticas y riesgos de corrupción". Transparency International. Pp. 3. (1) *UNPAN Statistical Databases* Central Government Expenditures by type and function, as a percentage of all central government expenditure as of 1997. Source used: IMF Government finance statistics. Calculation of TI-S. The result is obtained by excluding salaries and payment of interests from the equation.

³⁶ In the Peruvian case, Treaties are constitutionally recognized. **1993 Political Constitution. Article 55.** Treaties formalized by the State and in force are part of national law. (Official translation)

³⁷ "...After the second world war, the promotions of free trade and the non-discrimination of foreign goods and services was structured following a new system comprising multilateral organisms, which articulated what was called a new global economic governance. In this way, economic integration agreements and free trade agreements were developed within the framework of what we know as "globalization"; (2) a critical context for the State and the production of law. Precisely, globalization involves reshaping the traditional concept of State, Nation, citizenship, Constitution and Law, as States' sovereignty has diluted in the midst of the complexity of supranational relations, and the sources of Law have multiplied in multilateral

that usually any kind of standardization enables cost reduction. Although the topic of costs typically relates to the economic sphere, however, such standardization would also allow for obtaining almost continuously legislation and/or regulations in accordance with the changes occurring around the world.

Since the beginning of the present paper, references have been made to the GPA; which are a proof of this. Even though Peru is not a party to this WTO agreement, however by means of different FTAs, it is possible to verify that we are heading towards that direction.

While there are certain particularities in each of the FTAs signed by Peru, nevertheless, there is no denying that there are many similarities between them.

All of the above leads us to conclude that Peru, through its current trade policy, clearly demonstrates that it is part of the process of international standardization of Public Procurement. All this is accomplished through signing different kinds of Treaties (FTAs). This situation, allows Peru to achieve the longed-for Predictability and Stability in Public Procurement Processes at the international level.

Conclusions

1. Peru is not a party to the **Agreement on Government Procurement (GPA)**, however, it possesses the minimum legislative conditions required to be a party to the referred Agreement.
2. Peruvian legislation on Public Procurement complies with the minimum international standards and responds to the principles set out in Trade Agreements and other countries' legislation. We are in the capacity to provide stability and certainty to their investments.
3. Peruvian regulations on Public Procurement mandates that every Public Procurement shall be carried out under conditions of equal treatment, objectivity and impartiality.
4. **Free Trade Agreements (FTAs)** constitute an important part of Peru's trade policy. Signing the FTA with US, Japan, among other economies, is a clear proof of a process of international standardization of Public Procurement.
5. In Peru, there is no definition of public contract as well as no general regulation on public procurement.
6. The constant manipulation and amendment of public procurement legislation –or at least the Public Procurement Law- allows us to establish that clear and immutable contractual conditions are undermined.
7. The political powers, in light of the lack of stability or control mechanisms, weaken the scattered public procurement system, creating diversity and inconsistencies in the general procurement criteria.

organisms or legal documents, which in some cases are private...". In: "La internacionalización de la contratación pública en Latinoamérica, los modelos de Chile y Colombia". Juan Pablo Sarmiento E.

8. The Peruvian State, despite having regulated the public procurement of goods and services through legislation, has yet to consolidate all the existing types of procurement, resulting in a lack of regulatory clarity and guarantees.