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Regulation of International Construction Contracting Works: Contradictions Between Transnational and National Frameworks

Uluslararası İnşaat Müteahhitliği İşlerinin Regülasyonu: Ulusötesi ve Ulusal Çerçeveler Arasındaki Çelişkiler

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ABSTRACT

This paper analyzes the regulation of international construction contracting works involving major infrastructure and real estate projects. The focus of the study is the relationship between transnational and national regulation. The basis of the analysis is the notion that different regulatory regimes represent the interests of different segments of capital and that these regimes are shaped by national states trying to meet the multiple demands. In this way, regulatory regimes are viewed as an area where contradictions between segments of capital are negotiated. First, it is argued that the national state and capital segments negotiate transnational regulation both on a national and transnational scale. This argument is based on the examination of the World Trade Organization's Revised Agreement on Government Procurement, the World Bank's New Procurement Framework, the contract forms of the International Federation of Consulting Engineers, and the Public Procurement Law of Turkey. Secondly, it is argued that the integration process of transnational regulation was interrupted as a result of the reluctance of the new state-capital configurations introduced in the twenty-first century to join the transnational regulation regimes. The research is based on analysis of transnational and national regulatory texts, statements and reports from intergovernmental organizations and European industry associations, and interviews with executives of construction, law firms and experts from intergovernmental organizations.

Keywords: *Construction contracts; export and development funding; government procurement; international construction contracting; transnational regulation.*

ÖZ

Bu yazıda, büyük altyapı ve emlak projelerini içeren uluslararası inşaat müteahhitliği işlerinin regülasyonu incelenmektedir. İncelemenin odağını ulusötesi ile ulusal regülasyon arasındaki ilişki oluşturmaktadır. İncelemenin temelinde farklı regülasyon rejimlerinin farklı sermaye kesimlerinin çıkarlarını temsil ettiği ve bu rejimlerin çoğul talepleri karşılamaya çalışan ulusal devletler tarafından biçimlendirildiği düşüncesi yatmaktadır. Bu şekilde, regülasyon rejimlerine, sermaye kesimleri arasındaki çelişkilerin müzakere edildiği bir alan olarak bakılmaktadır. İlk olarak, ulusal devlet ve sermaye kesimlerinin ulusötesi regülasyonu hem ulusal hem de ulusötesi ölçekte müzakere ettikleri ileri sürülmektedir. Bu argüman Dünya Ticaret Örgütünün Gözden Geçirilmiş Kamu İhale Anlaşması, Dünya Bankasının Yeni İhale Çerçevesi, Uluslararası Müşavir Mühendisler Federasyonunun Sözleşme Formları ve Türkiye Kamu İhale Yasasının incelenmesine dayanmaktadır. İkinci olarak, uluslararası inşaat müteahhitliği piyasalarına ağırlıklı olarak XXI. yüzyılda giren yeni devlet-sermaye kurulumlarının ulusötesi regülasyon rejimlerine katılmaması sonucu ulusötesi regülasyonun bütünleşme sürecinin sekteye uğradığı ileri sürülmektedir. Araştırma, ulusötesi ve ulusal regülasyon metinleri, hükümetler arası kuruluşların ve Avrupalı sektör birliklerinin beyan ve raporları ile inşaat, hukuk firmaları yöneticileri ve hükümetler arası kuruluşların uzmanları ile yapılan mülakatların analizine dayanmaktadır.

Anahtar sözcükler: *İnşaat sözleşmeleri; ihracat ve kalkınma fonları; kamu ihaleleri; uluslararası inşaat müteahhitliği; ulusötesi regülasyon.*

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Introduction

The internationalization process of capital continues in the shadow of trade wars and increasing protective measures. International construction contracting (InCC) works constitute an important core in this process, due to their key role in capital accumulation especially in developing countries and the backward and forward linkages they mobilize. One of the main factors shaping the internationalization process of capital is the regulation of the market. The global market consists of multiple and diversified national regulatory systems. For the internationalization of capital coordination of these systems is as important as outruling protective measures. Intergovernmental organizations continue their efforts to harmonize market rules on a global scale. Private organizations attempt to increase their capacity to regulate standards of contracts, production processes and products. Nevertheless, there are contradictions between transnational regulation[1] and the regulatory systems of national states. Such regulations strengthen or weaken different capital segments across countries in the competition to take part in InCC works. Accordingly, they constitute one of the areas in which conflicts between capital segments are negotiated.

In this paper, I will analyze the relationship between transnational and national regulations and point to current trends in the transnational regulatory integration of InCC works. First, I will visit one of the platforms where contradictions between the interests underlying different types of regulation are negotiated: the texts of transnational regulations. Second, I will show that the historical conflict between capital in advanced and latecomer countries has become more complicated by the emergence of new state and capital actors. The new actors have stayed out of transnational regulatory regimes and have brought new ways of governance to InCC projects. I will argue that these developments have changed the course of the negotiation process of transnational regulation and led to their disintegration.

The InCC projects consist of finance, management, engineering, procurement, production and post-production management of large infrastructure or real estate works. These require large amounts of money capital and investments with significant risks as they return in the long term and rely on international transactions in on-ground production (Liu, et. al., 2016). These projects are the collaborating works ranging from number of public, private, foreign and domestic actors. In these projects, state treasuries, project-owning state institutions, public and private banks, multilateral development and investment banks, project management companies, manufacturers and service providers with backward or forward linkages to the construction sector, and construction contractors take part together. This article discusses construction companies that sign InCC contracts or are subcontractors of the business.

The InCC projects constitute an important field of capital accumulation and therefore, a significant arena for inter-capitalist competition. Companies of different capacities and in different countries are competing to occupy main positions in these projects. Two types of capacities compete and collaborate in these projects: *financial-technical superiority and price superiority*, i.e. capacity to reduce costs (Gülöksüz, 2016). The capacities of the companies are also linked to government actions on their behalf. The financial and political power of governments and their policies that support the InCC companies in domestic or foreign markets are key components of their competitive advantages. The competition between these different types of capacities is conditioned by the regulation of the projects. Transnational regulation tends to favor financial-technical superiority whereas national regulation tends to favor price superiority. The types of companies that can enter and win procurements, and the distribution of risks and rewards between employers and contractors is shaped by regulatory frameworks. A construction company manager observes the InCC market as:

> The construction contracting market is a jungle. Employers make specifications to serve for their own purposes. We cannot speak of an 'international' contracting market. The regulatory frameworks are re-negotiated in each and every procurement. However, intense efforts to form a single market are underway. (Interviewee-4, July 12, 2016).

To analyze the regulatory systems, I used the transnational regulative texts on InCC works and the public procurement legislation of Turkey. In order to analyze the interests underlying the systems, I used the position documents and reports of the business associations of European InCC companies and various documents released by the OECD and EC. I have also conducted five interviews with the executives of InCC and law companies and with an officer in WB Turkey. The next section deals with the developments in the expansion of transnational regulations and different approaches to these developments.

Relationship Between Transnational and National Regulation in the InCC Works

Transnational Regulation As the Legal Form for Transnational Capital to Posit its Interests in Latecomer Countries

InCC companies based in advanced capitalist countries maintained their strong competitive position up to the

1 The regulatory systems taken as transnational regulation in this paper are: (i)Regulations of inter-governmental organizations such as multilateral agreements, model laws and standard documents. (ii)Regulations of non-governmental or private organizations.

twenty-first century. It was vital for them to be able to enter the markets of latecomer countries and to procure key positions in InCC projects. Starting from the 1970s, new regulatory arrangements started to be incorporated into the national legal systems in the name of neoliberal policies. These policies were introduced to some of the latecomer countries by international financial institutions. In this context, theoretical approaches have been developed that conceptualize a uni-directional flow of capital and regulation from the advanced to the latecomer countries. A broad literature was concerned about the flow of over-accumulated capital in the advanced capitalist countries into the production of the built environment in latecomer countries and efforts to build legal and institutional frameworks to ensure that flow. The theory of capital switch developed by Harvey (1989) is the most prominent theory in this respect. In the field of law and society, the uni-directional flow concept underlies Cutler's (2003, 2009, 2013) approach. She analyzed transnational regulation as a legal order which posits the interests of transnational capital in the latecomer societies. According to her, an increase in the influence of transnational regulation reduced the law-making autonomy of national states. The transnational *private* regulation, furthermore, cut off the link between national states and their law-making and created a plurality in the authority to make laws. For Cutler, transnational regulation deprived local societies of their capacity to make decisions and subordinated them to the discipline of transnational capital accumulation and the interests of transnational capital. Cutler's approach revealed the political content of legal rules and the class segment empowered by transnational regulation. Indeed, the demands of InCC companies confirmed Cutler's assertions. For instance, the business associations in Europe urged transnational regulatory regimes to be implemented worldwide and in this context all countries to join the WTO Agreement on Government Procurement or to adjust their systems according to internationally harmonized documents such as the UNCITRAL Model Law of Public Procurement. They also called for multilateral banks to enforce the use of standard procurement documents and contract forms in their funding practices (EIC, 2005, 2012; CICA et al, 2014). In particular, they required the removal of abnormally low bids (EIC, 2015). Transnational regulations were in the interests of these companies in many ways. Contrary to national regulation, transnational regulation restricted discriminatory rules, emphasized financial-technical criteria as well as price criteria (although not mandatory in most regimes), reduced the impact of political decision-making and increased the accessibility of procurements for foreign companies by clearly and explicitly defined procurement specifications. Despite its merits, there are also shortcomings in conceptualizing a uni-directional flow in Cutler's approach. Considering local societies as homogeneous, she does not take into account the fact that these societies also inhere diverse class interests and state motivations. She also regards the state and capital in these countries as passive recipients of transnational capital and regulations. She does not acknowledge how the state and capital in these countries act in the making, modifying or implementing transnational regulations.

Negotiation of Transnational Regulation by the States and Social Classes in the Latecomer Countries

The approach outlined in the previous section was criticized by researchers who analyzed the response of states and social classes to the pressures to incorporate transnational regulation into national legal systems (Ercan & Oğuz, 2006; İslamoğlu, 2016).[2] Ercan and Oğuz (2006) argued that uneven development between the advanced and latecomer political economies was not the result of a uni-directional relationship but a combined one. Uneven development was cast by the alliances and confrontations between over-accumulated capital in the advanced capitalist countries and the segment of capital in latecomer countries, which had reached a higher level of accumulation and tended to internationalize. For them, the liberalization of the Turkish Public Procurement Law in 2003[3] was supported by both capital segments. However, it had the potential to cause the deprivation of small and medium-sized capital. In the years following the law, governments took measures to protect small and medium-sized capital, including amendments and implementation of the law. Ercan and Oğuz reveal the diversity of class interests in latecomer societies and the relationships between class segments across countries. They also show that instead of losing their capacity to make laws in the face of the imposition of transnational regulation, nation states can adopt external regulation in accordance with the outcomes of the class struggle within their territories.

Ercan and Oğuz pointed to four main areas where the Public Procurement Law was amended: the empowerment of political vs technocratic branches of the government, the scope of the law, the threshold values for foreign capital participation, and the pre-qualification criteria. The legislative changes continued in the following years, bringing more protections for domestic companies with price superiority. Within the scope of the procurement of works, subsequent amendments introduced price advantages to domestic bidders[4] and bidders proposing

[2] These theories have also been criticized in the development literature (Weiss, 1997, 2003). Researchers argue that despite transnational restrictions, nation states could make room to implement policies autonomously.

[3] In Turkey, the IMF standby agreements in 1980 and 2001 and the EU accession program in the early 2000s accelerated the incorporation of transnational regulations in the national legal system.

[4] Law #6111 (2011).

the use of domestic products,[5] the facility of making abnormally low bids above a certain value and eliminating those below that value,[6] exemption of some public works and public organizations from the Public Procurement Law,[7] the exemption of some major transportation projects from an article in the Budget Law,[8] and multiplication of the financial tools available to domestic bidders.[9] Some of these changes pointed to the removal of the Turkish legislation from transnational regulation.

An equally significant component of the tendency to avoid transnational regulation, however, was the negotiation of transnational regulations themselves. Regulatory regimes brought in by inter-governmental organizations were negotiated between governments and organized groups. Likewise, regimes brought in by non-governmental and private organizations were negotiated settlements which left significant space for nation states and social classes to act autonomously. I will examine this issue within the scope of three transnational regimes.

WTO's Revised Agreement on Government Procurement (GPA)

The GPA sets the principles and methods by which international procurements are conducted (GPA, 2014). It is based on three general principles: non-discrimination, transparency and procedural fairness, all of which prevent procuring administrations from granting privileges to domestic bidders. The contradictions contained in the Agreement are manifested in the flexibility of its structure preventing it from realizing universal market liberalization among its signatories.[10] The non-discrimination principle, set out in the main text of the agreement, is punctured by the Coverage Schedules of each country in Appendix I. The coverage of each country of specified procuring entities, goods, services and construction services, and threshold values limits the scope of the GPA.[11] This is combined with the principle of reciprocity according to which each country is entitled to apply non-discrimination provisions only to the coverage of other trading parties. The negotiation of the GPA is also evident in some provisions regarding the major fields of conflict between different segments of capital. One of these provisions concerns the abnormally low bids. The GPA allows for the primacy of price superiority by recognizing the lowest price as the only criterion for awarding contracts. Moreover, it also makes room for abnormally low bids, giving procuring state organizations the freedom not to verify the bidder's ability to meet the terms of the contract. These examples show traces of states and capital in latecomer countries on the GPA.

The GPA's effectiveness in unifying the rules in global InCC projects is also reduced by the limited scope of its membership (19 countries and EU). While most of the signatories are North Atlantic-centered advanced capitalist countries, the latecomer countries which make up potential InCC customers (as they still lack major infrastructural works) are not parties. The African countries have neither Signatory nor Observer Status (except Cameroon). The BRICS countries, all of which have large construction markets, are outside the GPA but participate as Observers, and some are in the accession process.[12] A joint policy paper issued by associations of InCC companies in Europe, however, states that China, which is in the accession process has left out key regions, state organizations and sectors in its coverage (EuDA, et. al. 2019). The report points out that, since 2001, China has submitted six offers to the GPA and the latest offer in 2014 was limited to procurements conducted with financial funds with about 10% of the market, leaving out the procurement of major infrastructure and public utility projects, which account for about 90%. Therefore, in addition to being qualified by its signatories, the GPA has been weakened by the exclusion of countries with significant shares of global InCC investments.

The WB's New Framework for Procurements

The WB's New Framework modifies the Bank's stance on the use of standard procurement documents in the procurements funded by the organization (WB, 2015). Previously, the Bank used its Procurement Guidelines and Standard Bidding Documents that were mandatory for all procurements. The New Framework made it possible the use the procurement systems of selected procuring state organizations, after being modified and evaluated by the Bank as Alternative Procurement Arrangements. The Bank's new procurement policy marks a new negotiated settlement in the dispute between foreign and domestic companies on one hand, and companies with financial-technical and price superiorities on the other. Standard documents are in the interests of the former by introducing (country-specific) threshold values for international

[5] Law #6518 (2014).
[6] Law #6518 (2014).
[7] Law #6518 (2014), #6288 (2012).
[8] Law #6761 (2016).
[9] Law #7061 (2017).
[10] See Shingal (2011) for an analysis showing that the GPA has not been effective in increasing foreign market access in the procurement markets for services in Japan and Switzerland.
[11] By November 2019, Canada and the USA excluded screening services from their coverage. Canada also excluded procurements by the Federal Department of Transport. Israel, Liechtenstein, Republic of Moldova, Aruba and Singapore listed a number of services in their coverage and excluded others listed in the Division 51 of the Provisional Central Product Classification of the UN. The EU and Montenegro responded the actions of some countries by restricting bidders from procurements above certain thresholds. Israel, Japan and Korea fixed threshold values above 5 million SDR issued by most signatories (8.5 million; 15 million for sub-central government entities; 15 million for sub-central and other government entities, respectively).
[12] China, the Russian Federation, India and Brazil have had Observer Status in the GPA Committee since 2002, 2013, 2010 and 2017 respectively. China and Russia are negotiating accession to the agreement. Turkey has the Observer Status since 1996. 34 WTO members in total have observer status, nine of which are in the accession process.

procurements and limiting price advantages to domestic bidders (WB, 2002). These also include other advantages that transnational regulations provide to such companies. Two InCC company executives express the significance of standard documents:

International standard documents are used for large companies in large works. Using these documents allows comparison of apples to apples. In the procurement specifications, they define everything precisely. The specifications of the (national) administrations are open to interpretation. They do not cover all the holes. (Interviewee-4, July 12, 2016).

Multilateral development banks bring in rules that ensure timing, budget and quality. We want banks to enforce these rules mandatory. (...) The WB sides with the governments' making procurements and contracts in their own way. Governments are given the freedom to formulate the qualification criteria. Then, they are left free to award the contracts to the types of contractors of their own will. (Interviewee-3, June 29, 2016).

Conversely, the WB's new policy has the potential to strengthen domestic companies with price superiority, as it opens up more space for local decision-making and rules. However, the new policy is also due to the fact that the companies' dependency on transnational regulation to operate in foreign countries has decreased. This is because they increasingly overcome the problem of adaptation to local systems by conducting their operations in foreign countries through foreign-based subsidiaries such as joint ventures or local branches (Interviewee-5, November 27, 2017).

FIDIC's Standard Contract Forms

The standard contract forms issued by the International Federation of Consulting Engineers (FIDIC) since 1957 define the duties, rights, responsibilities and obligations of contract parties: the employer (state organizations in most InCC works) and the contractor. These forms ensure clear and pre-defined procedures which facilitate the companies' conduct in foreign countries. The manager of a law firm points to the coordination power of FIDIC:

The EU has funds for infrastructure such as water treatment, sewerage, wind power, hydroelectric power plants. While know-how and equipment for the use of these funds are provided by German, French and the other companies, Turkish companies do the construction work. These are called construction consortiums. When foreign companies are involved, FIDIC is applied. The EU binds funds to FIDIC, not to current laws in the EU countries. (Interviewee-2, September 15, 2015).

These forms contain contradictions between employers and contractors as they distribute the risks and rewards of contract execution. The risks are particularly important for the construction contracts because they extend over long time periods and involve many unforeseen possibilities. In fact, the InCC companies in Europe have criticized the content of these forms as well as advocating their worldwide use. One major claim was that the FIDIC editions after 1987 gradually shifted the risk balance against contractors (CICA, et. al., 2017).[13] They also claimed that the release of the Silver Book for EPC (Engineering Procurement Construction) Turnkey Contracts in 1999 turned out to be against contractors as this book was used by employers in other types of contracts because it handed over responsibility of all unforeseen possibilities to the contractor.

Conflicts over the distribution of risks are also manifested in the flexibility of the structure of FIDIC contract forms. The General Conditions of Contracts can be modified in the Particular Conditions of Contract. The latter conditions, designed to include the features of the site and the project, potentially provides the flexibility for the parties to change the allocation of risk to the other party. An example of this behavior was given by some member state organizations benefiting from EU Structural Funds. Associations of the InCC companies in Europe have informed the EU authorities that some governmental organizations in Poland and Romania have changed the General Conditions in the Yellow and Red Books with the provisions they brought to the Particular Conditions (FIEC and EIC, 2011, 2016). They also claimed that some of these provisions referred to the Silver Book. These claims were also expressed by an InCC company executive:

In developed countries, FIDIC applies to public procurements. In countries that accessed the EU later, such as Poland, Romania, and in Turkey to an extent, FIDIC is applied but its important terms were changed. For example, the responsibility of the contractor is limited in FIDIC. They remove this limit. They change the admission conditions. (Interviewee-3, June 29, 2016).

These claims show that the influence of governments over contract forms against companies has been increasing. FIDIC responded to the demands of the contractors by issuing the Guidance for the Preparation of Particular Conditions and the Five Golden Principles of FIDIC in 2017. However, the FIDIC's failure to enforce Golden Principles in a mandatory way could prevent the implementation of the principles.

The approach in this section modifies the concept of a unidirectional relationship between states and social

[13] They criticize the pre-release edition in 2017 for assigning the unidentified and residual risks to the contractor, defining the contractor's obligations without specifying the terms of this obligation as the work is 'fit-for-purpose', and the time limits for the Notices of Claims that would increase the time and costs of dispute resolution and prevent the contractor from making claims.

classes in advanced and latecomer societies in the formation of legal rules. However, developments in some of the latecomer countries in recent years show that the North Atlantic-centered outlay of the capitalist economy and the relationship between the political economies at the center and at the periphery of capitalism has been further transformed.

Deterioration of Transnational Regulation by the Rise of New State and Capital Agents Not Participating in North Atlantic-centered Regulatory Regimes

In the twenty-first century, a larger number of construction companies based in latecomer countries entered the international markets. As observed by a World Bank official in Turkey:

In the past, large companies would win in international procurements. Now, companies all over the world have made progress. Big companies cannot win procurements without competing. Moreover, they have to establish joint ventures with local companies. (Interviewee-5, November 27, 2017).

Some of these companies were part of distinctive state-capital configurations which furnished them with strong competitive capacity in international markets. Chinese governmental institutions such as ministries, public banks and state-owned companies were the most prominent actors in this regard.[14] This was particularly so after the Chinese government's Going Global Strategy launched in 1999 and the Belt and Road Initiative in 2013. One of the reasons for their competitiveness was that China stayed out of transnational regulation in the relevant areas and thus could act independently from the regulations that its competitors had to abide by. These developments have made the conceptual frameworks based on a dual domination and subordination structure between advanced and latecomer countries inadequate. Above all, they created the need to theorize the fragmentation of the coordination of international capital movements. Picciotto (2011a, 2011b, 2013) argued that comprehensive and unifying legal forms are no longer possible or successful in regulating transnational capital movements. According to him, these movements are organized by multi-layered and temporary network relationships. These relationships are established between public, private and hybrid organizations and are regulated by sub-national, national and international regulatory regimes. Different regulatory regimes overlapped and intertwined in the global market. The approaches in the previous sections have addressed the relationship between transnational and national regulation and the interests underlying them. If we take Picciotto's approach from this perspective, we can suggest that in his view, the contradictions between these two regulatory regimes are re-negotiated in certain policy areas or on an event basis. On the other hand, if we go back to the debate about the regulatory autonomy of nation states, we can suggest that Picciotto casts nation state institutions as key actors in governance networks. They internalize or externalize different regulatory regimes in line with their policy preferences. Picciotto's approach is strong because it describes the disintegration of transnational regulation and explains how international economic activities are organized despite their tendencies to move away from transnational regulation. But an important shortcoming is that he considers regulation as a technical issue that ensures coordination. He does not clarify the interests behind different regulatory regimes, or rather, does not make them intrinsic to his theory.[15] In the following, I will examine the actions of Chinese government organizations and companies in the InCC markets and the contradictions they create with their North Atlantic-based counterparts.

One area of contradiction was state-supported low-cost export credits to Chinese state-owned InCC companies.[16] Low-cost loans were possible because Chinese public banks were not bound by the OECD Arrangement on Officially Supported Export Credits. The OECD Arrangement imposed restrictions on maximum official support levels, down payments, maximum repayment terms, minimum interest rates, minimum premium rates for credit risk, and forms and minimum concession levels of tied aid (OECD, 2018). These regulations increased the costs of the members of the Arrangement. Low-cost loans allowed Chinese companies to bring abnormally low bids to international procurements. These companies were awarded in the procurements made according to the lowest price criterion (EuDA, et. al. 2019). Low-cost credits proved to be a threat to the InCC companies based in advanced capitalist countries, not only in the markets of latecomer countries, but also in their own markets. For instance, these credits could be used to support Chinese companies in the EU internal market, as EU regulations prohibiting distortive public subsidies did not apply to official credits provided by non-EU states to companies operating in the EU (EIC, 2011; EuDA, et. al. 2019). Likewise, there were no restrictions on their use in the procurements funded by the European Investment Bank or other European development finance institutions.

In the face of China's official funding practices, some OECD countries, notably Japan and Korea, have started

[14] For an argument that the Chinese state apparatuses and quasi-market actors have to be regarded as fragmented and decentralized rather than monolithic see Shen and Power (2017).

[15] Picciotto (2011a, pp. 449-50) asserts that economic power takes certain legal forms and that certain legal forms legitimize exclusion and inequalities.

[16] For information on low-interest loans provided by various Chinese public banks for the Belt and Road Initiative (BRI) between 2005-2017, see OECD, (2018, pp.18-19).

to provide official forms of funding that are outside the scope of the OECD Arrangement (EIC, 2018b).[17] They also increased their tied aid practices. These were signs of the disintegration of the OECD Arrangement. A study conducted for the Federation of European International Contractors mentions "a potential collapse of the unique multilateral official finance system" (EIC, 2018b, p.16.) The Federation refers to the US Export-Import Bank which declared in 2015 that with the introduction of the funding programs of export credit agencies in China and other countries operating outside the OECD Arrangement, the share of trade-related official support governed by the Arrangement fell from 100% in 1999 to 34% in 2014 (EIC, 2016, p. 4).

The demands of the European InCC companies in the face of these developments show that the search for protection is based on the reassertion of EU regulations and institutions. They mandated the implementation of European state-aid regulations to all firms operating in the European internal market or to projects funded by the EU institutions, and the rejection of abnormally low bids (EuDA, et. al. 2019). They also proposed the establishment of a strong European export finance institution to support European InCC companies in foreign markets against the Chinese credits. The EC also proposed the use of the EU's financial instruments for this purpose in its Construction Sector Strategy. (EC, 2012).

The second area of contradiction was the discrimination of foreign InCC companies in procurements funded by Chinese governmental organizations in domestic or foreign markets. In China, wholly foreign-owned enterprises are legally prohibited to participate in public procurements in the construction sector (EuDA, et. al. 2019). Although Sino-foreign joint ventures are allowed into procurements, they are subjected to a discriminatory qualification regime (EIC, 2006). According to the associations of the InCC companies in Europe, this has resulted in a decrease in the market share of foreign InCC companies, falling from 6% before China's WTO accession to less than 1% in 2019 (EuDA, et. al. 2019). The demands of the European companies against this fact were to place discrimination on the principle of reciprocity, that is, to ensure that the companies of countries that exclude European firms from their own procurement markets are not included in EU-funded procurements (EuDA, et. al. 2019; EIC, 2011). This requirement was also shared by the EC (2012), which proposed regulating market reciprocity. This proposal meant a mutual closure of the procurement markets in the construction business and a move away from free trade. However, the companies kept their faith in transnational regulations by calling on EU institutions to make efforts to open up the Chinese construction market by persuading China to sign the GPA. The EC adopted a similar direction in its strategy on China (EC, 2016).

A third area of contradiction was the tied-financing infrastructure deals of Chinese governmental organizations in Africa. Since the 1960s, infrastructure works in Africa have been funded mainly by the WB and public funding agencies of the USA, UK and France (Wethal, 2019, p. 480). Contractors from Western Europe, North America and Japan won the procurements. The goods used in these works were also obtained through imports from these countries. Wethal (2018) argues that even if the tied financing was not provided, the participation of local companies was limited due to lack of local capacity. For her, the liberalization policies that started in the 1980s highlighted the cost factor and led to the success of the Chinese companies capable of doing business at low-costs (Wethal, 2019).[18] In the twenty-first century, the Chinese ministries negotiated a series of investments with foreign governments, and China Eximbank or other public banks funded the works (Wethal, 2017, 2018; EuDA, et. al. 2019). China Eximbank undertook tied financing requiring the use of Chinese goods and services in the execution of the projects. In addition to low-cost credits, Chinese construction companies (mostly SOEs) were offered tax exemptions, reduced costs of imported labor, equipment and materials, reductions in bureaucratic procedures and the possibility to apply lower standards and rules.[19] An InCC company executive refers to these deals:

The Chinese government gives credits. Chinese companies conduct the works in Africa. China overturns all orders. Construction companies are of state origin. Africa needs everything. It doesn't have any infrastructure: water, energy, transportation, housing. Companies having credits from countries like China are doing well there. Governments are obliged to contract these Chinese companies even if they conduct the business badly. (Interviewee-3, June 29, 2016).

The Federation of European International Contractors announced that Chinese companies have tripled their international market share globally over the past ten years from 7% to 21% and doubled from 28% to 56% in Africa (EIC, 2018a, p.1). Against these developments, associations of InCC companies in Europe have called for a reconsideration of the EU infrastructure funding for China, particularly for the Belt and Road Initiative (EuDA, et. al. 2019). Japan's announcement that it would stop providing bilateral ODA to China is an example of these demands (EIC, 2018b).

[17] Like investment loans or guarantees provided by OECD-ECAs and bilateral development financial institutions, equity investments, import loans, working capital facilities or pre-export financing.

[18] Also see Dobler, 2017.

[19] For a reference to an analysis on the trade-off of quality, safety, social equity and environment with less time lapse in Chinese transport investments, see OECD (2018, p. 22).

The consequence of the contradictions discussed in this section is that the transnational regulation, which has long represented the interests of North Atlantic-based transnational capital, has now become an obstacle to the very same capital. This fact has disrupted the sustainability of transnational regulatory regimes and restricted the coordination of transnational capital flows with narrower scopes, such as regional or bilateral agreements or compromises as the case may be.

Conclusion

A closer look at the capital and the state of the latecomer countries shows that they bring the regulatory integration and differentiation tendencies together. This study reveals the different class interests underlying the two processes. With the expansion of transnational regulation since the 1970s, small and medium-sized capital in these countries has faced the threat of loss, while the conditions for the internationalization of large-scale capital have been created. National states have been subject to contradicting or overlapping class demands from inside and outside, and have tried to meet them within their national regulatory systems. The amendments to the Turkish Public Procurement Law provided an example of governments' efforts to meet such demands.

Stronger states and capital segments have more influence over transnational regulatory regimes, while others also have the power to shape them. Nation states have either stayed out of these regimes or significantly limited them. The cases of the GPA, WB New Framework and FIDIC have shown that this negotiation was effective, and these regimes contained the conditions of nation states and the capital of latecomer countries. It can be said that these actors will continue to be linked to transnational regulations due to their dependence on the money capital operating within the framework of transnational regulations or motivation for taking part in international markets. It can also be said that it is difficult for them to be excluded from the formation of an integrated market in the long run. The regulation of procurements, contracts and state-aid in construction, however, has been one of the areas where transnational regulation can be the least expanded, as it constituted a crucial part of governments' redistribution and employment policies.

The example of the participation of Chinese organisations in the InCC markets shows that staying out of transnational regulation provides cost advantages and low-costs give these organizations significant competitive advantages in the context of a liberalized market environment in the twenty-first century. In the face of this situation, transnational regulatory regimes have become disadvantageous to the states and capital that bound up with them. This has led to the disruption or even decline of the expansion process of transnational regulation. As demonstrated by the business associations in Europe, transnational capital that has pioneered the development of transnational regulation tends to narrow the scope of free trade in particular by proposing to introduce the principle of non-discrimination on the basis of reciprocity. Nevertheless, this also shows that the search for solutions to competition problems continues within the framework of transnational regulation.

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References

Cutler, C. (2003). Private power and global authority: transnational merchant law in the global political economy. Cambridge University Press.

Cutler, C. (2009) Transnational Law and Privatised Governance. In Pauly, L. W., & Coleman, W. D. (Eds.), Global ordering: Institutions and autonomy in a changing world (ProQuest Ebook Central, pp.144-165). UBC Press.

Cutler, C. (2013). Legal Pluralism as the "Common Sense" of Transnational Capitalism. Oñati Socio-Legal Series, 3(4), 719–740.

Dobler, G. (2017). China and Namibia, 1990 to 2015: how a new actor changes the dynamics of political economy. Review of African Political Economy, 44(153), 449–465. DOI: 10.1080/03056244.2016.1273828

Ercan, F., & Oguz, S. (2006). Rescaling as a class relationship and process: The case of public procurement law in Turkey. Political Geography, 25(6), 641–656. DOI: 10.1016/j.polgeo.2006.05.006

Gülöksüz, E. (2016). The 'Global' and the 'Local' in the Regulation of Large Urban Infrastructure Projects. In Geniş, Ş., Osmanoğlu, E. (Eds.). II. International Conference on Urban Research Book of Proceedings (pp. 43-54). İdeal Kent Yayınları.

Liu, J., Yan, P., & Zhao, X. (2016). Risk paths in international construction projects: Case study from Chinese contractors. Journal of Construction Engineering and Management, 142(6), 1-11. DOI: 10.1061/(ASCE)CO.1943-7862.0001116

Harvey, D. (1989). The urban process under capitalism: a framework for analysis. In The Urban Experience (pp.59-89). The Johns Hopkins University Press.

Islamoglu, H. (2016). New Politics of Governing Global Capitalism: Sovereign Governments and Living Law. Society & Economy, 38(4), 497–512. DOI: 10.1556/204.2016.38.4.4

Picciotto, S. (2011a). Regulating global corporate capitalism. Cambridge University Press.

Picciotto, S. (2011b). International Transformations of the Capitalist State. Antipode, 43(1), 87–107. DOI: 10.1111/j.1467-8330.2010.00812.x

Picciotto, S. (2013). Mediating Contestations of Private, Public and Property Rights in Corporate Capitalism. Oñati Socio-Legal Series, 3(4), 622–646.

Shen, W., & Power, M. (2017). Africa and the export of China's clean energy revolution. Third World Quarterly, 38(3), 678–697. DOI: 10.1080/01436597.2016.1199262

Shingal, A. (2011). Services procurement under the WTO's Agreement on Government Procurement: Whither market access? World Trade Review, 10(4), 527–549. DOI: 10.1017/S1474745611000309

Weiss, L. (1997) Globalization and the myth of the powerless state. New Left Review, 225, 3-25.

Weiss, L. (2003). States in the Global Economy: Bringing domestic institutions back in. Cambridge University Press.

Wethal, U. (2017). Passive Hosts or Demanding Stakeholders? Understanding Mozambique's Negotiating Power in the Face of China. Forum for Development Studies, 44(3), 493–516. DOI: 10.1080/08039410.2017.1317660

Wethal, U. (2018). Beyond the China factor: Challenges to backward linkages in the Mozambican construction sector. Journal of Modern African Studies, 56(2), 325–351. DOI: 10.1017/S0022278X18000150

Wethal, U. (2019). Building Africa's Infrastructure: Reinstating History in Infrastructure Debates. Forum for Development Studies, 46(3), 473–499. DOI: 10.1080/08039410.2019.1616609

Texts of Transnational Regulation

OECD. (2018). Arrangement on officially supported export credits, 1 January 2018.

WB. (2002). Standard bidding documents: procurement of works.

WB. (2015). Procurement in World Bank investment project financing, Phase II: The new procurement framework.

WTO. (2012). Revised Agreement on Government Procurement https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm [Date of Access 10 January 2020].

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Abbrevations

CICA	The Confederation of International Contractors' Associations
EIC	European International Contractors
EuDA	European Dredging Association
FIEC	The European Construction Industry Federation
ICAK	International Contractors' Association of Korea
OCAJI	The Overseas Construction Association of Japan, Inc.

Policy Papers

EC. (2012, July 31). Communication from the Commission to th European Parliament and the Council. Strategy for the sustainable competitiveness of the construction sector and its enterprises. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0433&from=EN

EC. (2016, June 22). Joint communication to the European Parliament and the Council. Elements for a new EU strategy on China. https://eeas.europa.eu/archives/docs/china/docs/joint_communication_to_the_european_parliament_and_the_council_-_elements_for_a_new_eu_strategy_on_china.pdf

European Dredging Association, European Construction Industry Federation, European International Contractors. (2019, September 17). Joint policy paper on fostering a level playing field in construction services. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2005, June 1). Position paper on the World Bank consultation paper 'increasing the use of country systems in procurement'. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2006, July 1). Position paper on market access barriers in the construction sector in China. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2011, August 1). Position on the EU consultation on an initiative on access of third countries to the EU's public procurement market. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2012, September 29). Position paper on the review of the World Bank's procurement policy and procedures. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2015, February 6). Position on the MDB Working Group's consultation on "abnormally low tenders. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2016, May 25). Position paper on the review of the OECD local cost rule in relation to construction services. https://www.eic-federation.eu/sites/default/files/fields/files/eic-pp_oecd-local-costs.pdf

European International Contractors. (2018a, March 8). Memo correcting the unlevel playing field between European and Chinese international contractors. https://www.eic-federation.eu/services/position-papers

European International Contractors. (2018b, November 12). Official finance practices of the PR China. https://www.eic-federation.eu/sites/default/files/paragraph-files/sfi_study-china-official_finance_practices.pdf

OECD. (2018). China's Belt and Road Initiative in the global trade, investment and finance landscape. https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf

The Confederation of International Contractors' Associations, European International Contractors, International Contractors' Association of Korea, The Overseas Construction Association of Japan, Inc. (2017, January 25). Joint letter to FIDIC.

The Confederation of International Contractors' Associations, The International Federation of Consulting Engineers, European International Contractors. (2014, January 28). Joint Position Paper on the Revised Proposed New Framework for the World Bank's Procurement Policy (dated October 18, 2013). https://www.eic-federation.eu/services/position-papers

The European Construction Industry Federation, European International Contractors. (2011, May 4) Joint statement on sound management of EU structural and cohesion funds and public procurement. https://www.eic-federation.eu/services/position-papers

The European Construction Industry Federation, European International Contractors. (2016, March 18). Position paper on the use of (un)fair contract conditions in projects financed by the Connecting Europe Facility (CEF). https://www.eic-federation.eu/services/position-papers