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**Public Procurement and Private Standards:  
Ensuring Sustainability Under the WTO Agreement on Government  
Procurement**

MARIA ANNA CORVAGLIA\*

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\* Post Doctoral Research Fellow, Durham Law School, email [m.a.corvaglia@durham.ac.uk](mailto:m.a.corvaglia@durham.ac.uk). The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP/2007-2013) – ERC Grant Agreement no. 312304. I wish to thank Professor John Linarelli for his very insightful comments and the unanimous reviewers for their constructive feedback on an early draft of this paper.

## I. Introduction

Given the globalisation of the supply chain, the effective implementation of clear and sustainable objectives in trade practices has become a priority. Yet private consumers and governmental authorities remain considerably less assured regarding the social impact of the production and delivery of the goods and services they purchase.<sup>1</sup> If everyday consumer preferences, at the level of the individual, are shaped by the information provided by labels and certifications, the use of private standards by central and local authorities in their public purchasing activities, despite its significant advantages, also appears to be more complex and controversial.

Sustainable standards and labels, associated with public awards, help to monitor and certify the labour and environmental conditions of the production processes, strengthening both the credibility and accountability of the domestic public procurement system. Moreover, the integration of transnational private initiatives, such as certifications and codes of conduct, offers undeniable opportunities in terms of cost reductions in the management of the supply chain.<sup>2</sup> However, private standards embedded within the selection processes for the award of public contracts have the potential to distort international competition and undermine the best use of taxpayers' money.<sup>3</sup> In particular, governmental bodies' use of these private initiatives in public procurement practices may raise considerable doubts about the compliance of these practices with the application of the principles of non-discrimination at the international level.

It is against this backdrop that this paper intervenes. The purpose herein is to analyse how the WTO international legal framework of public procurement might integrate with private business initiatives of ethical supply management. International legal scholars have thus far explored the WTO framework's relation to private regulatory regimes only in terms of them being technical barriers to trade, or embedded within regulatory initiatives of consumer health protection. However, the ways in which the regulatory framework of the private regulations is incorporated in the purchasing actions of public authorities under the WTO plurilateral initiatives on government procurement remains fully unexplored.

Building on the results of research into the inclusion of horizontal objectives at different stages of the procurement process,<sup>4</sup> this paper broadens the research agenda by including in its analysis the public procurement of transnational private regulation and verification schemes of suppliers' production chains. The WTO Agreement on Government Procurement (GPA) – the main international regulatory instrument that aims at ensuring the compliance of transnational procurement practice with the principle of non-discrimination – is the main reference of the paper's legal analysis.

The originality of this paper's contribution to the academic discussion on transnational business regulation is twofold. Firstly, the discussion herein pushes on the debate on the WTO framework of standards and private initiatives beyond the context of the WTO Agreement on

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<sup>1</sup> Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2006) 93–118.

<sup>2</sup> Helen L. Walker, Lucio Di Sisto and Darian McBain, 'Drivers and Barriers to Environmental Supply Chain Management Practices: Lessons from the Public and Private Sectors', 14 *Journal of Purchasing and Supply Management* 69 (2008).

<sup>3</sup> Lutz Preuss, 'Addressing Sustainable Development through Public Procurement: The Case of Local Government', 14 *Supply Chain Management: An International Journal* 213 (2009).

<sup>4</sup> Sue Arrowsmith, 'A Taxonomy of Horizontal Policies in Public Procurement', in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: Cambridge University Press, 2009) 108–46.

Technical Barriers to Trade (TBT Agreement) and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), exploring the implications of these business practices under the GPA. Secondly, the paper aims at expanding the research on the inclusion of non-economic objectives in public procurement, integrating a comparative analysis with the study of concrete private mechanisms of monitoring and enforcement of environmental and labour criteria along the supply chain.

This paper explores the use of private standards and codes of conduct in the context of public procurement regulations, explaining the political benefit of and legal justifications for their increasing use. It enters into the discussion of the fundamental legal implications associated with the use of these business practices, providing an overview of the main legal challenges that these initiatives pose to the WTO regulatory framework in general and to the WTO regulation of public procurement more specifically. The paper then analyses the compliance of these private initiatives with the plurilateral regulation offered by the GPA, and the particular interpretative approach that the principle of non-discrimination assumes in the context of the GPA. Finally, assuming the inclusion of these private initiatives can be reconciled with the principle of non-discrimination set in the GPA, and with the positive commitments of transparency and fairness required at different stages of the procurement process, the paper will conclude with some considerations regarding policy implementation.

## **II. The Rise of Transnational Private Regulations (TPRs) and Their Incorporation Into Public Procurement**

The progressive integration of ethical and environmental objectives in transnational business operations,<sup>5</sup> the challenges associated with the fragmentation of the globalised supply chain,<sup>6</sup> and the increased demand for private actors to take responsibility for the management of their supply chain,<sup>7</sup> have resulted in significant changes in international trade practices. Scholars in the fields of international relations and business management have theorised about the emergence of non-state mechanisms of market regulations, often encompassed in the definition of ‘transnational private regulations’ (TPRs).<sup>8</sup> As a result, a growing volume of international trade is associated with businesses’ voluntary mechanisms, and the use of private codes and standards has serious trade implications: at the same time it represents both a trade barrier and a trade enhancer in the globalisation of the supply chain.<sup>9</sup>

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<sup>5</sup> Tim Bartley, ‘Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions’, 113 *American Journal of Sociology* 297 (2007).

<sup>6</sup> John Gerard Ruggie, ‘Global Markets and Global Governance: The Prospects for Convergence’, in Steven Bernstein and Louis Pauly (eds), *Global Liberalism and Political Order: Toward a New Grand Compromise?* (Albany, NY: SUNY Press, 2007) 23–48.

<sup>7</sup> Benjamin Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority’, 15 *Governance* 503 (2002).

<sup>8</sup> Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’, 38 *Journal of Law and Society* 20 (2011). These business regulatory mechanisms have also been labelled differently, for example as ‘non-state market driven’ governance systems. See Cashore, above n 7. The broad categorisation of civil regulation has been also frequently used. David Vogel, ‘Private Global Business Regulation’, 11 *Annual Review of Political Science* 261 (2008).

<sup>9</sup> Gabriela Alvarez and Oliver Von Hagen, ‘When Do Private Standards Work? Literature Review Series on the Impacts of Private Standards; Part IV’, International Trade Centre, [http://www.intracen.org/uploadedFiles/intracenorg/Content/Policy\\_Makers/Articles/When%20do%20Private%20Standards%20Work%20-%20Part%20IV%20for%20web.pdf](http://www.intracen.org/uploadedFiles/intracenorg/Content/Policy_Makers/Articles/When%20do%20Private%20Standards%20Work%20-%20Part%20IV%20for%20web.pdf) 2012.

The modern evolution of public procurement fully reflects these emerging international business dynamics. The strategic use of public procurement for promoting social and environmental goals has a long history,<sup>10</sup> founded on its economic relevance in terms of governmental spending in the market, as a significant fraction of GDP.<sup>11</sup> However, the trends in privatising the delivery of public services beginning in the 1980s and 1990s, combined with the emergence of more collaborative forms of procurement processes together with private actors, introduced a new dimension in the strategic use of public procurement for social and environmental purposes.

The phrase ‘sustainable public procurement’ has been drawn upon to describe this emerging trend. This broad term embraces not only procurement practices with a strong environmental focus, but also more ethical initiatives of socially responsible public procurement.<sup>12</sup> Under the definition of sustainable procurement, a great variety of socio-economic issues have been wrapped into the procurement decisions of many developed countries, particularly in Europe – the demands, for instance, for goods to be produced using sustainable timber, to respecting environmental standards in the construction of public buildings, to guaranteeing safe working conditions (as with uniforms for government officials being manufactured in child-labour-free conditions), to mention just a few common examples.<sup>13</sup> In the context of sustainable public procurement, governmental procurement authorities rely more and more on private standards, certifications and other TPRs in their procurement policies at local, national and regional levels of governance. The requirement to purchase certified fair trade products is one of the growing practices of ethical sourcing in public awards, demonstrating a more ethical and sustainable approach to public purchasing.<sup>14</sup>

Before turning to the international legal implications of this phenomenon, it is important to explore the political, economic and legal motives behind the growing inclusion of TPRs in sustainable procurement practices, particularly among developed and European countries.

#### **A. The Use of TPRs in Public Procurement Practices: Legal and Political Justifications**

In the context of the progressive globalisation and fragmentation of production and the supply chain, the challenges associated with achieving environmental and social policy objectives in the award of public contracts are not only legal in nature. For this reason, the choice of

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<sup>10</sup> From the EU to the United States, Canada or South Africa, procurement practices are also driven by the political determination to protect the environment, to enforce the respecting of decent labour conditions, to ensure compliance with human rights or to alleviate structural discrimination based on race and gender. For the most comprehensive overview on the instrumental use of public procurement for social purposes, see Christopher, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford: Oxford University Press, 2007).

<sup>11</sup> OECD, ‘The Size of Government Procurement Markets’, 1 OECD Journal on Budgeting, <http://www.oecd.org/newsroom/archives/1845927.pdf> 2002.

<sup>12</sup> Reinhard Steurer, Gerald Berger, Astrid Konrad and Andre Martinuzzi, ‘Sustainable Public Procurement in EU Member States: Overview of Government Initiatives and Selected Cases’, Research Institute for Managing Sustainability, [http://www.sustainability.eu/pdf/csr/policies/Sustainable%20Public%20Procurement%20in%20EU%20Member%20States\\_Final%20Report.pdf](http://www.sustainability.eu/pdf/csr/policies/Sustainable%20Public%20Procurement%20in%20EU%20Member%20States_Final%20Report.pdf) 2007.

<sup>13</sup> Oshani Perera, Nupur Chowdhury and Anandajit Goswami, *State of Play in Sustainable Public Procurement* (Winnipeg: International Institute for Sustainable Development, 2007).

<sup>14</sup> EFTA, ‘State of Play of Fair Trade Public Procurement in Europe’, EFTA European Fair Trade Association, [http://www.unpcdc.org/media/402778/state\\_of\\_play\\_of\\_fair\\_trade\\_public\\_procurement\\_in\\_europe\\_-\\_september\\_2010\\_-\\_efta.pdf](http://www.unpcdc.org/media/402778/state_of_play_of_fair_trade_public_procurement_in_europe_-_september_2010_-_efta.pdf) 2010.

integrating TPRs in public procurement practices is based on a series of political, economic and legal justifications, essentially driven by the need to increase the legitimacy, accountability and efficiency of the procurement process.

Firstly, public procurement, even if oriented towards maximising efficiency and achieving the best ‘value for money’, has a much broader regulatory scope than private procurement.<sup>15</sup> Governmental procuring authorities are not neutral economic actors and they buy goods and services on the market on behalf of the national community they represent. It is generally argued that their purchasing decisions (and their spending of taxpayers’ money) should necessarily be oriented towards reflecting the ‘common good’ and ‘public interest’ of their community.<sup>16</sup> It would not be acceptable for governments, in the awarding of public contracts, to allow practices that would violate the basic policies regulating their own communities, such as environmental commitments or labour rights. The inclusion of TPRs may be of considerable help to public procuring entities in enabling them to monitor socio-environmental objectives and enforcing them on contractors and subcontractors.<sup>17</sup>

In procuring goods and services on the market, governmental activities rely more and more on the information provided by private certification and standards, as ‘private actors have superior information regarding production processes’.<sup>18</sup> As with private consumers, labels and certifications provide procuring authorities with valuable information concerning the production of the procured products and services’ compliance with socio-environmental criteria.<sup>19</sup> In this respect, labelling and certification schemes often offer the additional guarantee of third-party certification. Although some certifications and labels do not rely on independent inspections, the use of TPRs does reduce the regulatory burden and the costs for the public authorities tasked with monitoring and verifying predefined sustainable standards among various competing subcontractors.<sup>20</sup>

The need for governments to uphold a certain standard in their dealings with the market is not only a matter of principle, but also because of the opportunity presented by procurement itself. The use of public procurement for environmental and social purposes, if combined with the inclusion of TPRs in the procuring process, has great potential to act as an enforcement mechanism on private business actors. One of the main justifications for the instrumental use

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<sup>15</sup> A number of regulatory objectives can be identified as major drivers behind public procurement systems and they have been extensively studied in the literature. A major objective common to all procurement systems is efficiency and value for money in the acquisition of goods and services, together with the objectives of integrity, fairness and transparency. For a comprehensive introduction to the objectives and general principles of public procurement regulation, see Sue Arrowsmith, John Linarelli and Don Wallace Jr, *Regulating Public Procurement: National and International Perspectives* (The Hague: Kluwer Law International, 2000).

<sup>16</sup> Christopher McCrudden, ‘International Economic Law and Human Rights: A Framework for Discussion of the Legality of “Selective Purchasing” Law Under the WTO Government Procurement Agreement’, 2 *Journal of International Economic Law* 3 (1999).

<sup>17</sup> That standards and certification always impact positively on the sustainability conditions along the supply chain is, however, contested, particularly when it comes to labour practices. For a more critical voice, see Stephanie Barrientos and Sally Smith, ‘Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems’, 28 *Third World Quarterly* 713 (2007).

<sup>18</sup> Kenneth W. Abbott and Duncan Snidal, ‘International “Standards” and International Governance’, 8 *Journal of European Public Policy* 345 (2001), at 355.

<sup>19</sup> Abby Semple, ‘The Role of Environmental and Social Labels in Procurement’, *Public Procurement Analysis*,

<http://www.procurementanalysis.eu/resources/Environmental+and+social+labels+in+procurement.pdf> 2012.

<sup>20</sup> *Ibid.*

of public procurement relates to rising concerns over the effectiveness of traditional methods of promoting environmental and labour policy objectives. It is often argued that procurement criteria and compliance clauses represent effective incentives to encourage the respecting of social and environmental standards and the adoption of good practice by private corporations.<sup>21</sup> The use of procurement policies has been argued to be more efficient, and at the same time more transparent, if supported by private regulatory mechanisms and administrative regulations at the national level.<sup>22</sup>

Moreover, the instrumental use of public procurement not only strengthens the efficiency and coherence of broader national environmental and social public policies, but also increases the enforceability of voluntary business practices in the context of corporate social responsibility (CSR). In this perspective, public procurement has progressively been seen as a powerful means of enforcing certain environmental and labour standards and CSR voluntary codes of conduct along the supply chain of businesses and private actors.<sup>23</sup> In this regulatory perspective, public procurement becomes an effective way of providing to private actors concrete market-based incentives, in terms of access to public contracts, to adopt social and sustainable criteria and avoid the ‘compliance gap’ typical of CSR initiatives.<sup>24</sup>

For all these reasons, the inclusion of private initiatives of certification and verification of social and environmental considerations has progressively translated public procurement into a complex but efficient instrument to ensure socially responsible practices along the lengthening and increasingly fragmented production and supply chain.<sup>25</sup>

## **B. TPRs and the Value of Information Along the Public Procurement Cycle**

The advantages of using TPRs in the context of the strategic use of procurement for the purposes of sustainability is based on the essential function that TPRs provide in the procurement process: sharing information. Certifications and labels contribute to the exchange of information between the various actors – procuring authorities, contractors and subcontractors – involved in the procurement process. ‘Labels are information shortcuts’<sup>26</sup> which can facilitate the communication exchange at different stages of the delivery and production of the supply chain associated with the award of a public contract.<sup>27</sup>

In functioning as a vehicle of information regarding the sustainability of the suppliers’ production processes, TPRs may be incorporated at different steps of the procurement process: in the product technical specifications, in connection to award criteria, and associated with contract clauses. At the beginning of the procurement cycle, technical specifications define the

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<sup>21</sup> Christopher McCrudden, ‘Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?’, 19 *Oxford Journal of Legal Studies* 167 (1999).

<sup>22</sup> Reinhard Steurer, ‘The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe’, 43 *Public Sciences* 49 (2010).

<sup>23</sup> McCrudden, above n 1.

<sup>24</sup> David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institution Press, 2005).

<sup>25</sup> Tom Fox, Halina Ward and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study*, World Bank, <http://pubs.iied.org/pdfs/16017IIED.pdf?> 2002.

<sup>26</sup> Roberto 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: Cambridge University Press, 2015) 99–113.

<sup>27</sup> Sarah Roberts, ‘Supply Chain Specific? Understanding the Patchy Success of Ethical Sourcing Initiatives’, 44 *Journal of Business Ethics* 159 (2003), at 164.

subject matter of the procurement, providing to potential competitors descriptions of the goods, constructions and services to be procured.<sup>28</sup> Award criteria represent the core aspect of the selection process and they correspond to the quantitative and qualitative factors used as references for the evaluation of the tenders submitted.<sup>29</sup> Moreover, TPRs can also be integrated in the phase of the public contract management, after the selection of the winning suppliers. Contract conditions ensure the winning supplier respects the terms of the concluded procurement process.<sup>30</sup>

There are substantial differences in the roles played by TPRs during the various stages of the procurement process. In their function as channels of information, TPRs are used at different times by governmental procuring authorities for two major purposes: 1) to gather information in order to develop sustainability criteria to integrate into public tenders; and 2) to act as a ‘proof of compliance’ – that is, to provide information about contractors and subcontractors’ upholding of the sustainability criteria.<sup>31</sup>

At the beginning of the procurement process (and if incorporated into technical specifications), codes and standards serve as a technical reference for the descriptions of the products and services to acquire. Technical specifications usually refer to relevant social codes and standards as an easy and understandable solution for expressing minimum standards of production, delivery and performance, commonly understood by the potential suppliers. In the award selection process, however, TPRs aim at providing confirmation to the governmental authorities regarding the respect of ethical and labour standards in the suppliers’ business behaviour, as specified in the award criteria. If included as award criteria, TPRs reduce the costs for governments in that they verify the criteria adopted as a selection mechanism in the award of the contract, instead of governments conducting the verification processes separately.

Alongside the selection of the winning suppliers, the management of procurement contract performance can also be used to enforce environmental and labour objectives.<sup>32</sup> The practice of including TPRs in contractual clauses represents a particularly interesting verification scheme, specifically regarding labour and social standards within production processes. Including sustainable criteria in contractual clauses obliges the winning bidder to respect these criteria along their supply chain, and usually also to provide appropriate evidence. For this reason, the inclusion of TPRs in the contract performance clauses becomes an especially effective verification method of sustainable standards: they represent legally binding obligations for the winning tenderer and in many cases avert the costs of contract dissolution.<sup>33</sup>

However, the impact of TPR initiatives – on international trade in general and on public

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<sup>28</sup> Arrowsmith, Linarelli and Wallace, above n 15, at 407–40.

<sup>29</sup> Gian Luigi Albano, Giacomo Calzolari, Federico Dini, Elisabetta Iossa and Giancarlo Spagnolo, ‘Procurement Contracting Strategies’, in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds), *Handbook of Procurement* (Cambridge: Cambridge University Press, 2006) 82–120.

<sup>30</sup> Laura Carpineti, Gustavo Piga and Matteo Zanza, ‘The Variety of Procurement Practice: Evidence from Public Procurement’, in *ibid*, at 14–44.

<sup>31</sup> David D’Hollander and Axel Marx, ‘Strengthening Private Certification Systems through Public Regulation: The Case of Sustainable Public Procurement’, 5 *Sustainability Accounting, Management and Policy Journal* 2 (2014).

<sup>32</sup> Ergon Associates, ‘Labour Standards in Public Procurement’, <http://www.gsdc.org/docs/open/CON43.pdf> 2007.

<sup>33</sup> Philipp Tepper, *Verifying Social Responsibility in Supply Chain: A Practical and Legal Guide for Public Procurers*, The LANDMARK Consortium c/o ICLEI, [http://www.landmark-project.eu/fileadmin/files/en/latest-achievements/LANDMARK-legal\\_guidance-www.pdf](http://www.landmark-project.eu/fileadmin/files/en/latest-achievements/LANDMARK-legal_guidance-www.pdf) 2012.



procurement practices more specifically – has raised progressively serious concerns about barring access to the market.<sup>34</sup> What is more, choosing to incorporate TPRs at different stages of the procurement process can considerably impact the conditions of competition between the suppliers in the market. If, on the one hand, the inclusion of TPRs at the beginning of the procurement process can directly affect the tender's entry-level for competitors, on the other hand, TPRs included as award and selection criteria can easily result in unnecessary restrictions on competition for certain suppliers.<sup>35</sup> Thus, the use of labelling and other certification as technical specifications or award criteria, with varying potential impacts on the competition between the suppliers, has significant implications in terms of discrimination.<sup>36</sup>

For all these reasons, it is important to bear in mind that both the decision to integrate TPRs as enforcement mechanisms and the choice of the specific procurement stage in which to include TPRs have crucial implications for the international regulation of public procurement.

Based on these introductory considerations, the paper will now explore how the use of TPRs within sustainable procurement practice fits into the WTO regulatory framework of public procurement and how it impacts the respecting of the principle of non-discrimination in the GPA. The paper will first examine how the adoption of labels and certifications affects how the negative commitment of the prohibition of discrimination is respected in the GPA. The paper's legal analysis will then turn specifically to the use of TPRs at different stages of the procurement process, and the ways that impacts how the positive commitments of fairness and transparency defined by the GPA are respected for each stage of the procurement process. Even though it is technically possible to refer to private initiatives with different economic and legal implications at each stage of the procurement contract, not all have the same potential to create legal concerns at the WTO level.

### **III. The Use of TPRs under the WTO Regulatory Framework: The Special Case of the GPA**

The increasing relevance of certifications and private standards to trade, together with the emerging legal challenges associated with the use of labels and codes of conduct, is rapidly becoming more prevalent inside the WTO multilateral trade architecture.<sup>37</sup> As the formulation of TPRs is characterised by the collaboration of multiple parties at different levels of economic governance, the use of TPRs blurs the distinction between the mandatory and voluntary market regulations adopted by state and non-state actors.<sup>38</sup> For this reason, the use of these hybrid forms of regulation in trade practice has raised significant concerns about accountability, legitimacy and transparency at the WTO level.<sup>39</sup> However, these legal

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<sup>34</sup> See Alvarez and Von Hagen, above n 9.

<sup>35</sup> Stephen Brammer and Helen Walker, 'Sustainable Procurement in the Public Sector: An International Comparative Study', 31 *International Journal of Operations and Production Management* 452 (2011).

<sup>36</sup> Albert Sanchez Graells, 'More Competition-Oriented Public Procurement to Foster Social Welfare', in K.V. Thai (ed.), *Towards New Horizons in Public Procurement* (Boca Raton, FL: PrAcademics Press, 2010) 81.

<sup>37</sup> Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties', 17 *Journal of International Economic Law* 739 (2014).

<sup>38</sup> Abbott and Snidal, above n 18.

<sup>39</sup> Deirdre Curtin and Linda Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?', 38 *Journal of Law and Society* 163 (2011).

challenges have specific connotations with regards to the use of TPRs in public procurement practices for socio-environmental purposes.

### A. TPRs and the Major Regulatory Challenges under the WTO

The emerging literature on the international trade implications of the use of TPRs has identified two major legal challenges associated with the use of private standards and certifications at the WTO level: the accountability and the legitimacy of these initiatives.<sup>40</sup>

Firstly, the use of TPRs engenders considerable doubt regarding accountability at the international level. These initiatives' blurring of the distinction between public and private regulatory dimensions means considerable concerns have been raised about the possibility of adjudicating the potential trade-distortive effects of TPRs under the scope of the WTO jurisdiction. What is particularly controversial is the extent to which, given the trade-distortive effects of TPRs used by private or governmental entities, these private regulatory initiatives may trigger the responsibility of the member states under the WTO dispute settlement.<sup>41</sup> A great deal of attention has been paid in the existing literature to the possibilities of including TPRs under the coverage of the Agreement on Technical Barriers to Trade (TBT Agreement) and the definitions of technical regulations and standards as laid out in Annex 1 of the TBT Agreement.<sup>42</sup>

Secondly, the incorporation of TPRs into trade measures has also raised issues surrounding legitimacy and transparency,<sup>43</sup> which, translated into the WTO context, could result in possible violations of the principle of non-discrimination.<sup>44</sup> The use of private regulatory initiatives has been frequently criticised due to 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, for example, and against goods and services from developing countries.<sup>45</sup>

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<sup>40</sup> Kai Purnhagen, 'Mapping Private Regulation – Classification, Market Access and Market Closure Policy and Law's Response', 49 *Journal of World Trade* 309 (2015); Jan Wouters and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 *World Trade Review* 479 (2012); Alessandra Arcuri, 'The TBT Agreement and Private Standards', in Tracey Epps and Michael J. Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Cheltenham: Edward Elgar, 2013) 485–524; Christian Vidal-León, 'Corporate Social Responsibility, Human Rights, and the World Trade Organization', 16 *Journal of International Economic Law* 893 (2013).

<sup>41</sup> Rex J. Zedalis, 'When Do the Activities of Private Parties Trigger WTO Rules?', 10 *Journal of International Economic Law* 335 (2007).

<sup>42</sup> Arcuri, above n 40; Christian Tietje, 'Voluntary Eco-Labeling Programmes and Questions of State Responsibility in the WTO/GATT Legal System', 29 *Journal of World Trade* 123 (1995); Arthur E. Appleton, 'The Agreement on Technical Barriers to Trade', in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2005).

<sup>43</sup> Fabrizio Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement', EUI Working Paper, [http://www.eesc.europa.eu/resources/docs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi\\_12062014.pdf](http://www.eesc.europa.eu/resources/docs/a-comparative-analysis-of-transnational-private-regulation-fcafaggi_12062014.pdf) 2014.

<sup>44</sup> Vogel, above n 8.

<sup>45</sup> Manoj Joshi, 'Are Eco-Labels Consistent with World Trade Organization Agreements?', 38 *Journal of World Trade* 69 (2004). Prema-Chandra Athukorala and Sisira Jayasuriya, 'Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective', 26 *The World Economy* 1395 (2003). Spencer Henson and John Humphrey, 'Understanding the Complexities of Private Standards in Global

What appears to be particularly problematic is the regulatory scope of these private initiatives: they aim at monitoring and regulating the socio-environmental aspects of production processes along the supply chain, often without resulting in any of the final products' distinguishable characteristics.<sup>46</sup> For this reason, the use of TPRs has become particularly relevant in the WTO's open discussion on the principle of non-discrimination<sup>47</sup> and the issue of non-product related processes and production methods (non-product related PPMs).<sup>48</sup> The social and environmental production characteristics highlighted by TPRs may very well have a direct impact on the determination of the 'likeness' between national and imported products and, subsequently, on the compliance with the obligation of non-discrimination. At the core of this interpretative question lies the extent to which the use of TPRs may influence the market conditions of the products' completion, and consequently whether they should be taken into consideration in adjudicating conformity with the non-discrimination obligation.<sup>49</sup>

Would a potential discrimination between goods and services resulting from the use of TPRs, highlighting specific social and environmental production methods, be acceptable under the WTO framework? Is there a difference in the interpretation of this discrimination based on TPRs if the buying/procuring choice is conducted in the market by governmental bodies and not private individuals? To respond to this question, the analysis of the compliance with the principle of non-discrimination needs to distinguish the contexts of using TPRs and to differentiate the use of private initiatives in the particular field of government procurement. The different WTO Agreements have developed slightly different approaches to the interpretation of the principle of non-discrimination and to the concept of 'likeness' in relation to the processes and methods of production.<sup>50</sup> For this reason, the use of TPRs and the issue of compliance with the prohibition of discrimination will necessarily be interpreted under the specific regulatory context of the GPA, as explored in the following sections.

## **B. The Peculiarity of the WTO GPA: Coverage and the Non-Discrimination Principle**

Due to the distinct character of an economic transaction where the chief purchaser is also the main regulator in the market, public procurement has traditionally been left outside the scope of the WTO multilateral trading system for both goods and services under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).<sup>51</sup> The WTO negotiations on trade regulation in the field of government procurement

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Agri-Food Chains as They Impact Developing Countries', 46 *The Journal of Development Studies* 1628 (2010).

<sup>46</sup> Ans Kolk and Rob Vam Tulder, 'Setting New Global Rules? TNCs and Codes of Conduct', 14 *Transnational Corporations* 1 (2005).

<sup>47</sup> For a comprehensive overview see Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge: Cambridge University Press, 2011).

<sup>48</sup> Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy', 11 *European Journal of International Law* 249 (2000).

<sup>49</sup> Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality', 27 *Yale Journal of International Law* 59 (2002).

<sup>50</sup> Robert E. Hudec, 'The Product-Process Doctrine in GATT/WTO Jurisprudence', in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honor of John H. Jackson* (The Hague: Kluwer Law International, 2000) 187-217. Amelia Porges and Joel P. Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects', 37 *Journal of World Trade* 783 (2003).

<sup>51</sup> Annet Blank and Gabrielle Marceau, 'The History of Government Procurement Negotiations Since 1945', 5 *Public Procurement Law Review* 77 (1996).

started in the 1960s within the OECD framework, later transferred to the GATT system with the Tokyo Round, and concluded in 1994 with an agreement on the text of the GPA, which entered into force in 1996. The GPA, modernised and revised in 2011, is one of the two ‘plurilateral’ Agreements of the WTO: it stands outside the system of the ‘single undertaking’ and does not impose binding commitments on all WTO members, but only to the GPA signatory parties.<sup>52</sup>

In the plurilateral institutional context of the GPA, discussion of the legality of TPRs assumes a different shape, most immediately in terms of coverage and accountability. The issue of the possible coverage of these private regulatory initiatives under the WTO legal system, as is particularly important in the context of the TBT and the SPS Agreements, is not applicable in the case of the GPA. The responsibility of the GPA member states – and only the GPA parties, not the entire WTO membership – is always triggered by the actions of their governmental or local authorities, when they are included in the GPA Annexes. And the decision to include TPRs in the procurement decision and documentation is always related to a governmental decision, taken at the central or local level. For this reason, the issue of the GPA’s coverage of private initiatives is not framed as the coverage of private actions under a WTO legal instrument, but as the coverage of the single governmental authorities using TPRs in the GPA.

The coverage of the GPA consists, in fact, in a complex system of commitments, resulting from the coverage negotiations, set forth in Appendix I which defines the coverage of each party’s obligations.<sup>53</sup> As required by Article II:2(d) of the GPA, in order to be covered by the Agreement on Government Procurement the procurement must be by a ‘procuring entity’. Article 1(o) defines a procuring entity as ‘an entity covered under a Party’s Annexe 1, 2 or 3 to Appendix I’. Thus, the question of the coverage of public procurement including TPRs is one of the coverage of the specific procurement authority that adopts labelling and certifications under Appendix I of the GPA.

Moreover, in the discussion of the compatibility of TPRs, the second most significant regulatory difference under the WTO plurilateral regulation of government procurement consists in the different interpretation of the principle of non-discrimination. The exclusion of the discipline of public procurement from the multilateral trading system in GATT, Article III:8(a), and in GATS, Article XIII(1), results in a somewhat distinct construction of the principle of non-discrimination, integrating positive and negative commitments.<sup>54</sup>

The text of the GPA creates legally binding commitments that entail two major sets of non-discriminatory obligations for its signatory parties. The negative commitment of the prohibition of non-discrimination set in Article IV:1 of the 2011 GPA Revised Text, is complemented by a set of detailed positive commitments to transparency in the award procedure (from Article VIII to Article XVIII of the Revised GPA). To ensure full compliance with the GPA, the inclusion of standards or certification schemes should not only not result in a violation of the general obligation of non-discrimination per se, but should also conform to

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<sup>52</sup> Arie Reich, ‘The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Strict Reciprocity’, 31 *Journal of World Trade* 125 (1997).

<sup>53</sup> Robert D. Anderson and Kodjo Osei-Lah, ‘The Coverage Negotiations Under the Agreement on Government Procurement: Context, Mandate, Process and Prospects’, in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge: Cambridge University Press, 2011) 61–91.

<sup>54</sup> Sue Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer Law International, 2003) 160–63.

the procedural requirements of fairness and transparency set by the GPA for the different stages of the award procedure. However, due to the lack of cases on public procurement brought in front of the WTO dispute settlement bodies on the basis of the GPA, how the two sides of the principle of non-discrimination are linked in the GPA architecture remains unclear. For example, it has yet to be established if a violation of the positive commitments of transparency and fairness in the procurement process (lack of transparency in the publication of the call for expressions of interest regarding public contracts, say) will always necessarily trigger a violation of the general prohibition of non-discrimination set in Article IV:1 of the Revised GPA.<sup>55</sup>

For this reason, to fully understand the complexity of the use of TPRs under the WTO regulation of government procurement, it is important to develop the analysis in two progressive stages: firstly, exploring the compliance of these private practices with the principle of non-discrimination in general terms (Section IV); and then turning to the procedural possibilities that the GPA allows for the use of TPRs at different stages of the procurement process (Section V).

#### **IV. Sustainable Policy Objectives, TPRs and the GPA Regulation of Public Procurement**

The compatibility of using TPRs for the enforcement of socio-environmental objectives in procurement practices is strictly linked to the regulatory space that the sustainable use of public procurement for non-economic objectives has under the GPA.

The use of TPRs for the implementation of sustainable procurement policies in fact finds its main theoretical framework in the broad academic discussion on the compatibility of the GPA with the strategic use of public procurement for the achievement of social and environmental goals.<sup>56</sup> These regulatory objectives are often referred to as ‘horizontal’ or ‘secondary’ policies of the procurement process, in addition to the primary objective of achieving best value for money in the acquisition of the goods and services that comprise governmental necessities.<sup>57</sup>

In the evolution of the WTO discipline of government procurement, a defining moment in the approach to sustainable objectives came with the conclusion, at the Geneva Ministerial Conference in December 2011, of the renegotiation process of the GPA.<sup>58</sup> Compared to the 1994 GPA, the Revised Text provides increased flexibility regarding the inclusion of sustainable policy objectives, acknowledging the growing practice of the environmental use of public procurement (see below). Moreover, another significant part of the negotiating package annexed to the Ministerial Declaration of December 2011 is represented by the ‘Future Work

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<sup>55</sup> Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary*, 2nd ed. (Oxford: Hart Publishing, 2012) 669–70.

<sup>56</sup> See Arrowsmith, above n 4.

<sup>57</sup> The term ‘secondary’ policy is mainly used in the EU context, whereas in the US the more frequently preferred terminology is ‘collateral’ policy. However, a significant segment of the procurement literature adopted the term ‘horizontal’ to define social and environmental policies in public procurement, alternately parallel to the objectives of efficiency and value for money. Robert D. Anderson, Steven L. Schooner and Collin D. Swan, ‘The WTO’s Revised Government Procurement Agreement – An Important Milestone Toward Greater Market Access and Transparency in Global Procurement Markets’, 54 *The Government Contractor* 1 (2012).

<sup>58</sup> Robert D. Anderson and Sue Arrowsmith, ‘The WTO Regime on Government Procurement: Past, Present and Future’, in Anderson and Arrowsmith (eds), above n 53, at 3–56.

Programmes of the Committee on Government Procurement'.<sup>59</sup> The Future Work Programme sets the negotiating agenda and reflects the major interests of the parties for the development of the WTO procurement discipline: in Annexe E, it clearly identifies sustainable procurement as the priority for future negotiations.

On the basis of the Revised GPA Agreement,<sup>60</sup> legal scholars seem to agree that the WTO plurilateral regulation on government procurement allows the use of procurement practices for social and environmental purposes under specific circumstances: 1) if these sustainable 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' schedules 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.<sup>61</sup>

Discussion regarding the use of public procurement for socio-environmental objectives turns around the discriminatory effects caused by the inclusion of sustainable development concerns on the conduct of the procurement process. The legality of the inclusion of TPRs for socio-environmental purposes is at the core of the concern about compliance with the principle of non-discrimination. In short, does the decision to introduce TPRs into sustainable procurement practices result in a violation – direct or indirect – of the principle of non-discrimination?

#### **A. The Use of TPRs and the Obligation of Non-Discrimination under the GPA**

The main regulatory scope of the GPA consists in guaranteeing the principle of non-discrimination in procurement practices between signatory parties. As introduced in the preamble of the Revised Agreement, 'measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services'. Article IV:1(a) of the Revised Text 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', and at the same time, according to Article IV:1(b), GPA parties must accord a no less favourable treatment also to 'goods, services and suppliers of any other Party', thus guaranteeing that the regulatory treatment remains the same among the GPA signatory parties. Moreover, in the GPA, the standard by which the obligation of non-discrimination is measured is expressed in terms of 'treatment no less favourable', consisting in the lack of both *de jure* and *de facto* forms of discriminatory procurement

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<sup>59</sup> The Future Work Programme is an integral part of the negotiating package achieved in December 2011 and it is formally included in Appendix 2 to the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the GPA. The Work Programme is composed of seven Annexes, each of them including a decision from the Committee on Government Procurement concerning specific procurement issues.

<sup>60</sup> Robert D. Anderson, 'The Conclusion of the Renegotiation of the World Trade Organization Agreement on Government Procurement: What It Means for the Agreement and for the World Economy', 21 *Public Procurement Law Review* 83 (2012); Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to Procedural Rules and Other Transparency Provisions', in Arrowsmith and Anderson (eds), above n 53, at 285–334.

<sup>61</sup> The most authoritative analysis of the instrumental use of procurement's compliance with the WTO procurement are represented by Arrowsmith, above n 54, and McCrudden, above n 10.

practices.<sup>62</sup> In the particular case of the inclusion of TPRs in sustainable procurement practices, de facto forms of procurement discrimination become the most relevant, as usually deriving from neutral regulatory provisions implying the allocation of unfair advantages to national producers or suppliers.

However, it is important to underline that the content of the non-discrimination principle has a specific connotation in the field of public procurement. According to Sue Arrowsmith, the interpretation of the principle of non-discrimination in public procurement has to necessarily take into consideration the relevance of the modification of the conditions for competition resulting from the procurement regulatory measures and to compare them to the normal conditions in public and private markets. The study of the discriminatory nature and implication of the procurement measures has to necessarily involve the study of the modification of the ‘prevailing conditions of competition ... and to consider how far the condition is justified by reference to the commercial objectives that it seeks to implement’.<sup>63</sup>

Unfortunately, the interpretation of the principle of non-discrimination has never been fully explored in the GPA jurisprudence under the WTO dispute settlement mechanism, apart from the panel report of the *Trondheim* case.<sup>64</sup> For this reason, interpretation of the GPA provisions on non-discrimination has often been conducted based on an extensive application of jurisprudence on the understanding of the ‘non-favourable treatment’ in other WTO legal texts, mainly in the GATT and TBT Agreement, raising many concerns in the academic literature.<sup>65</sup>

The interpretation of ‘treatment no less favourable’ seems to acquire substantially different connotations in the context of public procurement, and these interpretative differences assume considerable importance for the analysis of the inclusion of TPRs for socio-environmental policy objectives in public procurement. Two in particular are major concerns that would suggest a broader interpretation of the national treatment provision, limited to the context of public procurement: 1) the GPA wording of Article IV does not refer to the issue of likeness; and 2) set forth in the text of the GPA are detailed regulations and transparency requirements which provide for the operational implementation of the principle of non-discrimination within the award procedure.

First, Article IV of the GPA Revised Text prohibits discrimination simply on ‘goods, services and suppliers’, without referring to ‘like products’ in GATT, Articles I and III, or similarly GATS, Article II. The lack of a ‘likeness’ standard has been widely discussed in the literature in the context of the prohibition of non-discrimination of the GPA.<sup>66</sup> It could be argued that this notion is implicit or self-evident. Nevertheless, the specific absence of a ‘likeness’ reference in the GPA provision on non-discrimination can be explained by the specific nature of government procurement: a greater margin of flexibility for the

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<sup>62</sup> Lester, Mercurio and Davies, above n 55.

<sup>63</sup> Arrowsmith, above n 54, at 161–62.

<sup>64</sup> Mitsuo Matsushita, ‘Major WTO Dispute Cases Concerning Government Procurement’, 1 *Asian Journal of WTO and International Health Law and Policy*, 299 (2006).

<sup>65</sup> McCrudden, above n 10 referring to GATT Panel Report, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R (May 13, 1992)..

<sup>66</sup> Peter Kunzlik, ‘Environmental Issues in International Procurement’, in Sue Arrowsmith and Arwel Davies (eds), *Public Procurement: Global Revolution* (The Hague: Kluwer Law International, 1999), 199-217.

consideration of the regulatory purposes of potentially discriminatory procurement measures.<sup>67</sup> Indeed, a more flexible margin for policy seems to be granted by the GPA wording of the non-discriminatory provision to its signatory parties because of the simultaneous role of the procuring authority as regulatory authority and final consumer.

In the context of this analysis, the clear lack of a ‘likeness’ standard in the wording of Article IV becomes particularly relevant as being strictly linked to the issue of non-product related PPMs and the possibility of differentiating and discriminating ‘like’ goods and services based on process-based measures which do not impact on the final characteristics of the products. And, as seen above, the PPM debate is a fundamental aspect of the WTO legal framework of TPR initiatives, which includes typical non-product related PPM concerns. The legitimacy of the inclusion of PPM considerations within the procurement award process is still disputed in the procurement literature. However, due to the lack of a ‘likeness’ standard in Article IV of the GPA, the PPM issue appears to be ‘over-emphasized and unnecessary’ in the context of that Article and not connected to the interpretation of the principle of non-discrimination per se.<sup>68</sup> In the absence of a concrete link to the wording of the definition of the non-discriminatory principle, the discriminatory aspects of the procurement measures, including PPM concerns, becomes more evident and more interconnected with the GPA provisions regulating the procedural aspects of the procurement process and the transparency of different phases of the award procedure.

## **B. Positive Commitments of Non-Discrimination Under the GPA and the use of TPRs**

Together with the ‘likeness’ and PPM debates, another important difference in the application of the principle of non-discrimination to the context of public procurement consists in the existence of detailed regulations and transparency requirements set forth in the text of the Agreement. In the GPA the non-discrimination principle is enforced by a detailed procedural regulation concerning the award selection, which is intended to increase transparency and openness in the procurement process. For this reason, the transparency rules and requirements of the GPA for the conduct of the procurement process can be applied with a greater margin of certainty and may be interpreted as a ‘proxy for identifying discrimination’, particularly in connection with the use of TPRs in procurement processes.<sup>69</sup>

Each stage of the procurement process is regulated by specific positive commitments to transparency and non-discrimination as set out in the GPA. As seen from the analysis in Section II, TPRs are used more frequently for the enforcement of sustainable regulatory objectives at two stages of the procurement process: technical specifications and award criteria, together with contract performance. However, the GPA does not offer regulatory coverage for the adoption of contract performance requirements, an important aspect of the

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<sup>67</sup> Arwel Davies, ‘The National Treatment and Exceptions Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies’, in Arrowsmith and Anderson (eds), above n 53, at 429–43.

<sup>68</sup> Ibid, at 437. Davies elaborates, in the context of Government Procurement, Joost Pauwelyn’s thesis concerning the likeness debate in the GATT and GATS: see Joost Pauwelyn, ‘Comment: The Unbearable Lightness of Likeness’, in Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge: Cambridge University Press, 2008) 358–69.

<sup>69</sup> Lester, Mercurio and Davies, above n 55, at 714.



procurement process that remains regulated by private or administrative national procurement law.<sup>70</sup>

### *B.1 The Role of TPRs in Drafting Technical Specifications*

The inclusion of certification and other TPRs in the preparation of the technical specifications of procurement represent a particularly frequent practice in sustainable procurement, even if controversial inside the WTO regulatory framework of public procurement. Providing measurable minimum criteria and often referring to production methods, contractual specifications have also very frequently been adopted for the implementation of environmental policies: the 2010 OECD Public Procurement Survey revealed that the majority of OECD member countries introduced green criteria in the technical specifications of the procurement contract.<sup>71</sup>

For the purposes of the GPA, Article I defines technical specifications as ‘tendering requirement that: (i) lays down the characteristics of goods or services to be procured, including quality, performance, safety and dimensions, or the processes and methods for their production or provision; or (ii) addresses terminology, symbols, packaging, marking or labelling requirements, as they apply to a good or service’. This working definition of technical specification seems to clearly give the opportunity to procuring authorities to base their specifications on TPRs referring to ‘terminology, symbols, packaging, marking or labelling requirements’. Moreover, in this definition, no distinction is made between product-related and non-product-related processes and methods of production, confirming the possibility of referring to ethical and sustainable private initiatives in the draft of the specifications. The definition set forth in Article I assumes the possibility of accepting TPRs insofar as they do not create unnecessary obstacles to trade, as required in GPA, Article X.

From the Tokyo Procurement Code to the GPA Revised Text, the main concern in the WTO’s regulatory approach to the first stage of the procurement process consists in ensuring that specifications are not drafted in a way that restricts competition and international trade flows in the procurement markets. Article X of the Revised GPA aims, in fact, at enforcing the procuring authorities’ fulfilment of the non-discriminatory principle in the preparation and adoption of technical specifications, stating that ‘a procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade’.

With that scope in place, Article X clarifies that in drafting technical specifications, reference to international standards should be encouraged. Article X:2(b) specifies that the procuring authorities should base the formulation of contractual specifications for goods and services ‘on international standards, where such exist; otherwise, on national technical regulations, recognised national standards or building codes’. Moreover, one of the most important developments that occurred in the renegotiation of the GPA Revised Text was the recognition of the use of public procurement for the achievement of environmental purposes, and in particular the new wording of the provision set forth in Article X regulating the use of technical specifications. Paragraph 6 of the GPA Revised Text, Article X, recognises that ‘a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or

<sup>70</sup> McCrudden, above n 10, at 489.

<sup>71</sup> OECD, ‘Special Feature: Green Procurement’, *Government at a Glance 2011*, [http://dx.doi.org/10.1787/gov\\_glance-2011-49-en](http://dx.doi.org/10.1787/gov_glance-2011-49-en) 2011.

apply technical specifications to promote the conservation of natural resources or protect the environment’.

Many aspects of the reformed regulations of technical specifications under the Revised Text of the GPA seem to suggest the legality of the use of TPRs at this stage of the procurement process: the definition of technical specifications in Article I mentioning marking and labelling, the reference to international standards, and the inclusion of the possibility of environmentally-friendly specifications in the wording of Article X, are all important aspects pointing in the direction of an inclusive interpretation. As previously argued, TPRs are often used as sources of information for the further development of technical specifications. Nothing in the Revised GPA seems to prevent the use of TPRs to further clarify the governmental needs at this stage of the procurement process, referring to international environmental conventions, climate-friendly production process or to the respect of international standards of labour rights protection.

However, an interpretation of the GPA that allows technical specifications to refer to private labelling or sustainable certifications cannot in any case result in unnecessary obstacles to trade or violations of the general rules of transparency which govern the procurement process. Article X:3 clarifies that the development of technical specifications cannot result in a direct or indirect violation of the principle of non-discrimination that may be derived in terms of a distortion of consumer preferences or prejudice against foreign tenderers associated with the use of TPRs. Such references to verification mechanisms should not, in fact, be understood as endorsing different treatment based on the origin of the products and services or allocating an unjustifiable advantage to national suppliers.

In this respect, the new wording of Article X in the GPA Revised Text offers precise indications to the contracting authorities in order to avoid negatively affecting or precluding competition. In the case of the inclusion of sustainability criteria and TPRs, and similarly to the use of design and descriptive characteristics in the specifications, 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’. The specific requirement to allow equivalent goods and services seems to exclude the use of TPRs as definite proves of compliance at this stage of the procurement process. However, it suggests a broad interpretation of technical specification open to the inclusion of the reference to the socio-environmental needs of the governmental authorities, allowing also the evaluation of comparable offers.

### *B.2 TPRs and Verification Schemes at the Award Stage of the Contract*

Together with their use in technical specifications, TPRs are traditionally the instruments widely adopted in the process of the award selection of the competing bidders. However, at this point, certifications and standards provide a different contribution to the management of the sustainability of the procurement process: their main purpose consists in the verification of the offers’ compliance with the sustainability criteria as required in the tender documentation.

Article XV of the GPA prohibits discrimination between domestic suppliers and suppliers of other parties, treating ‘all tenders under procedures that guarantee the fairness and impartiality of the procurement process’. It is crucial that the inclusion of TPRs in the assessment of the environmental and ethical performance of the bidders should not result in discriminatory practices in the selection process.

To minimise the negative impact on competition, it has been argued that the use of labels and other TPRs should be limited to proving compliance with the sustainable criteria, and explicitly allowing the acceptance of equivalent proofs of compliance with the specified social requirements, such as technical dossiers, test results from a recognised body or manufacturers' declarations. In fact, a priority in the award stage is that all bidders must be treated equally, with the same chances of scoring maximum points in the evaluation process.<sup>72</sup>

The GPA Revised Text provides significant guidance for the regulation of the procurement award selection: Article XV defines the main principles to be followed in the regulation of the award selection and a number of additional provisions address the different aspects and transparency requirements of the contract selection process of the qualified suppliers.<sup>73</sup> GPA, Article X:9, provides a non-exclusive list of possible types of evaluation criteria, and requires that award criteria are specified in advance in the tender documentation. On the basis of this illustrative list, award criteria 'may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery'. Moreover, in the context of the regulation of the tender documentation, the GPA also includes guidance in relation to the possibility of ranking the award criteria in their evaluation. Article X:7(c), in fact, prescribes that the tender documentation shall include 'all evaluation criteria the entity will apply in the awarding of the contract, and the relative importance of such criteria'.

Even if the Revised GPA does not explicitly outline an evaluation mechanism for the identification of the most advantageous tender, its weighting of the evaluation criteria seems to be indirectly recognised. The possibility of developing weighted criteria and an evaluation methodology for the supplier selection taking into consideration life-cost analysis and sustainability performance based on TPRs is particularly important in the context of sustainable procurement practices. The emphasis on transparency in the GPA regulation of the award procedure, in this respect, stresses the importance of expressly including in the tender documentation the specific importance that the procuring authorities associate with each of the evaluation criteria in the selection process, including the possible verification schemes and certifications.

Moreover, apart from the specific transparency requirements set forth in the GPA for time periods (Article XI), the treatment of tenders (Article XV) and tender documentation (Article X), there seems to be no major limitations on the inclusion of environment and labour concerns in the award criteria and in their evaluation process.<sup>74</sup> If appropriately included in the tender documentation with the specification of their relative importance and weight in the evaluation process, the reference to international standards of environment or labour protection in the award criteria does not appear to represent a violation of the non-discrimination principle in the award stage of the procurement process. Moreover, nothing in the wording of the GPA regulation of award criteria seems to exclude the possibility of considering sustainability concerns as additional award criteria in the suppliers' selection process, once the evaluation of price factors and economic considerations have produced equivalent results.

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<sup>72</sup> Arrowsmith, Linarelli and Wallace, above n 15, at 721–40.

<sup>73</sup> Lester, Mercurio and Davies, above n 55, at 726–27.

<sup>74</sup> Viola Dannenmaier, *Good Practice in Socially Responsible Public Procurement: Approaches to Verification from Across Europe*, The LANDMARK Consortium c/o World Economy, Ecology & Development, [http://www.landmark-project.eu/fileadmin/files/en/latest-achievements/LANDMARK-good\\_practices\\_FINAL.pdf](http://www.landmark-project.eu/fileadmin/files/en/latest-achievements/LANDMARK-good_practices_FINAL.pdf) 2012.

However, in the context of the GPA regulation of the award phase, the use of certification and multi-stakeholder initiatives could turn out to be a controversial issue, even if the question has not thus far ever been raised. To avoid facing a violation of the non-discrimination principle, the use of labelling and certifications should be interpreted as additional means of confirming the quality of the offers, granting suppliers the opportunity to provide equivalent evidence in support of their offers.

## **V. Conclusions, Policy Implications and Future Perspectives**

As discussed in this paper, TPRs and voluntary monitoring initiatives offered by the private sector have a great impact on the proactive use of public procurement for the achievement of policy objectives, in particular proactively protecting environmental and labour rights along the supply chain. Based on the specific analysis of the international procurement regulatory framework of the WTO Agreement on Government Procurement in the paper, the following important legal considerations and policy implications can be drawn.

Firstly, the legality of the incorporation of TPRs takes on different connotations in terms of accountability and coverage. Unlike the TBT and the SPS Agreements, the ambiguity in the coverage of the use of private labelling and certifications transmutes into an easier discussion about the coverage of the specific procurement practices under the GPA parties' respective schedules of commitments.

Secondly, the interpretation of the principle of non-discrimination also assumes a different shape under the GPA in comparison to other WTO agreements. In particular, the GPA regulatory discipline seems to allow the contracting authorities a greater margin of flexibility when referring to production processes and methods not reflected in the final characteristics of the products. This inclusive interpretation is founded on the interpretation of non-discrimination as equal competing opportunities and the lack of the crucial standard of 'likeness' in the wording of the GPA text.

Thirdly, the prohibition against providing a less favourable treatment associated with the inclusion of TPRs in procurement practices is combined with a series of positive procedural requirements in the Revised GPA to be followed at different stages of the procurement process. Certification schemes, codes of conduct and stakeholder initiatives can not only be used as important sources of valuable information for the contracting authorities in the drafting of technical specifications, but can also serve as important verification mechanisms in the award process as award criteria. Different procedural limitations seem to allow the inclusion of TPRs in the procurement process and to ensure a balance between the socio-environmental policy concerns and the other regulatory principles of public procurement, particularly the principles of efficiency and non-discrimination in the conduct of the procurement process. The ruling under the GPA concerning the regulation of technical specifications, for example, was grounded in the fundamental concern to not impose unnecessary restrictions on competition, but it clearly allows the reference to environmental considerations in Article X of the Revised GPA and, for this reason, seems to suggest the possibility of including TPRs as indication and sources of information of the governmental needs.

Finally it is important to underscore that the legal status of the use of TPRs in the GPA as described in this paper is subject to evolve following the course of the WTO procurement negotiations. The Future Work Programme of the WTO Committee on Government Procurement, attached to the Revised GPA, clearly identified the sustainable use of public

## PUBLIC PROCUREMENT AND PRIVATE STANDARDS

procurement as a priority in the forthcoming negotiations of the WTO discipline of government procurement. Annexe E includes the Decision on a Work Programme on Sustainable Procurement: it recognises the increasing importance of sustainable procurement schemes adopted at the national and local level; and the Committee on Government Procurement is invited to explore in future the possibilities for the integration of sustainable objectives with the principle of 'best value for money' and the main trade obligations of the contracting parties. It seems likely that, with their increasing importance as monitoring and enforcement mechanisms, the TPRs will contour and permeate the future shape of the WTO discipline on government procurement.