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DOI:

[10.14324/111.444.ewlj.2018.06](https://doi.org/10.14324/111.444.ewlj.2018.06).

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Document Version

Publisher's PDF, also known as Version of record

Citation for published version (Harvard):

Corvaglia, MA & Li, K 2018, 'Extraterritoriality and public procurement regulation in the context of global supply chains' governance', *Europe and the World: A law review*. <https://doi.org/10.14324/111.444.ewlj.2018.06>.

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Checked for eligibility: 24/10/2018

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Special issue: *Extraterritoriality of EU Law and Human Rights after Lisbon*

Article

Extraterritoriality and public procurement regulation in the context of global supply chains' governance

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How to Cite: MA Corvaglia, K Li, 'Extraterritoriality and public procurement regulation in the context of global supply chains' governance' [2018] 2(1): 6. *Europe and the World: A law review* [16]. DOI: <https://doi.org/10.14324/111.444.ewlj.2018.06>.

Submission date: 6 February 2018; Acceptance date: 27 July 2018; Publication date: 10 October 2018

Peer review:

This article has been peer reviewed through the journal's standard double blind peer-review, where both the reviewers and authors are anonymised during review.

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Abstract

With the globalisation of supply chains, the respect for human rights and labour standards in procurement practices has become a crucial priority also in the domestic regulation of public procurement. This paper focuses on two specific characteristics of the use of public procurement regulation for the enforcement of human rights and labour standards: its extraterritorial effects on companies and firms across different jurisdictions and its reliance on private certifications and labels. Both of these new aspects are evident within the new 2014 EU Procurement Directives, which includes a number of far-reaching regulatory features that facilitate the monitoring of the respect for human rights and labour standards of contractors and subcontractors across borders. However, this new dimension of public procurement has the potential to create tension within the framework of multilateral trade governance, specifically, the World Trade Organization (WTO) trade regime.

Keywords: Public Procurement; WTO; Private Standards; Business and Human Rights; Global Supply Chain Regulation; Directive 2014/24 EU; Extraterritoriality; Territorial Extension; Jurisdiction in International Law

1. Introduction

With the globalisation of supply chains, the respect for human rights and labour standards in procurement practices has become a crucial priority.¹ Human rights violations and modern slavery are now a real concern in the complex management of public supply chains as demonstrated by recent corporate scandals such as the notorious collapse of the Bangladeshi Rana Plaza. Particularly in European countries, domestic procurement regulations have gradually introduced mechanisms to address the transparency and the sustainability of the associated global supply chains (GSCs). In this context, the 2014 reforms of the European Union (EU) Procurement Directives² have garnered the attention of academics and practitioners from the fields of supply chain management and public procurement.

There are two reasons for this. First, the regulation of public procurement has opened several new opportunities for the enforcement of human rights and labour standards in support of broader social policy objectives.³ Second, public procurement has increasingly gained importance as a regulatory tool for addressing important aspects of transparency and accountability in GSCs.⁴ These developments highlight the fact that public procurement regulation has to significantly contribute to the respect of sustainability standards, while ensuring the strategic and efficient use of limited public resources. In this light, the EU 2014 Directives, as well as the jurisprudence of the Court of Justice of the European Union (CJEU), have explicitly recognised the importance of the use of certifications and labels, and the reformed EU Directives have addressed the behaviour of subcontractors.

This paper adds another dimension to the existing discussion on the use of public procurement to achieve social and labour objectives – its extraterritoriality. The paper looks at how the regulation of public procurement extends its jurisdictional reach to better protect human and labour rights abroad in fragmented global supply chains, for instance through the use of private mechanisms of labels and certifications. The EU 2014 Procurement Directives have the potential to directly influence, with the use of certifications and labels, the behaviour and the operation of firms outside the EU jurisdiction via territorial extension, conditioning the access to public contracts on human rights and labour standards.

This paper highlights the complex nature of public procurement regulation as a modern transnational regulation, which includes domestic state actions with extraterritorial implications as well as private voluntary initiatives at the firm level. However, this new dimension of public procurement has the potential to create tension within the framework of multilateral trade governance, specifically, the World Trade Organization (WTO) trade regime. Understanding the practical and normative issues involved in supply chain governance through public procurement can provide valuable insights into these complex regulatory frameworks, which will only become more common in the future.

Based on its analysis of the EU procurement framework, this paper argues that: (1) the development of public procurement as a regulatory tool to ensure human and labour rights is a useful complement to existing approaches of multilateral soft law and private initiatives; (2) the 2014 Procurement Directives, in particular Directive 2014/24/EU, extends its regulatory influence outside the EU territorial jurisdiction and directly impacts the behaviour of firms, suppliers and subcontractors linked by supply chains across different jurisdictions; and (3) that this specific use of public procurement can be compliant with rules of

¹ILO, *Decent Work in Global Supply Chains* (International Labour Conference 105th Session, 2016 Report IV, International Labour Office, Geneva).

²Replacing and repealing the EU Directives 2004/18/EC and 2004/17/EC, Directive 2014/24/EU on public procurement and Directive 2014/245/EU on procurement in the water, energy, transport and postal services sectors, have been adopted by the Council and the parliament to establish the new EU legal framework for public procurement, together with Directive 2014/23/EU on the award of the concession contracts. For a more extensive analysis, see Roberto Caranta, 'The Changes to the Public Contract Directives and the Story They Tell About How EU Law Works' (2015) 52 *Common Market Law Review* 391.

³Anja Wiesbrock, 'Socially Responsible Public Procurement. European Value or National Choice?' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016).

⁴Olga Martin-Ortega and Andy Davies, *Protecting Human Rights in the Supply Chain. A Guide for Public Procurement Practitioners* (CIPS Chartered Institute of Procurement and Supply 2016).

(extraterritorial) jurisdiction under international law and with WTO rules. This article also contributes to the broader discussion on the extraterritoriality of EU law and the role of the EU as a global regulatory power.⁵

The paper is structured as follows. First, the paper explores the complexity of the governance of GSCs due to the fragmentation of production across borders, which made extraterritorial regulation both necessary and desirable (section 2). In particular, section 2 discusses why both multilateral international efforts and private corporate social responsibility (CSR) initiatives were insufficient, and how the development of domestic procurement regulations to ensure human and labour rights may be particularly useful to mitigate these weaknesses. In the next section, the paper discusses some important features of the use of public procurement to enforce human rights and labour standards, in particular its implications in terms of extraterritoriality and the use of private labels and certifications (section 3). In section 4, the EU public procurement framework's contribution to the extraterritorial enforcement of human and labour rights along fragmented GSCs is presented. The EU approach is analysed in relation to both the use of labels and certifications in procurement practices and the introduction of a specific regulation of subcontractors in the 2014 EU Procurement Directives. Finally, the paper discusses broader implications at the international level of the extraterritorial use of public procurement to enforce human and labour rights under the WTO multilateral trade regulatory framework (section 5).

2. Transnational efforts to regulate global supply chains and managing their sustainability

The progressive integration of economic markets as a result of the liberalisation of trade and investment and the fragmentation of supply chains has increasingly enabled corporations to extend their operations across national borders.⁶ Global enterprises usually involve complex networks of subsidiaries, franchisees, suppliers, contractors and subcontractors, sourcing the cheapest components and workforce across borders to maximise profits.⁷ The global demand for cheap labour exposes workers, particularly from vulnerable groups, to an increasing risk of precarious forms of employment, subpar factory conditions regarding health and safety, overlong working hours and excessively low wages.⁸ Ruggie's 2007 study on corporations and human rights reveals how deep the impact of corporations on a wide range of human rights and labour rights can be.⁹ At the same time, the fragmentation of production across different national markets and jurisdictions makes the effective enforcement of human rights and labour increasingly challenging. Thus, the management and regulation of GSCs is emerging as an intricate network of transnational regulations involving different international, domestic and private actors across multiple levels of economic governance.

Ensuring that multinational corporations provide decent working conditions and guarantee human and workers' rights is a priority in the agenda of international organisations such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organization (ILO).¹⁰ Various international instruments have tried to impose human rights commitments on multinational corporations: the OECD Guidelines on Multinational Enterprises,¹¹ the ILO Tripartite

⁵Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 87 and Elaine Fahey, *The Global Reach of EU Law* (Routledge 2016).

⁶Richard Baldwin and Javier Lopez-Gonzalez, 'Supply-Chain Trade: A Portrait of Global Patterns and Several Testable Hypotheses' (2015) 38 *The World Economy* 1682.

⁷For a more extensive overview, see Layna Mosley, *Labor Rights and Multinational Production* (Cambridge University Press 2010).

⁸Olga Martin-Ortega, Opi Outhwaite and William Rook, 'Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods' (2015) 19 *The International Journal of Human Rights* 344.

⁹Almost 60 per cent of cases reported to the UN featured direct forms of involvement of the companies or their subsidiaries in the abuses, with considerable impact on the workers and their communities. For more details, see UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Addendum* Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*, A/HRC/8/5/Add.2 adopted 23 May 2008.

¹⁰Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2017) 163–208.

¹¹OECD, 'Guidelines for Multinational Enterprises, 21 June 1976, 15 ILM 969 (1976)', the latest version: <<http://mneguidelines.oecd.org/guidelines/>> accessed 20 September 2018.

Declaration of Principles Concerning Multinational Enterprises and Social Policy,¹² and more recently, the UN ‘Protect, Respect and Remedy’ Framework and the UN Guiding Principles on Business and Human Rights implementing this framework.¹³ While all these instruments have significantly advanced the business and human rights agenda, as soft law instruments they lack binding force and strong enforcement mechanisms. The only serious attempt at the international level to establish binding rules on corporations, the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,¹⁴ failed because of strong protest by States. Even now, in mid 2018, the prospects of an international instrument to regulate corporate conduct are limited.¹⁵

Parallel to these international efforts, other actors, including States, non-governmental organisations (NGOs) and private corporations, have recognised the importance of promoting sustainability as well as human and labour rights and have adopted myriad regulatory approaches, often overlapping and not necessarily coherent or coordinated.¹⁶ As at mid 2018, the complex challenge of regulating global supply chains has been, in fact, primarily addressed by private actors using a variety of private initiatives and CSR measures.¹⁷ As a result of the increased public attention paid to the sustainability record of business enterprises, a plethora of codes of conduct have been established together with private mechanisms to strengthen these codes, particularly independent monitoring, auditing and, ultimately, the adoption of labels and certifications.¹⁸ Enterprises, employers’ organisations and industry associations lead these private initiatives with the aim of improving compliance as part of corporate supply chain management.¹⁹

However, despite increased scrutiny by the informed public, it is unlikely that private self-regulation alone will suffice to significantly mitigate the risk of violations of human rights and labour standards along GSCs.²⁰ CSR, unfortunately, remains a ‘management-driven add-on’ in which employers and organisations can engage if it is financially beneficial for business operations.²¹ While companies with strong brands (as measured by the ratio of advertising expenditure to net sales) and those that refer to third-party certification programmes demonstrate strong global supply chain management measures,

¹²ILO, ‘Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ 16 November 1977, 17 ILM 422, the latest version: <www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> accessed 20 September 2018.

¹³UNHRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2011) UN Doc A/HRC/17/31; the UN Guiding Principles operationalise the ‘Protect, Respect and Remedy Framework for Business and Human Rights’ also developed by the Special Representative: UNHRC, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2008) UN Doc A/HRC/8/5.

¹⁴Sub-Commission on the Promotion and Protection of Human Rights ‘Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights’ (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

¹⁵Ecuador and South Africa, backed by human rights NGOs, have launched a new initiative in the Human Rights Council in the UNHRC, ‘Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ (2014) UN Doc A/HRC/RES/26/9.

¹⁶Gary Gereffi, John Humphrey and Timothy Sturgeon, ‘The Governance of Global Value Chains’ (2005) 12 *Review of International Political Economy* 78.

¹⁷The nature and extent of CSR has been the subject of much academic debate and it is difficult to give a specific definition of CSR. In broad terms, ‘CSR refers to business responsiveness to social agendas in its behaviour and to the performance of these responsibilities.’ Jeremy Moon, ‘Government as a Driver of Corporate Social Responsibility’, ICCSR Research Paper Series, No. 20-2004, 2.

¹⁸Debra Cohen Maryanov, ‘Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain’ (2010) 14 *Lewis & Clark Law Review* 401–12.

¹⁹An overview of the complexity of the various private initiatives to enforce fair labour standards within global supply chains is provided by Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013).

²⁰Traditionally, the very nature and defining element of CSR is that companies undertake these measures voluntarily. According to a 2001 definition by the European Commission, CSR is a ‘concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with other stakeholders on a voluntary basis’. See European Commission, ‘Promoting a European framework for Corporate Social Responsibility’ (COM (2001) 366), para 8.

²¹See Robert McCorquodale, ‘Corporate Social Responsibility and International Human Rights Law’ (2009) 87 *Journal of Business Ethics* 391.

other companies have lagged behind.²² Thus, only a small number of companies voluntarily apply CSR programmes that provide thorough transparency along their entire global value chain. In response, States and international organisations are increasingly promoting stronger visions of CSR that is more focused on the prevention and the mitigation of negative social impacts. In particular, this development has been encouraged by the debate surrounding business and human rights and particularly by the UN Guiding Principles, which has a clear focus on individual rights violations.²³ One of the tools used by domestic governments and recommended by the UN Guiding Principles, which forms the focus of the subsequent analysis, is the increasing use of public procurement regulation to pursue social and environmental goals.

3. The transnational use of public procurement to achieve social objectives

The importance of public procurement to ensure the respect of social policies and objectives of social and individual equality has a long history and it has been widely discussed in the literature.²⁴ In different historical periods, national governments have used the purchasing power of public agencies in support of various policy objectives of social justice (e.g. promoting the social inclusion of disadvantaged groups and the economic development of local communities) or in support of individual equality (e.g. enforcing decent working conditions and ILO standards).²⁵ Grounded on the economic relevance of public spending, socially responsible use of public procurement has seen the inclusion of social and labour considerations at the different stages of the procurement process, from technical specifications, to award criteria and to special performance clauses.²⁶ Major international instruments of procurement regulation openly acknowledge the importance of the social dimension of public procurement. For instance, this aspect clearly emerged in the renegotiations of the UNCITRAL Model Law and the World Bank Procurement Regulations.²⁷ The social influence of procurement regulations has also been officially recognised by the ILO Labour Clauses (Public Contracts) Convention 1949 (No. 94), the only international instrument exclusively focused on the promotion of social equality and minimum wages through public procurement.²⁸

More than ever, international and domestic regulations of public procurement are now addressing the respect of human rights and decent working conditions in the long and complex production and supply chains associated with public contracts. Procurement regulations have more frequently included mechanisms to monitor the behaviour of contractors and subcontractors across different countries, often referring to private initiatives (certifications and labelling) or international standards (like the ILO Conventions). The following sections explore the twofold contribution that modern public procurement offers as a regulatory instrument to enforce social standards on corporations across national borders. First, attention is drawn to the extraterritorial reach of such measures (section 3.1) and second, the specific use of private labels and certifications, resulting in a new form of hybrid regulation, is discussed (section 3.2).

²²This statement is based on an analysis of the 2014 submissions of Conflict Minerals Reports to the SEC according to s 1502 of the US Dodd-Frank Wall Street Reform and Consumer Exchange Act, Pub.L. 111–203, H.R. 4173, which were analysed by Galit A Sarfaty, ‘Shining Light on Global Supply Chains’ (2015) 56 *Harvard International Law Journal* 441–6; according to the data presented in the study, only 7.34 per cent of 967 companies could prove strong due diligence measures on whether their supply chains were at risk of manufacturing conflict minerals from the Democratic Republic of Congo and neighbouring countries; s 1502 of the US Dodd-Frank Wall Street Reform and Consumer Exchange Act requires due diligence in the form of a reasonable country of origin inquiry to determine whether the minerals were sourced from the DRC or one of its neighbouring countries and if affirmed, additional corporate measures to determine the source and the supply chain of the minerals.

²³See for a more detailed account, John G Ruggie, ‘Just Business: Multinational Corporations and Human Rights’ (Amnesty International Global Ethics Series, 1st edn, W.W. Norton & Company 2013) 69.

²⁴For the most comprehensive historical overview of the social use of public procurement, see Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press 2007).

²⁵Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart Publications, 2017) 43–95.

²⁶Sue Arrowsmith, ‘Horizontal Policies in Public Procurement: A Taxonomy’ (2010) 10 *Journal of Public Procurement* 149.

²⁷Corvaglia (n 25), 195–232.

²⁸The Convention obliges national procurement authorities to include the protection of labour rights in their public tender process. These provisions should guarantee wages, hours of work and other working conditions at least equal to those normally observed for the kind of work in question in the area where the contract is executed. ILO International Labour Conference, *General Survey Concerning the Labour Clauses (Public Contracts) Conventions, 1949 (No. 94) and Recommendation (No. 84)* (ILO Publications 2008).

3.1. The extraterritorial use of public procurement as an instrument to enforce sustainable GSCs

Because of the size of public spending and the strong bargaining power of public administrations, the inclusion of social conditionality and the respect for human rights and labour rights have always been a dimension of the use of public procurement regulation.²⁹ However, following the privatisations in the 1980s and 1990s of the delivery of public services and the fragmentation of production across countries, the use of public procurement to achieve social objectives has assumed a new dimension.³⁰ Public procurement decisions are not only attempting to ensure that the winning bidder awarded of the public contract follows socially responsible practices, but also the suppliers and subcontractors involved in the production of the final goods and services procured.³¹ Therefore, procurement regulation, which progressively affects contractors and subcontractors down the global supply chain, has become a tool to improve working conditions and address violations of human rights abroad.³² The direct impact that public procurement has on companies' behaviours along their production chains has been clearly recognised in the UN Guiding Principles in the context of the State duty to protect, which encourages 'States [to] promote respect for human rights by business enterprises with which they conduct commercial transactions'.³³ The new UN 2030 Agenda for Sustainable Development also reaffirms the connection.³⁴

In the last 10 years, different European countries' domestic procurement initiatives have gradually introduced specific provisions regarding contractors and subcontracts to ensure transparency and sustainability within GSCs³⁵ and to promote respect for human rights and decent working conditions.³⁶ For instance, the Netherlands' procurement regulation requires the tendering company to make 'reasonable efforts' to assess the social impacts and the risks in their supply chain.³⁷ Similarly, Sweden's county councils request that contract awardees have full knowledge of their supply chain.³⁸ Taking it one step further, Switzerland offers another interesting example for the enforcement of labour standards and decent working conditions in relation to goods and services procured from outside the Swiss territory.³⁹ Thanks to the Swiss Federal Ordinance on Public Procurement (OPP), adopted in 1995, Switzerland has implemented an extensive system of sustainable public procurement,⁴⁰ requiring the bidders and their subcontractors abroad, regardless where situated, to provide certifications to the Swiss authorities to prove their compliance with eight ILO core standards.⁴¹

²⁹Denis Audet, 'Government Procurement: A Synthesis Report' (2002) 2 OECD Journal on Budgeting, <<https://www.oecd.org/gov/budgeting/43506020.pdf>> accessed 20 September 2018.

³⁰Khi V Thai, 'Public Procurement Re-Examined' (2001) 1 Journal of Public Procurement 9.

³¹Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (World Bank Publications 2002).

³²Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' in Aurora Voiculescu and Tom Campbell and Doreen McBarnet (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (93rd–118th edn, Cambridge University Press 2006).

³³Principle 6 of the UN Guiding Principles and Commentary thereto.

³⁴In the context of Goal 12: 'Ensure sustainable consumption and production patterns', at 12.7 the 2030 Agenda openly encourages the promotion of 'public procurement practices that are sustainable, in accordance with national policies and priorities', Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

³⁵For an overview, see Stephen Brammer and Helen Walker, 'Sustainable Procurement in the Public Sector: An International Comparative Study' (2011) 31 International Journal of Operations & Production Management 452.

³⁶Martin-Ortega, Outhwaite and Rook (n 8), 341.

³⁷PIANOO, *Social Conditions in Global Supply Chains Explained*, <www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-conditions/social-conditions-global-supply-chains> accessed 20 September 2018.

³⁸Claire Methven O'Brien, Amol Mehra, and Nicole Vander Meulen, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, International Learning Hub on Public Procurement and Human Rights, 19 July 2016, <www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions> accessed 20 September 2018.

³⁹Marc Steiner, 'Is There a Swiss Approach towards Sustainable Public Procurement?' (2013) 1 European Procurement & Public Private Partnership Law Review 73.

⁴⁰The Swiss federal public procurement framework is composed by the Federal Act on Public Procurement of 15 December 1994 and the Ordinance on Public Procurement of 11 December 1995, <www.admin.ch/opc/de/classified-compilation/19940432/index.html> and <www.admin.ch/opc/de/classified-compilation/19950538/index.html> accessed 20 September 2018.

⁴¹According to the Swiss procurement system, the compliance with at least the eight ILO Core Conventions is required in the main parts of the bidders' supply chain. If production is to be abroad, the bidders and their subcontractors are required to provide certifications and other documents to the Swiss authorities proving the compliance with the ILO standards mentioned,

In addition, both at state and federal level, the US procurement regulation has been traditionally characterised by an extraterritorial reach of its social and environmental dimension.⁴² The Federal Acquisition Regulation (FAR) explicitly prohibits the procurement of goods produced by forced or indentured child labour,⁴³ which is implemented by the US Department of Labour through a ‘List of Products Requiring Contractor Certification as to Forced or Indentured Child Labour’.⁴⁴ Moreover, the US procurement regulation also monitors the ability of companies to perform due diligence on their subcontractors, even if located abroad, in relation to child labour and human trafficking.⁴⁵ Another interesting addition to existing US procurement regulation in relation to the transparency of supply chains is the Federal Funding Accountability and Transparency Act, which requires the Executive Branch to disclose contractors, subcontractors and the location of primary performance of the contracted work.⁴⁶

These governmental efforts to monitor and regulate the sustainability of production across GSCs necessarily imply the extension of territorial jurisdiction and its effects over legal persons, in our case subcontractors along CSCs, whose conduct takes place abroad. Thus, extraterritoriality⁴⁷ is becoming an essential dimension of modern procurement regulation efforts. This extraterritorial dimension of business and human rights regulations garnered particular attention during Ruggie’s work on the UN Guiding Principles, and several studies were commissioned during the drafting process. However, these studies, although they collected an abundant amount of material, were ultimately inconclusive in resolving the normative question of extraterritoriality.⁴⁸ Thus, the UN Guiding Principles themselves only included a rather weak compromise, stating ‘States are not generally required under international human rights law to regulate . . . extraterritorial activities . . . Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.’⁴⁹

The normative problem in relation to extraterritoriality stems from a strict interpretation of the principle of sovereign equality.⁵⁰ As a result, the imposition of duties and rights outside one’s own territory could result in a claim of undue interference in the domestic affairs of another state. For this analysis, Joanne Scott’s distinction between extraterritoriality and the less controversial form of ‘territorial

including the disclosure of information on subcontractors and third parties. The bidders are liable for the respect of minimum social conditions of third parties and will be subject to contractual sanctions if they violate those standards—While the Swiss Federal Recommendations ask for proportionality in the imposition of sanctions, they have zero tolerance for any violation of the ILO core labour standards.

⁴²David Drabkin and Khi V Thai, ‘US Federal Government Procurement: Structure, Process and Current Issues’ in Louise Knight and others (eds), *Public Procurement, International Cases and Commentary* (Routledge 2007).

⁴³Federal Acquisition Regulation, 48 C.F.R. 22.1503.

⁴⁴This is a list of products where there is a reasonable suspicion that they have been manufactured using child labour. During the procurement process, potential contractors have to certify that either they (a) will not sell a product on the list, or (b) they have made a good-faith effort to determine whether forced child labour was used. This in turn means that contractors have to perform extraterritorial due diligence on their subcontractors to ascertain that there was no child labour within their supply chain. This list includes, for instance, bricks from Afghanistan and toys from China, US Department of Labor, List of Products Produced by Forced or Indentured Child Labor <www.dol.gov/ilab/reports/child-labor/list-of-products/> accessed 20 September 2018.

⁴⁵In the US, this is defined as recruitment and other employment practices through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery – Federal Acquisition Regulation, 48 C.F.R. 22.1703.

⁴⁶Federal Funding Accountability and Transparency Act of 2006, s 2(b)(1)(D), Pub.L. 109–282, 120 Stat. 1186, 1187 (2006).

⁴⁷Extraterritoriality describes a concept connected to the jurisdiction of States under general international law, which is a different concept to that of jurisdiction in human rights treaties, although the two are often confused, see Marko Milanovic, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’ (2008) 8(3) Human Rights Law Review 411.

⁴⁸See Jennifer A Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas: A Report for the Harvard Corporate Social Responsibility Initiative to Help Inform the Mandate of the UNSG’s Special Representative on Business and Human Rights’ (Corporate Social Responsibility Initiative Working Paper No. 59, Harvard University, John F Kennedy School of Government 2010) <https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> accessed 20 September 2018; Olivier De Schutter, ‘Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations’ (2006) <<https://criidho.uclouvain.be/documents/Working.Papers/ExtraterrRep22.12.06.pdf>> accessed 20 September 2018.

⁴⁹Commentary to art 2 of the UN Guiding Principles.

⁵⁰Bernard H Oxman, ‘Jurisdiction of States’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007).

extension' seems particularly useful. If extraterritoriality is the application of a measure triggered by something beyond territorial connections with the regulating State,⁵¹ the term 'territorial extension' describes a regulatory measure that is rooted in a territorial connection, but which nonetheless takes into account conduct and circumstances abroad and thus may indirectly affect extraterritorial actors and situations.⁵² EU law has increasingly expanded the scope of various regulations beyond the limits of territorial jurisdiction using such 'territorial extension' in different areas from climate change, to maritime and air transport, to the regulation of financial services.⁵³ The EU's Due Diligence Regulation on the importation of timber and timber products⁵⁴ is probably the case that most clearly illustrates the concept of territorial extension applied to the management of GSCs. It requires EU traders who place timber products on the EU market to exercise due diligence along the supply chain and prohibits the placing on the market of illegally harvested timber. According to the EU Regulation, third-party verified schemes can be used when assessing the risks of illegality related to timber or derived products along the supply chain.⁵⁵ This particular regulation is a territorial extension because the prohibition to place certain goods into the common market is a territorial rule, but in exercising this rule, the regulation takes into account circumstances abroad, namely whether the timber was harvested contrary to local law.

Importantly for the purposes of this paper, the principle of territorial extension is also at work in the regulation of public procurement and, in particular, procurement regulations concerned with the transparency and the sustainability of GSCs. The decision to procure from a specific economic actor, which is the granting of a domestic economic benefit in the form of a public contract, is a territorial act. However, in making the decision, the procuring government agency takes into account the human rights and labour conditions of the supplying companies located abroad. The procurer is thus required to look outside the boundaries of territorial jurisdiction and take into consideration circumstances abroad at the firm level in a third country or along the production chain globally. The practice of territorial extension within sustainable public procurement regulations has the potential to induce change or shape the operation of the contractors and subcontractors providing services outside the jurisdiction of the procuring government's authority. As explored above, those territorial extensions, such as the system employed by Switzerland, frequently require that both contractors and subcontractors respect the ILO core Conventions and, in particular, the prohibition of child labour.⁵⁶

3.2. The use of private labels and certificates within public procurement regulations

Procurement regulations increasingly include mechanisms addressing sustainability and transparency in production chains, and support the enforcement of voluntary initiatives of CSR. In particular, strengthening the compliance of suppliers and subcontractors with private initiatives such as codes,

⁵¹A prime example in the area of business & human rights are litigations based on the U.S. Alien Tort Statute (ATS). Enacted by the first Congress in 1789, the statute provides U.S. federal district courts with jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Historically, this statute has been interpreted to cover any such violation (by foreign corporations), even if it has no connection with the territory of the United States and any offender may be hailed into U.S. court for such acts. It comes as no surprise, therefore, that the assertion of such wide-ranging jurisdiction has provoked angry reactions from the home States of offending corporations. Possibly as a result, the Supreme Court has significantly scaled back the extraterritoriality of the ATS; see *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013) and the Brief of the governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *amici curiae* in support of neither party, at 12, arguing against direct extraterritoriality in this case; more generally on the objections of Western governments against the ATS, see Uta Kohl, 'Corporate Human Rights Accountability: The Objections Of Western Governments to the Alien Tort Statute' (2014) 63(03) *International & Comparative Law Quarterly* 665.

⁵²Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 89–90.

⁵³In the area of climate change, see for instance: Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change*, EU:C:2011:864, paras 121ff.

⁵⁴Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L293/23 ('EU Timber Regulation').

⁵⁵EU Timber Regulation, art 4(1); see further, Scott (n 52) 98–9.

⁵⁶In this discussion, the ILO Labour Clauses (Public Contracts) Convention, 1949 (No. 94) becomes particularly relevant; see above, fn 29 and accompanying text.

labels, certifications and social standards along their chains of production has been identified as a potential tool to enhance transparency in governmental regulation.

The relationship between corporate responsibility and public procurement has been extensively developed over time in the EU regulatory framework on CSR. It was first formally recognised in the 2002 Communication of the European Union (EU) on CSR, which stated that ‘making access to . . . public procurement conditional on adherence to and compliance with the OECD Guidelines for Multinational Enterprises, while respecting EC international commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Development’.⁵⁷ Subsequently, the implementation of CSR principles in public procurement practices was further consolidated in the new EU strategy on CSR⁵⁸ and in the EU Commission’s ‘Action Agenda for the period 2011–2014’ which explicitly recognised public procurement as a valuable policy instrument ‘enhancing market reward for CSR’.⁵⁹

In particular, private initiatives such as certifications, labels and social standards have acquired the increasingly important role of raising awareness of and promoting compliance with social and environmental considerations among multinational enterprises and across States.⁶⁰ Labels and certifications ensure that the production of the procured products and services complies with social and ethical criteria, often offering the additional guarantee of third-party certifications.⁶¹ These standards, labels and certifications are also often applied throughout a corporate network in the sense that the individual affiliates of a corporate group are also obliged to follow them.⁶² This way, the standards also necessarily entail extraterritorial effects as the individual affiliates may be well spread out globally.

The main advantage of using certifications and standards in the context of the social use of procurement for the enforcement of human and labour rights is based on their essential function of information sharing.⁶³ Certifications and labels exchange valuable information about the sustainability of the procured goods and services between the various actors involved in the production and supply – procuring authorities, contractors and subcontractors. In practice, they facilitate communication exchange along the global supply chain associated with the award of a public contract across different countries.⁶⁴ Moreover, certifications and standards are also flexible instruments, as they may be incorporated at different stages during the procurement process. They can be included, for instance, at the beginning of the procurement cycle in the product’s technical specifications, in connection to award criteria during the selection of the supplier, and in association with contract clauses after the winning bidder has been selected.⁶⁵ Finally, these private initiatives reduce the regulatory burden and the costs for the

⁵⁷European Commission, *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, 2 July 2002, COM (2002) 347 final, 29. For further reading, Reinhard Steurer et al., ‘Sustainable Public Procurement in EU Member States: Overview of Government Initiatives and Selected Cases. Final Report to the EU High-Level Group on CSR’ [2007] European Commission, Brussels <www.sustainability.at/pdf/csr/policies/Sustainable%20Public%20Procurement%20in%20EU%20Member%20States_Final%20Report.pdf> accessed 20 September 2018.

⁵⁸European Commission, *A Renewed EU Strategy 2011–2014 for Corporate Social Responsibility*, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee of the Regions COM (2011) 681 final.

⁵⁹*ibid.*, 10.

⁶⁰For a more comprehensive analysis, see Nils Brunsson and Bengt Jacobsson, *A World of Standards* (Oxford University Press 2002).

⁶¹Abby Semple, ‘The Role of Environmental and Social Labels in Procurement’, *Public Procurement Analysis* (March 2012) <<https://www.procurementanalysis.eu/app/download/5804183001/Environmental%2Band%2Bsocial%2Blabels%2Bin%2Bprocurement.pdf>> 20 September 2018.

⁶²For example, Apple joined the Fair Labor Association and allowed the association to assess Foxconn’s compliance with the Fair Labor Association Workplace Code. Foxconn is one of Apple’s biggest suppliers. See on this point: Justine Nolan, ‘From Principles to Practice: Implementing Corporate Responsibility for Human Rights’ in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015) 397.

⁶³Janelle Diller, ‘A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives’ (1999) 138 *International Labour Review* 99.

⁶⁴Maria Anna Corvaglia, ‘Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement’ (2016) 19 *Journal International Economic Law* 607.

⁶⁵Roberto Caranta, ‘Labels as Enablers of Sustainable Public Procurement’ in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015).

public authorities tasked with monitoring and verifying predefined sustainable standards among various competing subcontractors and across different jurisdictions.⁶⁶

4. The 2014 EU regulation of public procurement, the use of certifications along global supply chains and its extraterritorial implications

Since 2014, when the reform of the EU Procurement Directives was finalised, those directives have been described as a far-reaching instrument of public procurement regulation, opening up various opportunities for the achievement of social and labour policies in public procurement.⁶⁷ Even if there is some criticism about the discretionary nature of many of the new provisions,⁶⁸ it is undeniable that Directive 2014/24/EU pays considerably more attention to the protection of human and labour rights than previous procurement regulations, particularly with regard to GSC governance.⁶⁹ Moreover, building on the results achieved in the evolution of the Court of Justice of the EU (CJEU) jurisprudence and on best practices in some countries (as previously explored), the 2014 Directive establishes a more coherent regulatory framework compared to the previous procurement directives, harmonising the inclusion of labour standards and human rights conditionality inside procurement practices across the entire EU. In light of the increased regulatory attention to the use of procurement for social purposes and GSCs, Directive 2014/24 has achieved four significant improvements.

First, compared to the previous EU procurement regulatory framework, Directive 2014/24/EU provides more guidance and clarity regarding the use of public procurement for the protection of social and labour rights.⁷⁰ In Directive 2014/24/EU, the importance given to the proactive use of procurement to achieve social policies is significantly increased and it is assimilated to the use of public procurement to achieve environmental objectives, traditionally more prominent in domestic and international procurement regulations.⁷¹ This is particularly significant when compared to other international instruments of procurement regulation, in particular the WTO Agreement on Government Procurement (GPA) that only refers to environmental considerations in technical specifications and award criteria.

Second, the protection of fundamental labour rights included in domestic and EU regulations, international standards or collective agreements has officially become an objective of the entire regulation of public procurement in Directive 2014/24/EU. This is explicitly recognised in Article 18(2)⁷² and consolidated in the list of international agreements in Annex X of the Directive.⁷³ Moreover, Directive

⁶⁶Pamela K Robinson, 'Do Voluntary Labour Initiatives Make a Difference for the Conditions of Workers in Global Supply Chains?' (2010) 52 *Journal of Industrial Relations* 562.

⁶⁷For a more comprehensive analysis, see Sue Arrowsmith and Peter Kunzlik, 'EC Regulation of Public Procurement' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) 55; Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing 2010).

⁶⁸Anja Wiesbrock, 'Socially Responsible Public Procurement. European Value or National Choice?' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016) 75.

⁶⁹Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015) 163–4.

⁷⁰Sue Arrowsmith and Peter Kunzlik, 'Public Procurement and Horizontal Policies in EC Law: General Principles' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press 2009) 21.

⁷¹In the 2004 Directives and in the CJEU jurisprudence, the achievement of environmental purposes traditionally received considerably more attention when compared to the social dimension of public procurement. Following the holistic approach adopted in the Europe 2020 strategy to achieve sustainable growth balancing economic, environmental and social aspects, the new procurement Directive does not substantially differentiate between the regulatory solutions to balance economic efficiency with the objectives of environmental protection or social development. Both environmental and social considerations appear to be treated equally and are often addressed together in the wording of Directive 2014/24/EU. Beate Sjøfjell and Anja Wiesbrock, 'Why Should Public Procurement Be About Sustainability?' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2016).

⁷²Directive 2014/24/EU, art 18(2) requires that 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'

⁷³The ILO Conventions expressly listed in Annex X of Directive 2014/24/EU are: ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining;

2014/24 considerably broadens the spectrum of social and labour policies that could legitimately be achieved in procurement practices. Directive 2014/24 recognises the possibility of using public procurement to achieve both social and individual justice.⁷⁴ On the one hand, as clarified in recital 37, Directive 2014/24 aims to guarantee non-discrimination in the workplace and the respect of individual working rights (reflected in the various ILO conventions listed in Annex X). On the other hand, Directive 2014/24, as stressed in Article 20, also includes broader considerations of social justice and social inclusion, such as supporting the integration of disadvantaged communities or minority groups.

Third, the Directive pays more attention to the importance of enforcement of social and labour considerations along the entire production and supply chain.⁷⁵ Thus, the Directive extends the scope of its regulation and compliance not only to the main suppliers, but also to their subcontractors, regardless where they are situated, even if they are located outside the jurisdiction of the procuring country. In particular, Article 71 of the Directive requires EU Member States to make all necessary efforts to ensure respect for the environmental, social and labour obligations referred in Article 18(2).⁷⁶

Finally, the Directive pays specific attention to labels and certifications⁷⁷ in the granting of the procurement awards. The 2014 Directive builds upon the conclusions reached in the *Max Havelaar* case on the possibility of using labels and certifications, which are frequently adopted in the procurement process as proof of compliance with sustainability criteria along the associated production chain.⁷⁸ In the *Max Havelaar* judgment, when interpreting the text of the previous public procurement Directive 2004/18/EC, the CJEU introduced the possibility of referring to labels in technical specifications, on the condition that 'equivalent' labels would be accepted in the award process in order to limit excessive or unjustifiable restrictions on competition for public contracts.⁷⁹

Moreover, Directive 2014/24/EU further clarifies the use of labels. According to Article 43 of the Directive, labels are allowed through the entire procurement cycle. The possibility of introducing labels and certifications is not limited to technical specifications at the beginning of the procurement process, but is also extended to other steps, such as award criteria and performance conditions, that require and allow for proof of compliance.⁸⁰ Article 43 allows a 'specific label as means of proof that the works, services or supplies correspond to the required characteristics' in case the 'contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics'. The Directive therefore permits direct reference to a specific label, subject to a number of requirements.⁸¹ Article 43 sets specific conditions to guarantee the non-discriminatory use of labels⁸² and according to Article 43(2), the requirements specified on the labels must be linked to the subject matter.

ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour.

⁷⁴Maria Anna Corvaglia (n 25) 174–80.

⁷⁵Recital 105: 'it is important that observance by subcontractors of applicable obligations in the fields of environmental, social and labour law . . . provided that such rules, and their application, comply with Union law, be ensured through appropriate actions.'

⁷⁶Directive 2014/24/EU, art 71, states that: '1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit. 2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors'.

⁷⁷arts 2(1)(23) and 2(1)(24) provide the basic working definitions of labels and label requirements, and art 43 represents the main provision of Directive 2014/24/EU entirely dedicated to the inclusion of labels.

⁷⁸The CJEU, focusing on the interpretation of Directive 2004/18/EC, art 23(6), allowed the possibility of using the detailed specifications of eco-labels in technical specifications, on the condition that 'equivalent' labels would be accepted in the award process. Directive 2014/24/EU pushed forward the regulation of the use of labels in the context of sustainable public procurement. Case C-368/10 *Commission v Kingdom of the Netherlands* ('Max Havelaar') EU:C:2012:284, Judgment of 10 May 2012.

⁷⁹Roberto Caranta, 'Labels as Enablers of Sustainable Public Procurement', *Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder* (Cambridge University Press 2015).

⁸⁰Bogdana Neamtu and Dacian C Dragos, 'Sustainable Public Procurement: The Use of Eco-Labels' (2015) 10 *European Procurement & Public Private Partnership Law Review* 92.

⁸¹Abby Semple and Mark Cook, *A Practical Guide to Public Procurement* (Oxford University Press 2015) 4.29.

⁸²Labels should be based on verifiable criteria and established through an open and transparent procedure including all the relevant stakeholders, and the information should be available to all interested parties.

These specific provisions on subcontractors and labels considerably expand the possibility of enforcing human rights and core labour standards extraterritorially in the production chain associated with the procurement contract. In particular, the use of labels, which facilitate the exchange of information in relation to the behaviour of contractors and subcontractors wherever they are located, enriches the scope of procurement regulations and makes it possible to monitor and protect human rights and labour standards outside the jurisdiction of the procuring country.

However, while the procurement regulation of Directive 2014/24/EU made considerable attempts to ensure the respect of human and labour rights along GSCs, it remains undeniable that the requirements to respect specific labour conditions in the procurement process may imply some forms of direct or indirect discrimination between suppliers. This was argued in the latest *RegioPost* judgment⁸³ and in previous CJEU cases,⁸⁴ where the imposition of social criteria by national procurement authorities was discussed as a form of distortion of the fundamental freedoms in the EU internal market. The implicit risk of distortion and discrimination, grounded on the social use of procurement practices, represents the major concern of compatibility under the WTO law. The following section explores the compatibility of the social use of public procurement in the form of Directive 2014/24/EU with the broader WTO framework.

5. Global supply chains regulations and the concerns under the WTO regulatory framework: The special case of the GPA

Even though widely practised, the use of public procurement to achieve social objectives and its WTO compatibility have attracted little attention; so far, the literature has focused more on the environmental dimension of procurement.⁸⁵ Moreover, only one dispute in the vast WTO jurisprudence has dealt with the issue of selective public procurement practices with extraterritorial effects grounded on human rights concerns. The establishment of a Panel was requested only once⁸⁶ in a dispute related to a ban imposed by the procurement legislation of Massachusetts on public contracts with Myanmar (Burma) based on the violation of human rights committed in Myanmar.⁸⁷ However, the matter was eventually settled based on a decision of the US Supreme Court before any Panel Report could address the aspect of human rights conditionality or its controversial extraterritorial effects.

In the absence of any relevant WTO jurisprudence on the social use of public procurement, there are three main concerns that the use of public procurement to enforce social and labour concerns along the GSCs raises from a theoretical perspective. These concerns are the following: (1) the compatibility of the use of public procurement to enforce human rights and labour standards with the WTO GPA, (2) the legality of the extraterritorial effects that these regulations entail, and (3) the possibility of including private initiatives such as labels and certification inside governmental procurement measures to monitor GSCs.

5.1. The compatibility of the extraterritorial use of procurement to achieve social objectives under the WTO GPA

The core of the controversy on the legality of the use of public procurement to achieve social objectives under WTO law turns on the discriminatory effects caused by the inclusion of human rights and labour standards within the procurement process. The main regulatory objective of the GPA is to guarantee respect for the principle of non-discrimination in procurement practices covered by the threshold and

⁸³*RegioPost*, Case C-115/14, EU:C:2015:760, Judgment of 17 November 2015.

⁸⁴The use of minimum wage requirements in public procurement has previously been at the centre of the *Rüffert* and *Bundesdruckerei* cases, namely *Rüffert*, Case C-346/06, EU:C:2008:189, Judgment of 3 April 2008, and *Bundesdruckerei*, Case C-549/13, EU:C:2014:2235, Judgment of 18 September 2014. See Catherine Barnard, 'Using Procurement Law to Enforce Labour Standards' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 268.

⁸⁵Cristine Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 121.

⁸⁶United States – Measure Affecting Government Procurement – Request for Establishment of a Panel by the European Communities, WT/DS88/3, 9 1998.

⁸⁷Christopher McCrudden, 'International Economic Law and Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Law under the WTO Government Procurement Agreement' (1999) 3 *Journal of International Economic Law* 3.

by the Schedule of Commitments agreed between the GPA Signatory Parties.⁸⁸ On the basis of the new text of the GPA as revised in 2011,⁸⁹ procurement practices for purposes other than economic efficiency (in particular, to enforce social and environmental objectives) are in compliance with WTO regulation only under specific circumstances: (1) if these procurement practices are in compliance *de jure* or *de facto* with the principle of non-discrimination; (2) if discriminatory, that these practices are covered by the derogations to the GPA included in the parties' schedule of commitments; and (3) if discriminatory, and included in the scope of application of the agreement, that these practices can be justified under the exceptions of Article III of the GPA Revised Text.⁹⁰

Article IV:1 of the Revised GPA ensures the prohibition of discrimination, as each GPA party must provide 'treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers'.⁹¹ In the GPA, the standard by which the obligation of non-discrimination is measured includes both *de jure* and *de facto* forms of discriminatory procurement practices and the interpretation of 'treatment no less favourable' seems to acquire substantially broader connotations in the context of public procurement compared to other WTO agreements.⁹² The conditionality on human and labour rights imposed in the procurement process has the potential to result in *de facto* discriminations among the different competing suppliers based on their country of origin.⁹³ More precisely, the conditionality regarding respect for specific human or labour rights may entail *de facto* discriminatory effects if the requirements for participation in the public tendering process are drafted in a way that is more accessible for national suppliers than it is for non-domestic suppliers.⁹⁴

Two aspects of Article IV GPA seem to suggest a broader and less rigid interpretation of the national treatment provision in the context of public procurement, an interpretation that is more lenient to the acceptance of the social use of public procurement.⁹⁵ First, the wording of Article IV of the GPA does not refer to the issue of likeness and, second, the GPA imposes detailed regulations and transparency requirements, which provide for the implementation of the principle of non-discrimination along the different stages of the procurement process. The GPA regulation of the procedural aspects of the procurement process does allow additional margins of flexibility in the enforcement of considerations other than the maximisation of efficiency.⁹⁶ Even if there is no specific mention of social policies or labour rights, the new wording of the GPA allows the introduction of environmental aspects into technical

⁸⁸Rolf H Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 Public Procurement Law Review 184.

⁸⁹Arie Reich, 'The New Text of the Agreement on Government Procurement' (2009) 12 Journal of International Economic Law 989.

⁹⁰For a more extensive analysis, see Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011).

⁹¹According to art IV:1(b), GPA parties must also accord 'treatment no less favourable' to 'goods, services and suppliers of any other Party', thus guaranteeing that the regulatory treatment remains the same among the GPA signatory parties. Arwel Davies, 'The National Treatment and Exception Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies' in Sue Arrowsmith and Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 437.

⁹²Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law. Text, Materials and Commentary* (2nd edn, Hart Publishing 2012) 697–70.

⁹³Matthew Schaefer, 'Government Procurement Disputes: Lessons from the Dispute Over Massachusetts 1996 Act Regulating State Contracts with Companies Doing Business with Burma (Myanmar)' in Mark A Pollack and Ernst-Ulrich Petersmann (eds), *Transatlantic Economic Disputes. The EU, the US, and the WTO* (Oxford University Press 2004) 327.

⁹⁴Arwel Davies, 'The National Treatment and Exception Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies' in Arrowsmith and Anderson (eds) *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 433.

⁹⁵Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to Procedural Rules and Other Transparency Provisions' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011).

⁹⁶Robert Anderson and Sue Arrowsmith, 'The WTO Regime on Government Procurement: Past, Present and Future' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 47.

specifications and award criteria.⁹⁷ Moreover, the Revised GPA does not impose strict restrictions on the application and the methods of evaluation of the award criteria. For these reasons, apart from the respect of the specific transparency requirements, nothing in the GPA seems to suggest other major limitations on the inclusion of social and labour concerns in the award criteria and in their evaluation process.

Even if it results in discrimination, the social use of public procurement could still be compliant if it is justified under the general exceptions of Article III of the Revised GPA or if the procurement is excluded by the GPA coverage in the Parties' schedules of commitments. Within the context of the GPA general exceptions, the justification for the inclusion of social and labour considerations in procurement practices may be problematic. Two subparagraphs of the general exceptions under Article III:2 GPA could possibly be invoked even without a clear reference to labour and human rights, namely subparagraphs (a) and (d).⁹⁸ However, interpretative uncertainties – first, with regard to the legal definition of the grounds of exception and second with regard to the interpretation of the standard of necessity and appropriateness in this specific procurement context – make it difficult to justify discriminatory procurement practices that aim to achieve social and labour purposes. These difficulties led to the preference of the GPA Signatory Parties to exclude these practices from the GPA's coverage rather than trying to justify them, a pattern also supported by the negotiating history of the 1994 GPA.⁹⁹

Another possible objection within the WTO framework concerns the extraterritorial aspects of these social regulatory efforts. Though extraterritoriality in relation to the GPA has never been clarified in the WTO jurisprudence, some conclusions in relation to the General Agreement on Tariffs and Trade (GATT) may shed light on the issue. While in *Turtle/Shrimp*, the Appellate Body explicitly refrained from providing a clear answer on issues of extraterritoriality, it seemed to accept the consideration of extraterritorial circumstances in *EC – Seal*.¹⁰⁰ It is true that the Appellate Body in the *Seal* case struck down some parts of the EC Regulation for non-compliance with the Chapeau of Article XX GATT.¹⁰¹ However, unlike in *Turtle/Shrimp*, it accepted the extraterritorial implications of the regulation without further mentioning it. Thus, extraterritoriality does not seem to be a concern within the WTO framework.¹⁰²

5.2. The use of private mechanisms of GSC transparency under the WTO framework

The importance of private initiatives and CSR measures that attempt to regulate global supply chains, combined with the emerging dynamics of informal law-making, is rapidly becoming more important in the WTO multilateral trade architecture.¹⁰³ For this reason, significant doubts about their accountability and legitimacy under WTO law are raised.¹⁰⁴ What appears to be particularly problematic is to what extent the use of private initiatives, such as labels or certifications, is subject to WTO rules and the extent to which these forms of CSR regulation may lead to potential discrimination between the goods and services

⁹⁷For a more articulated analysis on the environmental use of procurement under the WTO, see Geert Van Calster, 'Green Procurement and the WTO – Shades of Grey' (2003) 11 *Review of European Community & International Environmental Law* 289.

⁹⁸Para (d) art III:2 GPA directly mentions procurement practices related to 'goods or services of persons with disabilities, philanthropic institutions or prison labour' and para (a) of art III:2 includes 'public morals, order or safety' in the scope of the GPA general exceptions.

⁹⁹McCrudden (n 24), 205.

¹⁰⁰In this case, the EC prohibited the importation of seal products unless the seals were hunted as a by-product of sustainable management of marine resources programmes or were hunted by certain indigenous communities. *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, 96–100. Robert Howse, Joanna Langille and Katie Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products' (2015) 48 *George Washington International Law Review*.

¹⁰¹For a broader analysis of the Chapeau of art XX, see Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 *The American Journal of International Law* 95.

¹⁰²For a more comprehensive analysis, see Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) *Journal of World Trade* 353.

¹⁰³Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties' (2014) 17 *Journal of International Economic Law* 739–51.

¹⁰⁴Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 *Journal of Law and Society* 163–88.

involved.¹⁰⁵ As confirmed in the context of the GATT and Agreement on Technical Barriers to Trade (TBT),¹⁰⁶ the use of social labelling schemes and certifications in public procurement cannot derogate from the application of the general principles of most favoured nation (MFN) and national treatment.¹⁰⁷ The reference to these private verification mechanisms of due diligence along the supply chain may not translate into a different treatment based on the origin of the products and services in violation of Article III GPA.¹⁰⁸

Together with the general principle of non-discrimination, it is worth noticing that the wording of Article X in the Revised GPA offers precise indications to the contracting authorities to avoid negative effects on competition. When regulating technical specifications and the possibility of including labels in them, according to Article X:3, ‘a procuring entity should indicate, where appropriate, that it will consider tenders of equivalent goods or services that demonstrably fulfil the requirements of the procurement by including words such as “or equivalent” in the tender documentation’.

Parallel to the conclusions of the CJEU in its judgment of 10 May 2012 in the *Max Havelaar* case,¹⁰⁹ the reference to equivalent specification as provided for by labels and certifications guarantees the openness of the competition for the adjudication of the public contract by the contracting authorities. However, paragraph 3 of Article X GPA was not included in the previous regulation of technical specifications under the 1994 GPA and has never been interpreted by the WTO Dispute Settlement System. For this reason, the margin of application and interpretation of this specific aspect is still very uncertain in both the literature and practice.¹¹⁰ Some guidance in relation to the requirement of ‘equivalence’, which may also be relevant for the GPA, may be inferred from the Appellate Body’s interpretation of Article XX GATT. After striking down the initial US regulation in *Turtle/Shrimp* for a violation of the Chapeau, the Appellate Body accepted a subsequent change to the regulation, which only required foreign regulatory programmes to be ‘comparable in effectiveness’ and that also allowed the US to take into account the specific conditions prevailing in the importing country.¹¹¹ It seems that this notion of granting flexibility by allowing programmes of ‘comparable in effectiveness’ was the critical aspect in the jurisprudence of the Appellate Body. It may also play a role in the GPA framework in relation to the use of private labels and certifications.

6. Preliminary conclusions and policy implications

International regulatory efforts to guarantee protection of human and labour rights are often weak in commitment and only provide limited enforcement. Moreover, private self-regulation alone monitoring the conduct of multinational enterprises cannot fully ensure the respect for human rights and labour standards. Using the synergy between the different layers of regulations in relation to the protection of human and labour rights and establishing more effective approaches thus becomes a priority in the context of the fragmentation of GSCs. Using public procurement regulation to manage and monitor GSCs is therefore

¹⁰⁵On another note, the use of private regulatory initiatives has been frequently criticised because of the lack of transparency in their formulation: environmental and social private standards have often been defined as disguised forms of discrimination, favouring national products and providers that comply with nationally established private codes of conduct against goods and services from developing countries. Manoj Joshi, ‘Are Eco-Labels Consistent with World Trade Organization Agreements?’ (2004) 38 *Journal of World Trade* 69. Prema-Chandra Athukorala and Sisira Jayasuriya, ‘Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective’ (2003) 26 *The World Economy* 1395; Spencer Henson and John Humphrey, ‘Understanding the Complexities of Private Standards in Global Agri-Food Chains as They Impact Developing Countries’ (2010) 46 *The Journal of Development Studies* 1628.

¹⁰⁶Jasper Stein, ‘The Legal Status of Eco-Labels and Product and Process Methods in the World Trade Organization’ (2009) 1 *American Journal of Economics and Business Administration* 285; Sue Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International 2003) 160–3.

¹⁰⁷Carlos Lopez-Hurtado, ‘Social Labelling and WTO Law’ (2002) 5 *Journal of International Economic Law* 719.

¹⁰⁸For a more extensive discussion, see Corvaglia (n 25).

¹⁰⁹Case C-368/10 *Commission v Kingdom of the Netherlands* (‘Max Havelaar’) EU:C:2012:284.

¹¹⁰Anderson and Arrowsmith (n 90) 22.

¹¹¹The Appellate body initially regarded the U.S. measures, which required other countries to adopt ‘essentially the same’ regulations as a condition for import, as unjustifiable under the Chapeau of art XX GATT. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* – Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 43–50.

high on the agenda for national legislation and is also gradually emerging in international instruments of procurement regulation.

This paper identified two specific characteristics of this new dimension of public procurement regulation: its extraterritorial effects on companies and firms across different jurisdictions and its reliance on private certifications and labels. While both aspects have played some role in public procurement for some time now, the growing complexity of GSCs has increased their prominence in contemporary regulation. As to extraterritoriality, this analysis has shown that such procurement regulations may be defined as territorial extensions, which, although they have a direct influence on the behaviour of firms across national jurisdictions, are generally compatible with principles of jurisdiction under international law. In relation to the use of labels and certifications, the paper concluded that they provide an effective mechanism of information sharing and reduce the burden of procuring agencies. Public procurement is thus becoming a hybrid, complex but efficient instrument to ensure socially responsible practices along the lengthening and increasingly fragmented production and supply chain.¹¹²

Both of these new aspects are evident within the new 2014 EU procurement framework, which includes a number of far-reaching regulatory features that facilitate the monitoring of the respect for human rights and labour standards of contractors and subcontractors across borders. Articles 71 and 18(2) of the Directive require all EU Member States to make all necessary efforts to ensure respect for the environmental, social and labour obligations, even along global GSCs. On the other hand, Article 43 allows for the broad use of private labels and certifications as means of proof of compliance, in line with the CJEU jurisprudence in *Max Havelaar*.

Finally, this paper argued the compatibility of these new forms of procurement measures with the text of the 2011 Revised GPA. The lenient interpretation of the concept of non-discrimination as applied to government procurement and the specific regulation of the different stages of the procurement process under the GPA offer additional flexibility that allows for the inclusion of social and labour considerations, as well as private labels and certifications.

Declarations and conflict of interests

This work builds upon the previous work already published in Maria Anna Corvaglia, 'Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement' (2016) 19 *Journal International Economic Law* and in Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart Publications, 2017).

¹¹²Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study* (World Bank 2002) <<http://pubs.iied.org/pdfs/16017IIED.pdf>> accessed 20 September 2018.