Transnational Law and Governance
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international lawyers, are not as international as they think?[58] If not, what the reasons are for this approach might be worth exploring.

Finally, this chapter's analysis shows that the relationship between the flourishing but still emergent B&HR field and the broader domain of human rights is still developing. As B&HR scholars, I suggest, we need to exercise greater sensitivity to the multiple contexts – doctrinal, administrative and political – of general human rights materials when they are marshalled in argument. If cruder approaches may appear to deliver short-term, local normative advances, over time they may yet undermine the fabric of the whole.

58 A. Roberts, *Is International Law International?*, Oxford: Oxford University Press, 2017.

6 The Duty to Protect in Public Procurement

Toward a Mandatory Human Rights Clause?

Deborah Russo

Introduction

Public procurement is the procedure by which governments and public authorities purchase goods, works and services from the market. Both in developing and developed countries, states are increasingly contracting out public functions in different areas, such as social and health services, security and criminal justice, education, immigration, energy, water and others.[1] They also conclude contracts with private entities, which provide goods, works and services necessary to the exercise of public functions. Notwithstanding the relevant scale of this phenomenon and its possible impact on the protection of human rights, there has not been much elaboration on the international obligations of States as procuring operators.

Public procurement has been included in the global process toward market liberalization and free trade. In fact, states have concluded agreements aimed at boosting competition and assuring best value for money, such as the WTO Government Procurement Agreement (hereinafter 'GPA') and specific chapters of some regional trade agreements.[2] These agreements aim to prevent national legislation or practice from distorting competition and discriminating against multinational enterprises interested in entering the market.[3] They prohibit

1 C. Methven O'Brien, 'Essential services, public procurement and human rights in Europe'. *University of Groningen Faculty of Law Research Paper*, 22/2015, 24 January 2015, 16 p.

2 WTO, *Agreement on Government Procurement*, 1994, www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last accessed 13 February 2018). For an overall analysis of the WTO agreement and its revision process see P. Pellentier, '2012 revision of the WTO Agreement on Government Procurement: coverage dimensions and context', www.econstor.eu/bitstream/10419/152257/1/879218 72X.pdf (last accessed 13 February 2018); R.D. Anderson, S.L. Schooner and C.D., Swan, 'The WTO's revised government procurement agreement – an important milestone toward greater market access and transparency in global public procurement markets'. *GWU Legal Studies Research Paper*, No. 2012–7, https://scholarship.law.gwu.edu/faculty_publications/123/ (last accessed 13 February 2018).

3 D. Collins, 'Government procurement with strings attached: the uneven control of offsets by the World Trade Organisation and regional trade agreements' *Asian Journal of International Law*, 2016, 1 ff.

national measures that unduly give prevalence to domestic over foreign tenders. At the EU level, a similar goal is pursued by the directives on public procurement, which prohibit any measure of direct or indirect discrimination against European enterprises based on nationality.[4]

However, liberalizing the public procurement market might divert public authorities from other objectives of general concern, such as protecting human rights as a national public policy goal. This is also due to the uncertainty as to whether and to what extent social clauses may be interpreted as trade protectionism and obstacles to competition. For this reason, there are some attempts to 'humanize' public procurement at an international level, in order to direct its potential toward sustainable development and promotion of human rights. Before analysing this trend, in the section below we will briefly consider, from a theoretical standpoint, how the duty to protect affects public procurement. The final section will suggest a possible way forward in protecting human rights in public procurement.

The Scope of the Duty to Protect in Public Procurement

The new 2030 Agenda for Sustainable Development promoted by the UN calls on all States to implement action plans for 'sustainable public procurement'. This expression refers to the practices of integrating social and environmental considerations into the procedures for selecting private contractors. In particular, Target 12.6 is to 'encourage companies [...] to adopt sustainable practices and to integrate sustainability information into their reporting cycle'. Furthermore, Target 12.7 calls on states to 'promote public procurement practices that are sustainable, in accordance with national policies and priorities'.[5]

The UNGPs, adopted by the UNHRC in 2011, include public procurement within the framework of states' commitments to creating an environment conducive to business respect for human rights. The 2011 UNGPs assume that states do not relinquish their human rights obligations when externalizing services or trading with enterprises. Hence, the duty of states to protect human rights concerns the potential violations arising out of commercial transactions, public–private partnerships and public procurement.[6] In this regard, UNGP 5 affirms that 'States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights'. As the commentary clarifies, privatizing does not relieve states of their international obligations. Accordingly, states are bound to specify the human rights obligations applying to future contractors in both their legislation and contractual documentation. Furthermore, the subsequent UNGP 6 calls on states to promote socially responsible business practices.[7]

UNGPs 5 and 6 reflect views already elaborated by the case law of the human rights treaty-based mechanisms – at least in the European system. In this regard, the ECtHR has affirmed that 'the State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals', and may be found responsible for violations of positive obligations deriving from the ECHR in case of wrongful acts committed by private entities.[8] It is also worth noting that the 'Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' includes the following provision:

> States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument.[9]

The responsibility of states in the field of public procurement may be 'direct', when it arises from a breach to respect human rights, or 'indirect', when violations of due diligence are concerned. In the context of procurement law, direct responsibility may be ascribed when a state fails to insert social clauses into public contracts, in violation of specific obligations, such as those provided by the ILO Public Contracts Convention (whose content will be examined in the next section) or by virtue of a special relationship between the state and the enterprise, according to draft articles 5 and 8 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.[10] As to their indirect responsibility, states may be held accountable for the failure to adopt appropriate preventive measures for violations caused by their private contractors or subcontractors in the performance of a contract.

However, when suppliers who are not located within a state's boundaries commit violations, the question arises of whether the state may be held

4 EU, *Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors*.

5 These principles are included in UN General Assembly, Resolution A/RES/70/1, 25 September 2015, www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed 13 February 2018).

6 The Guiding Principles implement the 'Protect, Respect and Remedy' Framework proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/3.

7 It says: 'States should promote respect for human rights by business enterprises with which they conduct commercial transactions'.

8 ECtHR, *Costello-Roberts v United Kingdom*, App. No. 22860/02, Judgment, 25 March 2003, para. 60; ECtHR, *Storck v. Germany*, App. No. 61603/00, Judgment, 16 June 2005, para 103.

9 UNHRC, *Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, UN doc. A/HRC/RES/26/9, 29 September 2017, p. 6.

10 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 13 February 2018).

responsible for violations perpetrated abroad. International law is gradually evolving in this field toward a possible extension of the territorial scope of the human rights obligations assumed by states. In 2011, the UNHRC considered that the prohibition on states to allow the use of their territory in a way which causes damage within the territory of another state extends to human rights law.[11] The implications of this assumption are clarified in the 2017 General Comment on State obligations under the ICESCR in the Context of Business Activities. Here, the UNCESCR affirmed that States' Parties have to pay close attention to the adverse impact outside their territories of the activities of enterprises that are domiciled under their jurisdiction. In particular, this obligation extends to any business entities over which Parties may exercise influence by regulatory means.[12] According to this interpretation, state responsibility may be grounded on a factual criterion, which is based in turn on the effective influence of national regulation (or 'deregulation') on the conduct of enterprises abroad.[13]

More importantly, the UNCESCR affirmed that

> in discharging their duty to protect, States' Parties should also require corporations [...] domiciled in the territory and/or jurisdiction of States' Parties [...] to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.[14]

This passage contributes to enlarging the scope of the duty to protect with respect to business activities outside state borders. Furthermore, the duty to protect includes the obligation to put in place effective monitoring, investigation and accountability mechanisms to ensure access to remedies for victims. This implies that, in the context of public procurement, states

> could deny awarding of public contracts to companies that have not provided information on the social and environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant.[15]

To comply with this principle, states should require tenderers to submit a due diligence report, including a human rights impact assessment of their activities.

Despite the increasing concern about human rights violations that may occur along government supply chains and the need to strengthen state accountability, compliance with the UNGPs is still limited. Particularly in the field of public procurement, the practice of states falls short of the mark.

As soft law seems insufficient to ensure human rights protection in business activities, the international community is moving toward negotiating a binding instrument on B&HR. The prospects of negotiation are still uncertain, as is its possible impact on public procurement law. In particular, the drafting of a provision requiring states (and IOs) to include human rights clauses when they contract with private enterprises has not been discussed yet. However, this option is highly desirable in order to ensure that states will properly fulfil their duty to protect. This point will be elaborated on further in the concluding remarks of this chapter, whereas the following section will briefly describe some international instruments concerning public procurement. A deeper insight into this practice might serve as a source of guidance and inspiration in the discussion about drafting a specific human rights clause.

A Brief Description of the Relevant International Practice

States and IOs have been promoting policies for the advancement of public procurement law. Within the WTO, public procurement is considered a relevant branch of the global market, which offers multiple business opportunities for all enterprises, irrespective of their nationality.

This is the prevailing objective of the WTO GPA (as well as of the procurement chapters of some other trade agreements), which is a plurilateral agreement adopted within the framework of the WTO with the goal of opening the public procurement market and promoting fair and transparent conditions of competition for all enterprises. The treaty is administered by the Committee on Government Procurement, which is composed of representatives of all the Parties and is entrusted with the function of settling disputes between the Parties and promoting the revision process of the agreement. Under the GPA, Parties are required to undertake further negotiations with a view to extending the coverage of the agreement. Negotiations to this end were successfully concluded in 2012 with the formal adoption of the Decision on the Outcomes of the

11 See UNHRC, *Resolution 21/11*, UN doc. A/HRC/21/39, 18 July 2012, para. 92: 'States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of law, policies and practices'.

12 UN, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN doc E/C.12/60/R.1, 10 August 2017, para. 35.

13 P. De Sena, 'Juridition étatique et imputation des violations extraterritoriales des droits de l'homme: quelques observations'. In D. Alland, O. De Frouville and J. Vinuales (eds), *Unité et diversité du droit international/Unity and Diversity of International Law Ecrits en l'honneur du Professeur Pierre-Marie Dupuy/Essays in Honour of Professor Pierre-Marie Dupuy*. Leiden, Boston: Brill, 2014, 785 ff.

14 Ibid., para. 38.

15 Ibid., para. 50.

Negotiations under Article XXIV:7.[16] This decision set out the future work programmes of the Committee, including 'a work programme on Sustainable Procurement'.[17] Accordingly, on 22 February 2017, the WTO Secretariat organized the first Symposium on Sustainable Procurement with the aim of defining the scope and objectives of 'sustainable procurement', analysing and comparing the key practices for incorporating social clauses at different stages of procurement procedures and discussing how to harmonize such practices with the free trade and 'best-value for money' principles.[18]

While this work is still in progress, there are currently limited obligations under the GPA concerning human rights standards. As far as the admissibility stage of a procedure is concerned, Article VIII does not mention human rights and only provides for the exclusion of suppliers who have been convicted for serious crimes or offences.

With respect to the awarding of contracts, paragraph 5 of Article XV provides that a public authority may use evaluation criteria based either on the most advantageous offer or the lowest price, provided that the relevant criteria are specified in the tender documentation. The criterion of the lowest price is problematic as it incentivizes offers based on economic considerations only, with a higher risk of reduced social protection.

Furthermore, Article X contains guidelines on the use of technical specifications, which are aimed at preventing the latter from creating an unnecessary obstacle to international trade. To this end, it requires that technical specifications be set out in terms of performance and functional requirements, rather than descriptive characteristics, and that they be based, where possible, on international, rather than national, standards. Tender documentation should always permit equivalent indications or certification of fulfilment of the relevant functional requirements. Public authorities are also allowed to introduce any technical specifications that may be necessary to promote the conservation of natural resources and protect the environment. However, the promotion of other social objectives, such as social protection of workers, is not permitted under the treaty, so that national measures for the protection of human rights might be found to conflict with the principles espoused by the GPA. For example, in a case brought before a WTO panel, *United States – Measure Affecting Government Procurement*, the European Community contended that an Act enacted by the Commonwealth of Massachusetts – prohibiting the procurement of goods and services from any person doing business with Myanmar, accused of serious human rights violations – breached the provisions on technical specifications and exclusion from participation.[19] Although, the case was never judged by the panel, it provides evidence of how national discretion in protecting human rights might be called into question.

EU legislation is likewise premised on principles similar to those of the WTO, aimed at abolishing any obstacles to freedom of movement and competition law. According to EU law, Member States must remove from their public procurement regimes any barriers to the circulation of goods, workers and services, as well as any discrimination against EU companies. However, since the 1970s European legislation has largely evolved toward a progressive integration of human rights and social policy considerations into public procurement.[20]

The new directives on public procurement adopted in 2014 define the conditions under which Member States are allowed to include social and environmental clauses at different stages of the procurement process.[21] Article 67 of Directive 2014/23/EU includes, among the award criteria, a 'cost effectiveness approach, such as life-cycle costing', which allows public authorities to consider the environmental externalities of a product from its inception to its completion, delivery and disposal. It also considers the 'best price-quality ratio according to qualitative, environmental and/or social aspects', provided that these aspects are linked to the subject matter of the contract. The latter criterion enables public authorities to give preference to bids from tenderers who maximize social outputs, such as economic operators who employ a higher number of disadvantaged workers. However, this opportunity is restricted by the 'link to the subject matter' requirement, which Article 70 of the same directive has extended to contract performance requirements. As a consequence, clauses referring to the general policy of enterprises, or to social criteria, which are not related to the goods, works or services forming the subject matter of the future contract, are prohibited.

The interpretation given by the ECJ must also be taken into account.[22] In the *EVN* case, the ECJ made it clear that the inclusion of social criteria must not give public authorities an unrestricted freedom of choice: such criteria must be clearly specified together with the weighting of their importance for the

16 WTO, *Decision of the Committee on Government Procurement*, GPA 113, 2 April 2012. www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm (last accessed 13 February 2018).

17 WTO, *The re-negotiation of the Agreement on Government Procurement (GPA)*, 2011. www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm (last accessed 13 February 2018).

18 WTO, *Symposium on Sustainable Procurement*, February 2017. www.wto.org/english/tratop_e/gproc_e/gp_symp_22feb17_e.htm (last accessed 13 February 2018).

19 WTO, *United States – Measures Affecting Government Procurement*, Panel report, WT/DS88/4, 11 January 1999, www.wto.org/english/tratop_e/dispu_e/cases_e/ds88_e.htm (last accessed 13 February 2018).

20 O. Martin-Ortega, O. Outhwaite and W. Rooke, 'Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods', *The International Journal of Human Rights*, 2017, 19, 2015.

21 EU, *Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the Award of Concession Contracts*, OJ L94/1, 28 March 2014, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023&from=NL (last accessed 13 February 2018); EC, *Supporting Social Responsibility in the Economy through Public Procurement*, 9 February 2016, http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8667&lang=en&title=Supporting-social-responsibility-in-the-economy-through-public-procurement (last accessed 13 February 2018).

22 ECJ, *EVN AG and Wienstrom GmbH v Republik Österreich*, C-448/01, 4 December 2003, para. 33.

purpose of evaluating the tender. Moreover, in the case concerned, which regarded a contract for the supply of electricity, a criterion giving preference to electricity produced by renewable energy sources should have referred to a specific supply period 'in order to be linked to the subject matter of the contract'.[23] Analogously, in the *European Commission v. Kingdom of the Netherlands* case, the ECJ judged that a clause requiring that tenderers comply with the criteria of sustainable purchasing and socially responsible business was contrary to the obligation of transparency and insufficiently connected to the subject matter of the contract.[24] However, in the *Regio Post* case, the ECJ affirmed that a public authority may require tenderers and their subcontractors to undertake to pay staff – who are called upon to perform the services covered by the contract – a minimum wage provided for under the legislation of the State in which the contract will be executed. In order to be lawful, this requirement must be established through legislation or universally applicable collective agreements and relate to the subject matter of the contract only.

An interesting novelty in the new directives is the 'general social clause' pursuant to Article 18, paragraph 2, where it is provided 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 labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in Annex X.

This clause requires Member States to introduce the measures necessary to ensure that contractors will comply with the social and environmental standards established by national, EU and international treaties listed in Annex X in the performance of their contract. The relevant treaties include some ILO Conventions (Numbers 87, 98, 29, 105, 138, 111, 100, 182) and other environmental protection agreements. Such agreements become applicable even to contractors of states that have not ratified them and thus provide an interesting example of how international treaty law may be incorporated into EU law.

The above-mentioned clause leaves some questions open for interpretation, such as the possible relevance of other international treaties which are not mentioned in Annex X, but to which a state is party, and whether the clause may be applied to all subcontractors and suppliers along the supply chain.

Unfortunately, the wording of the clause is ambiguous. However, as to the first question, the scope of Article 18, paragraph 2, should embrace all treaties in the field of human rights and environmental law that have been ratified by the procuring state. Such an interpretation would also comply with the national law requirement, given that the notion of 'national law' normally includes a state's international obligations.

Regarding the second question, it is worth considering that EU legislation requires transparency in the subcontracting chain. In fact, companies have to specify what part of the contract they intend to assign to a third party and identify the subcontractors for which a chain of responsibility may be drawn up. For this reason, the general social clause should be interpreted as covering not only the conduct of contractors, but also that of all subcontractors and suppliers involved in the performance of a contract. Moreover, in view of their duty to protect, as specified by the previously mentioned General Comment no. 24 of the UNCESCR, states should require all contractors and subcontractors to report their policies and procedures in the field of human rights protection and to provide effective means of accountability and redress for abuses.[25]

Another interesting provision is introduced by recital 101 of the preamble of the directive, which states that

> contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

This rule provides for the possible exclusion, at different stages of procurement procedures, of enterprises that failed to comply with human rights law.

A weak aspect of EU policy seems its prevalent discretionary character. In fact, the actual implementation of social clauses is left up to the initiative of Member States. There is no obligation for them to use social clauses. The sole exception is represented by the new 'general social clause', which introduces the obligation to ensure compliance with human rights law in the performance of a contract. This clause follows the 'conditions of contract' model, but in a more flexible way, since it does not establish uniform general conditions within the EU. Therefore, it may be argued that the EU has inaugurated a combined strategy. This strategy includes a 'flexible hard law approach' – for the application, to states' contractors, of obligations that are binding on Member States or derive from an international core standard – and a prudent 'promotional approach', whereby standards higher that those imposed by the law may optionally be included in the procurement documents, according to the social policy objectives of each EU Member State.

The prevalent discretionary pattern may also be found in the instruments adopted by the UN, which draw the attention of its states to the importance of

23 Ibid., paras. 66 ff.

24 ECJ, *European Commission v Kingdom of the Netherlands*, C-368/10, 10 May 2012, paras. 109 ff; ECJ, *RegioPost GmbH & Co. KG contro Stadt Landau in der Pfalz*, C-115/14, 17 November 2015, para. 88.

25 UN, *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, op. cit., para. 33.

vise public expenditure. The UNCITRAL Model Law on Public Procurement ssists states in elaborating a modern procurement law and favours the harmonzation of international standards, such as those provided by the GPA, the EU Directives on public procurement and the UN Convention against corruption.[26] t provides guidelines and procedures for achieving value for money and avoidng discrimination and corruption. Regrettably, it does not contain a human ights provision and leaves a wide margin of discretion to states with respect to he inclusion of social clauses.[27] In parallel, the UN is developing a strategy for romoting socially responsible procurement on the part of its Member States by nvesting in reports[28] documenting national policies, practices, drivers and pportunities for responsible public consumption and elaborating guidelines nd recommendations for furthering the commitment of states in this field.[29]

While a soft law approach prevails in the UN system, an interesting instrunent is the 1949 ILO Convention concerning Labour Clauses in Public Conracts, which establishes prescriptive requirements. This Convention obliges Contracting States to include clauses in their procurement procedures, which re designed to ensure conditions of contract for the workers concerned that are not less favourable than those established in the territory or area where the work is carried out. It also requires states to apply adequate sanctions for failure to insert those clauses in tender documentation. The content of this agreement is important even if it is limited to labour standards. Regrettably, it also omits any reference to conditions of contract applicable along the supply chain.

In conclusion, a common approach to socially responsible public procurement among the different international instruments is still lacking. A further harmonization in this area might be hampered by the fear that a uniform international standard would unduly restrict national discretion in accommodating the prevailing social needs of a local community or of a specific sector of services. As will be discussed in the next section, this concern is overestimated. The 'soft law approach' encourages states to develop their own national model in accordance with their respective social policies. However, this approach would not be sufficient to implement states' duty to protect in respect of possible human rights abuses perpetrated by contractors or subcontractors along the supply chain. For this reason, it is worth discussing in the section below a possible combined approach.

26 UNCITRAL, *Model Law on Public Procurement*, 2014, www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf (last accessed 13 February 2018).

27 Article 9, paragraph 2b affirms that suppliers or contractors should respect ethical standards applicable in the territorial state but it is not easy to assume that the expression 'ethical standards' includes human rights and social standards binding on the state where the contract is to be performed.

28 See, for example, UN, *Sustainable Public Procurement: A Global Review (Final Report)*, 2013, www.globalecolabelling.net/assets/Documents/unep-spp-report.pdf (last accessed 13 February 2018).

29 See UN Environment Programme, *Buying for a Better World: A Guide on Sustainable Procurement for the UN System*, 2011, www2.senado.leg.br/bdsf/bitstream/handle/id/242706/Buying%20for%20a%20better%20world%20-%20sustainable%20procurement%20guide.pdf?sequence=3 (last accessed 13 February 2018).

Concluding Remarks on a Possible Way Forward

As the survey on international practice has shown, obligations implied in the duty to protect are still mostly undefined.

The draft binding instrument on B&HR could fill the gap by requiring States to employ a model clause to enhance the different aspects covered by UNGPs 5 and 6: preventing human rights abuses and promoting social policy objectives.

The first aspect – namely the prevention of human rights abuses – entails extending the applicability of international human rights standards binding on the procuring state to both contractors and subcontractors. This objective is extremely relevant for states, since, as previously noted, it is a component of their duty to protect. As states must meet their international human rights obligations when they contract with enterprises, they have to specify in legislation and tender documentation that they expect contractors and subcontractors to respect human rights. Moreover, as was stressed earlier in the preliminary remarks, the scope of due diligence is progressively extending beyond their territorial border.[30] This means that a breach of due diligence could also derive from extraterritorial business activities, when it may be established that state regulation could have affected these activities. The evaluation should be based on the effective impact of the state regulation abroad. For this reason, the human rights clause should cover the activities of subcontractors along the supply chain.

The model clause could be shaped as a mandatory exclusion requirement or a contract performance condition. Hypothetically, it could provide for the exclusion of tenderers who have been already convicted for human rights violations and for those who do not provide a human rights impact assessment from their suppliers. In addition, it should establish the termination of the contract in the event of violations committed in the performance of a contract. Such violations could be ascertained in accordance with the national standards of the procuring states or, as it would be better, a common international human rights standard agreed in the future instrument.

The second aspect concerns the use of public procurement to further human rights protection and implies a promotional approach. For this purpose, the model clause (or its second paragraph) should encourage states to advance social and environmental protection above the threshold of law in accordance with their national social policy. In this perspective, public procurement might be

30 O. De Schutter and Z. Kedzia, *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN doc E/C.12/60/R.1, 17 October 2016, paras. 20 ff.

used as an instrument of national public policy for promoting the CSR of enterprises and pushing forward social goals. However, the challenge for states is to draft a clause that respects the criteria of objectivity, impartiality, efficiency and non-discrimination of procedures. In this regard, the establishment of a shared yardstick is not essential, given the importance of leaving each public authority a margin of discretion in defining its public policy objectives. At the same time, the development of an international system for measuring the 'added social value' of a tender – using conventional indicators that each public authority could combine according to its priorities – would be helpful for preventing the risk of bias.[31]

In conclusion, the drafting of a similar provision in a future binding instrument on B&HR would contribute to developing a comprehensive strategy for socially responsible procurement and could represent a starting point for future negotiations.

31 See V. Federico, D. Russo and E. Testi, 'Impresa sociale, concorrenza, valore aggiunto. Un approccio europeo', Padova: Cedam, 2012.

7 The EU's Promotion of Human Rights and Sustainable Development through PTAs as a Tool to Influence Business Regulation in Third Countries

Leonardo Borlini

Development and Progress: Markets as Social Constructions and the Two Souls of European Integration

> Progress is hence an ideal (social and political) notion, whereas development is a pragmatic and economic fact. Such dissociation requires a synchrony between 'development' and 'progress' as true progress is (apparently) not conceivable unless the economic premises needed to realize it are created.[1]

To begin an academic paper with a quotation, especially from one of the most controversial artists in the recent history of European literature and cinematic arts, is hazardous and, admittedly, somewhat pretentious. And yet still, this excerpt from Pasolini's '*Scritti corsari*' spectacularly catches some of the complexities the current chapter far more humbly attempts to deal with.

First, it hints at a multifaceted notion of 'market', not only as an actual or nominal place where forces of demand and supply operate, and where buyers and sellers interact (directly or through intermediaries) to trade goods, services, or contracts or instruments, for money or barter,[2] but also in its dynamic manifestation, as a place of experimentation and learning; as a composite and evolving institution in of itself.[3] Stated differently, the advocated synchrony between development and progress seems to posit that the very place where all business happens is a complex social construction: far from being jungles where the law of the strongest rules, markets are, in fact, a set of most sophisticated relations between producers and consumers, and between production factors, technical knowledge and organization in time and space. They are also a set of relations between economic actors and social, political, legal and civil institutions. From

1 P.P. Pasolini, *Scritti Corsari*. Milan: Garzanti, 1975, 175, loosely translated by the current author from the original text in Italian.

2 P. Krugman and R. Wells, *Microeconomics*, 3rd ed. London: Macmillan, 2013, 5.

3 See, *ex multis*, N. Irti, *L'ordine giuridico del mercato*, 3rd ed. Bari: Laterza, 2004, esp. 5–10, 73–79.