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Territorial extension and case law of the Court of Justice: Good administration and access to justice in procurement as a case study[†]

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Abstract

This paper uses EU trade policy to explore some of the legal implications of the territorial extension or extraterritoriality of EU public procurement law. The paper's starting position is that, with this policy and regulatory approach, the EU pursues two main goals: first, to further global standards of human rights protection and, second, to further regulatory convergence toward its own procurement standards. The paper concentrates on the pursuit of this second goal and, in particular, on the implications of such territorial extension of EU procurement law for the case law of the Court of Justice on good administration and access to justice, as recognised in the Charter of Fundamental Rights of the European Union. The paper concentrates on public procurement because of its relevance in free trade agreements between the EU and third countries, as well as the relevance of legislative and case law requirements concerning procurement remedies. The paper assesses both the outward and inward implications of the territorial extension for the Court of Justice's case law. The discussion in the paper also raises general issues concerning procedural design and the consideration of foreign law by the Court of Justice in different settings.

Keywords: public procurement; free trade agreements; extraterritoriality; territorial extension; jurisdiction; Court of Justice; foreign law; challenges; remedies; good administration; access to justice

JEL codes: H57; K23; K33; K42

1. Introduction

EU law has increasingly created effects beyond the European Union.¹ This has fuelled academic debate around the extent and legitimacy of such regulatory expansion,² as well as criticism of the global reach of EU law,³ from the perspective of its compatibility with international law and the rejection of extraterritoriality. There is no universally accepted definition of extraterritoriality, though,⁴ which complicates the assessment of claims of extraterritorial exercise of jurisdiction. For the purposes of this paper, it will be understood that the exercise of extraterritorial jurisdiction is only permissible in exceptional circumstances,⁵ and that the existence of a *sufficient connection* between the EU and the extraterritorial events or situations affected by EU law is the main criterion for the assessment of the international legality of the EU's expansive regulatory approach (which primarily takes the form of prescriptive jurisdiction).⁶ The existence of such sufficient connection is controlled by general principles of jurisdiction, and any extraterritorial effects of EU law that do not fall under specific headings of jurisdiction of international law will be considered illegitimate *extraterritoriality*.⁷ In the area of economic law, the most relevant general principle of jurisdiction is the 'effects principle', which justifies the exercise of jurisdiction when foreign conduct produces substantial effects on the territory of the regulating State.⁸ However, determining the existence of effects in a jurisdiction, and in particular indirect effects derived from foreign conduct, is not an easy task. This difficulty has prompted further thought and academic debate on the ways in which the existence of a sufficient connection can justify what would otherwise be impermissible extraterritorial jurisdiction under a strict construction of the effects principle.

In what I see as a reconceptualisation of the effects principle, Professor Joanne Scott coined the term 'territorial extension' of EU law and linked it to the existence of a 'relevant territorial connection' (i.e. a 'territorial trigger').⁹ According to her taxonomy,

a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state. By contrast, a measure will be regarded as giving rise to territorial extension when its application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad.¹⁰

From this perspective, it is clear that the EU regularly engages in the territorial extension of its law, in the sense that EU law impacts on the regulation of activities that do not take place in its territory. Such territorial extension can take place in different spheres of regulatory intervention (which go from a transaction-specific to a global scale),¹¹ and can serve different purposes (from performance optimisation, to norm catalysation, including market access regulation).¹² The extent to which territorial extension is

¹As clearly evidenced, for example, in R Dover & J Frosini, *The Extraterritorial Effects of Legislation and Policies in the EU and US*, Report for the Directorate-General for External Policies of the Union, May 2012 <[www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET\(2012\)433701_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET(2012)433701_EN.pdf)> accessed 30 November 2017.

²Eg Joanne Scott, 'The New Extraterritoriality' (2014) 51(5) *Common Market Law Review* 1343.

³Engaging in detail with the large corpus of literature that has emerged from this debate exceeds the scope of this paper. For a discussion of the context of internet regulation and references to previous academic work, see C Kuner, 'The Internet and the Global Reach of EU Law' (2017) LSE Law, Society and Economy Working Papers 4/2017 <http://eprints.lse.ac.uk/73421/1/WPS2017-04_Kuner.pdf> accessed 30 November 2017.

⁴Menno T Kamminga, 'Extraterritoriality', in *Max Planck Encyclopedia of Public International Law* (November 2012 edn) <<http://opil.ouplaw.com/home/EPIL>> accessed 30 November 2017.

⁵*ibid.*, 3.

⁶See the 1927 judgment of the Permanent Court of International Justice in the *Case 'Lotus' (France v Turkey)*, PCIJ Series A Number 10, 19; Kamminga (n 4) 9.

⁷The term 'extraterritoriality' is thus used to denote jurisdictional activity that is not in compliance with the mentioned international law standards.

⁸Kamminga (n 4) 15 and 17–19.

⁹Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* 87.

¹⁰*ibid.*, 89–90.

¹¹*ibid.*, 107.

¹²*ibid.*, 111.

legitimate or illegitimate requires a further normative assessment.¹³ Ultimately, for the purposes of this paper, it is understood that the existence of a relevant territorial connection with the EU would legitimise the exercise of prescriptive jurisdiction based on conduct or circumstances abroad (i.e. legitimate territorial extension), and only in the absence of such territorial trigger would the extraterritorial reach of EU law be considered illegitimate. This follows a functional understanding of extraterritoriality (*stricto sensu*) that assimilates it to illegitimate territorial extension for the purposes of this discussion.

In my view, Professor Scott's taxonomy is a useful framework for the assessment of the phenomenon of the increasing effects of EU law beyond its territory, but it also creates a difficult boundary issue in the assessment of the legitimacy of the territorial extension. Where the territorial trigger is tenuous, the sphere of regulatory intervention is global and the purpose of the EU's exercise of prescriptive jurisdiction is to push for norm catalysation, there can be concerns as to whether such an extreme form of territorial extension falls outwith permissible regulatory activity and constitutes illegitimate territorial extension or extraterritoriality of EU law *stricto sensu*¹⁴ – which raises difficult normative issues.¹⁵ With this conceptual difficulty in drawing a bright-line boundary between legitimate territorial extension and illegitimate extraterritoriality as background, I submit that the use of EU public procurement law¹⁶ for the extension of the EU's human and fundamental rights norms provides a good case study for the discussion of some aspects of this boundary issue, as well as for an analysis of the recursive difficulties that even legitimate territorial extension can create for the prescription, adjudication and enforcement of these norms *within* the EU.

This case study will be the focus of concentration for the remainder of this paper and can be seen as a critique of Scott's taxonomy at its boundary or, more generally, as a reflection on the limits to the legitimacy of the territorial extension of EU law. However, engaging in such critique is not my main aim; I will adopt a functional approach to the challenges derived from EU-standard-based procurement regulation in third countries as the main insight I try to convey in this paper is that the territorial extension of EU procurement law beyond its territory (whether legitimate or illegitimate) generates recursive effects on the way the Court of Justice operates. Most of the discussion in this paper will be concerned with the EU's effort to foster regulatory convergence in the area of procurement law, which in turn triggers the territorial extension of EU human rights norms.

To substantiate the thesis that the territorial extension of EU procurement law generates undesirable recursive effects within its own legal system, I will concentrate on the fact that – largely as a result of the strengthening in the Treaty of Lisbon of the EU's commitment to human rights as a horizontal policy concern, and in particular in its external relations¹⁷ – the EU actively leverages its trade and economic

¹³For discussion, see Barbara Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar 2017) 84 and ff.

¹⁴For discussion of the limitations of analyses nominally based on the concept of territoriality, see Cedric Ryngaert, 'Whither Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects' (2014) <<https://ssrn.com/abstract=2523157>> accessed 30 November 2017.

¹⁵Scott seems to accept this type of extreme territorial extension as unproblematic, given that '[w]hile many EU measures that create territorial extension are not based on pre-existing international standards, these measures nonetheless serve to address global or transboundary problems in relation to which international agreement on the importance of the underlying objective has been reached', above (n 9) 124–25.

¹⁶The current 2014 EU public procurement package is comprised of directives 2014/23/EU on concession contracts (OJ 2014 L94/1), 2014/24/EU on public sector procurement (OJ 2014 L94/65) and 2014/25/EU on utilities procurement (OJ 2014 L94/243). There are additional regulatory instruments, such as Directive 2009/81/EC on defence and security procurement (OJ 2009 L216/76) and directives 89/665/EEC and 92/13/EEC on remedies (both amended by Directive 2007/66/EC, OJ 2007 L335/31). These rules control the procurement activities of the EU Member States. In turn, procurement carried out by the EU institutions is controlled by the relevant version of the Financial Regulation (currently, the consolidated version of Regulation (EU, Euratom) 966/2012, OJ 2012 L298/1, which will be replaced by the recently approved Omnibus Regulation from 1 January 2019 <<http://data.consilium.europa.eu/doc/document/PE-13-2018-INIT/en/pdf>> accessed 13 August 2018). The Financial Regulation creates a system that closely follows the substantive rules of the 2014 EU public procurement package and, in particular, Directive 2014/24/EU. Given the general nature of the discussion on the territorial extension of EU procurement law in this paper, there is no need to engage in detailed technical aspects of any of these instruments or the differences between them. Thus, the considerations in this paper will be generally applicable to all of them.

¹⁷See Treaty on European Union (OJ 2012 C326/13) (TEU), arts 3(5) and 21. Art 3(5) Treaty on European Union (TEU) foresees that 'In its relations with the wider world, the Union shall ... contribute to ... the protection of human rights.' Art 21

power and uses its prescriptive jurisdiction to generate territorial extension of the human rights norms encapsulated in its Charter of Fundamental Rights (the Charter).¹⁸ Given the coordination of the scope of the Charter with the European Convention of Human Rights (ECHR),¹⁹ the promotion of human rights norms by the EU also results, indirectly, in the potential territorial extension of the ECHR in the case of dual-regulation rights (such as the right to access to justice, which is regulated in both Article 6 ECHR and Article 47 of the Charter).²⁰ EU public procurement law offers a useful case study of this dynamic because there are at least two distinct trends of territorial extension of fundamental rights protection through procurement regulation. Through market access conditionality and with two main and interlinked goals, the EU pursues: first, to further global standards of human rights protection and, second, to further regulatory convergence in procurement issues.

First, and probably more visibly, the 2014 version of EU public procurement law has created regulatory space for the territorial extension of core human rights guarantees. The 2014 rules include a number of mechanisms that Member States and their contracting authorities can use to foster human rights compliance.²¹ This territorial extension of EU human rights norms takes place at transaction and/or firm level,²² and has as its main goal an anti-circumvention objective that aims to avoid the expenditure of public funds in ways that perpetuate human rights violations.²³ Crucially, whether this represents legitimate or illegitimate territorial extension of EU human rights norms will depend on the existence of a sufficiently robust territorial trigger, which may be possible in view of the fact that the acquisition of goods, works or services takes place in the EU. However, given the breadth of the areas covered by the procurement rules – which allow for executive decisions based on activity at best remotely connected with the EU territory (e.g. the causation of environmental damage in a remote location) – this issue may deserve closer analysis. However, this first line of territorial extension of human rights norms through procurement law and supply-chain management is already receiving attention in scholarship and practice, and it will not be discussed in this paper.²⁴

Secondly, and less visibly, EU policy also pushes for the effectiveness of substantive and procedural EU public procurement law beyond the EU's territory²⁵ – which is a clear and rather prominent goal of EU trade policy.²⁶ This is pursued through the requirement of equivalence that the EU includes in its

TEU further establishes that ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: . . . the universality and indivisibility of human rights and fundamental freedoms . . . The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [those] principles.’ For discussion, see generally I Vianello, ‘Guaranteeing Respect for Human Rights in the EU’s External Relations: What Role for Administrative Law?’, in Sara Poli (ed), *Protecting Human Rights in the European Union’s External Relations*, CLEER PAPERS 2016/5 (TMC Asser 2016).

¹⁸Charter of Fundamental Rights of the European Union (OJ 2012 C326/391); also art 6(1) TEU.

¹⁹Convention for the Protection of Human Rights and Fundamental Freedoms, as amended <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 23 November 2017.

²⁰Art 52(3) of the Charter foresees that: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

²¹For detailed discussion, see A Sanchez-Graells, ‘Public Procurement and “Core” Human Rights: A Sketch of the EU Legal Framework’, in O Martin-Ortega and C M O’Brien (eds), *Public Procurement and Human Rights: Risks, Dilemmas and Opportunities for the State as a Buyer* (Edward Elgar, forthcoming) <<https://ssrn.com/abstract=3103194>> accessed 22 May 2018.

²²Scott (n 9) 107.

²³ibid, 111, by analogy.

²⁴The interested reader will find relevant materials and useful starting points at <www.hrprocurementlab.org/> accessed 23 November 2017. There are three reports by the International Learning Lab on Public Procurement and Human Rights worth considering: *Protecting Human Rights in the Supply Chain: A Guide for Public Procurement Practitioners* (1 July 2017), *Modern Slavery and Human Rights in Global Supply Chains: Roles and Responsibilities of Public Buyers* (20 December 2016) and *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (19 July 2016).

²⁵The idea that the EU has been engaging in regulatory transfer or ‘export’ of its public procurement rules is not new. See Michael Blauberger and Rike U Krämer, ‘European Competition vs. Global Competitiveness Transferring EU Rules on State Aid and Public Procurement Beyond Europe’ (2013) 13(1) *Journal of Industry, Competition and Trade* 171.

²⁶It should be noted that the EU has exclusive competence for the promotion of international procurement policy, as established by the Court of Justice in its Opinion of 16 May 2017 on the Free Trade Agreement between the European Union and the Republic of Singapore, 2/15, EU:C:2017:376, para 77.

free trade agreements (FTAs) – such as the ones recently concluded with Singapore²⁷ and Canada²⁸ and the one currently (as at August 2018) in negotiation with Indonesia²⁹ – and the stronger requirements of legal approximation that it includes in deep and comprehensive FTAs (DCFTAs) with neighbouring countries – such as those with Ukraine,³⁰ Moldova³¹ and Georgia.³² The EU supports these efforts for the territorial extension of its procurement standards through broader trade policies, such as the technical cooperation established between the European Commission and countries in the Euro-Mediterranean Partnership (EUROMED).³³ The key role the EU played in the revision of the multilateral World Trade Organization Government Procurement Agreement (WTO GPA)³⁴ shows convergence toward EU regulatory standards.³⁵ In such cases, from an international law perspective, the effectiveness of EU law beyond the EU's territory will not give rise to risks of extraterritoriality of the EU's prescriptive jurisdiction, as long as the underlying treaty provides sufficient coverage for the convergence toward EU standards in the relevant non-EU jurisdiction. Functionally, however, this regulatory export strategy still matches the concept of territorial extension of EU law.³⁶ Beyond these bilateral and multilateral efforts,³⁷ the EU is also planning a unilateral trade-retaliatory instrument (UTI) that would restrict access to EU procurement markets for goods, services and economic operators from third countries without a free trade relationship with the EU that ensured substantial reciprocity in the opening of their procurement markets.³⁸ Given the absence of an underlying treaty supporting the EU's unilateral action, the UTI would be a measure that triggers risks of illegitimate territorial extension of the EU public procurement rules.

On the whole, then, in pursuing regulatory convergence toward its own procurement standards and the human rights norms embedded therein, EU policy aims to create territorial extension of its public procurement rules at a country and global level,³⁹ with the main purpose of leveraging market access

²⁷See chapter 10 on government procurement of the EU-Singapore Comprehensive Free Trade Agreement <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151751.pdf> accessed 21 June 2017.

²⁸See chapter 19 on government procurement of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) <<http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>> accessed 21 June 2017.

²⁹See European Commission, Trade Negotiations between the European Union and Indonesia, EU Proposal on Public Procurement. Explanatory note, February 2017 <http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155293.pdf> accessed 21 June 2017.

³⁰See chapter 8 (Government Procurement) of Title IV on Trade and Trade-Related Matters of the EU-Ukraine Association Agreement (OJ 2014 L161/3).

³¹EU-Moldova Association Agreement (OJ 2014 L 260/4).

³²EU-Georgia Association Agreement (OJ 2014 L 261/4).

³³Generally, see European Commission, International Public Procurement—Enlargement and European Neighbourhood Policy <https://ec.europa.eu/growth/single-market/public-procurement/international/european-neighborhood-policy_en> accessed 21 June 2017.

³⁴<www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm> accessed 21 June 2017. For discussion, see Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011).

³⁵See Kamala Dawar and Monika Skalova, 'The Evolution of EU Public Procurement Rules and Its Interface with WTO: SME Promotion and Policy Space', in Grith S Ølykke and Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016). Also, Dimitris Tsarouhas and Stella Ladi, 'The EU in the World: Public Procurement Policy and the EU-WTO Relationship' (Conference of the Council for European Studies, Boston (MA), 2015) <<https://eustudies.org/conference/papers/download/90>> accessed 21 June 2017. For additional discussion, see Hilde Caroli Casavola, 'The WTO and the EU: Exploring the Relationship between Public Procurement Regulatory Systems', in Edoardo Chiti and Bernardo Giorgio Mattarella (eds), *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison* (Springer 2011).

³⁶Maybe not strictly, but at least in terms of indicating that the measure is applied (sometimes by the EU) in relation to conduct or circumstances abroad; see above (n 9) and accompanying text.

³⁷Generally, see European Commission, International Public Procurement – Bilateral Relations with non-EU Countries <https://ec.europa.eu/growth/single-market/public-procurement/international/bilateral-non-eu_en> accessed 21 June 2017.

³⁸See the Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. The full text <http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154187.pdf> accessed 21 June 2017. For discussion, see Kamala Dawar, 'The 2016 EU International Procurement Instrument's amendments to the 2012 buy European Proposal: A Retrospective Assessment of its Prospects' (2016) 50(5) *Journal of World Trade*. See also Scott (n 9) 108.

³⁹Scott (n 9) 107. That is, the EU creates 'higher level territorial extension' of its procurement law; *ibid*, 106.

regulation to ensure both counterparty reciprocity (in Scott's terms) and the catalysation of global norms⁴⁰ – that is, to further regulatory convergence. Whether this push for regulatory convergence results in legitimate territorial extension or illegitimate extraterritoriality requires careful assessment. However, this paper does not attempt to offer a definite answer to this question. Instead, it reflects on the implications of the EU's expansive procurement policy both outside and inside the EU's legal order.

This paper explores some of the legal implications of the territorial extension of EU public procurement law through DCFTAs, FTAs and the planned UTI. It concentrates on the EU's goal of furthering regulatory convergence toward EU procurement standards. The paper focuses on the territorial extension of EU procedural standards and its implications for the rules on procurement remedies⁴¹ and the related case law of the Court of Justice on the right to good administration⁴² and the right to access to justice (right to an effective remedy and to a fair trial).⁴³ This focus is justified on the basis that, crucially, where the EU creates territorial extension of its procurement rules, this includes not only EU statutory instruments, but also the case law of the Court of Justice – which creates a dynamic and difficult to foresee evolution of the material scope of the territorially extended EU procurement rules.⁴⁴ Additionally, given the expansive approach taken in the case law of the Court of Justice⁴⁵ toward procedural guarantees, the territorial extension of such case law can have a significant impact on the municipal administrative and judicial systems of the non-EU countries that are counterparties to trade agreements covering procurement – which could trigger extraterritoriality concerns, to the extent that developments in the Court of Justice's case law are not covered by the overarching treaty structures. This can be particularly relevant for countries with DCFTAs, where the procedural obligations are more demanding (although the risks of extraterritoriality are lower, due to the existence of the DCFTAs themselves), and also for countries facing potential trade disputes on the basis of the planned UTI (which could result in outright extraterritoriality), and for countries engaging in voluntary regulatory approximation, be it under an FTA or under the scope of the WTO GPA (which creates an intermediate scenario concerning risks of illegitimate territorial extension).

To explore these issues, and after providing a more detailed account of the way in which the EU engages in country-level territorial extension of its procurement law in the context of DCFTAs, FTAs and the planned UTI (Section 2), the paper assesses both the outward and inward implications of such territorial extension for the case law of the Court of Justice. From an *outward* perspective, the paper maps the ways in which EU law can generate territorially extended effects of its case law, both directly and through the mediated intervention of the European Commission. The paper stresses how, in this outward direction, the effects are primarily on the legal system of the non-EU jurisdiction and/or on the governance of the underlying FTA. The paper also stresses that, where there is no international treaty supporting the EU's intervention, it is possible to identify risks of illegitimate extraterritoriality of EU law (Section 3). From an *inward* perspective, the paper then assesses the recursive effects and implicit challenges that such territorial extension creates for the formation and development of the Court of Justice's case law. Here, the paper stresses that the effects are mainly felt in the EU's *own* legal order, although they can also create further recursive effects on the legal order of non-EU jurisdictions (Section 4). The paper raises

⁴⁰ *ibid.*, 111.

⁴¹ See the consolidated version of Directive 89/665/EEC, as amended by Directive 2007/66/EC <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:en:PDF>> accessed 23 November 2017.

⁴² Art 41 Charter. This has no equivalent ECHR counterpart.

⁴³ Art 47 Charter. Its counterpart is art 6 ECHR.

⁴⁴ This is, of course, also true in the case of any rules other than due process guarantees, and most of what is said in the paper will be applicable in the wider context of EU public procurement law.

⁴⁵ For example, the Court of Justice has established a strong link between the right to an effective remedy under art 47 of the Charter and the duties of procedural transparency in the context of procurement or time limits; see *Fastweb*, C-19/13, EU:C:2014:2194; see also Opinion of Advocate General Sharpston of 28 April 2016 in joined cases *Star Storage and Max Boegl România and ConstrucȚii Napoca*, C-439/14 and C-488/14, EU:C:2016:307. Some of these protections go beyond the standard protection under art 6 ECHR, which is also exceeded by the specific requirements derived from the right to good administration in art 41 of the Charter. For discussion, see A Sanchez-Graells, "'If it Ain't Broke, Don't Fix It'": EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts' in S Torricelli and F Folliot Lalliot (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Larcier 2018). Importantly, this case law does not only apply in the context of the remedies derived from Directive 89/665/EEC, but is framed in terms of general principles and fundamental rights.

general issues concerning procedural design and the consideration of foreign law by the Court of Justice, which could be relevant beyond the case study of EU public procurement rules. These are restated in the conclusion (Section 5).

2. Country-level territorial extension or extraterritoriality of EU procurement law by DCFTAs, FTAs and the proposed UTI

As mentioned above, the EU is implementing a consistent policy that seeks to ensure and/or promote the effectiveness of its public procurement laws and standards beyond its own territory, and is doing so through a variety of means. This section provides a more detailed account of the way the EU engages in country-level territorial extension of its procurement law through conditional market access in the context of DCFTAs (Section 2.1) and FTAs (Section 2.2). It also discusses how the EU plans to extend its policy through a UTI (Section 2.3).

2.1. Country-level territorial extension through DCFTAs

As a result of the DCFTAs concluded between the EU and neighbouring third countries, the latter have accepted obligations to engage in regulatory cooperation and convergence, which are bound to lead them to adopt similar standards to those set by EU public procurement law and its interpretation by the Court of Justice. As mentioned above, the existence of these international treaties largely deactivates concerns of extraterritoriality of EU procurement law. However, in my view, they still result in or evidence territorial extension, particularly where the obligations of regulatory approximation and reciprocity in equal treatment are loosely worded, and where the relevant EU rules do not derive from legislative instruments, but rather result from the case law of the Court of Justice. Remarkably, some DCFTAs are creating a structure geared toward explicitly ensuring territorially extended effects of the Court of Justice's public procurement case law, which is a rather unique feature.⁴⁶ This is particularly clear in the case of the DCFTAs signed between the EU and Ukraine, Moldova and Georgia. According to the EU-Ukraine DCFTA,⁴⁷ one of its objectives concerns 'the progressive approximation of the public procurement legislation in Ukraine with the EU public procurement *acquis*'.⁴⁸ It is explicitly stated that, in this process, 'due account shall be taken of the corresponding case law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU *acquis* occurring in the meantime'.⁴⁹ This creates the direct territorial extension of the Court of Justice's procurement case law, which is bound to impact the legislative and regulatory structures put in place by countries bound by a DCFTA with the EU.

Where such case law is concerned with due process guarantees foreseen in both the Charter and the ECHR (i.e. access to justice or fair trial), it could seem relatively unproblematic, given that Ukraine, Moldova and Georgia are signatories of the ECHR, which should already ensure a relatively high degree of compatibility and approximation of domestic rules with ECHR standards, which in turn influence the standards of the Charter. However, as mentioned above, given the existence of stand-alone procedural rights in the Charter that have no equivalent in the ECHR (notably, the right to good administration of Article 41 of the Charter), the expansive approach adopted by the Court of Justice in the creation of duties derived from both good administration and due process guarantees in the Charter,⁵⁰ and the possibility of further future developments that could raise the standard well beyond ECHR requirements (by virtue of the DCFTAs and the direct link they establish to the case law), these third countries could be bound to

⁴⁶Indeed, other than in relation to public procurement and State aid, Court of Justice case law in other areas is not explicitly mentioned in the relevant agreements, which may be seen as an indication of the EU's awareness of the Court of Justice's track record in actively extending the scope of application of the EU procurement rules. For extended discussion, see Albert Sanchez-Graells and Constant De Koninck, *Shaping EU Public Procurement Law: A Critical Analysis of the CJEU Case Law 2015-2017* (Kluwer 2018).

⁴⁷EU-Ukraine Association Agreement (n 30).

⁴⁸*ibid*, art 148.

⁴⁹*ibid*, art 153. The same is foreseen in the EU-Moldova Association Agreement (n 31) arts 268 and 273; and in the EU-Georgia Association Agreement (n 32) arts 141 and 146.

⁵⁰Which is explicitly allowed, in relation to dual-regulation rights, in art 52(3) *in fine* thereof.

adopt higher levels of procedural protection than those required under the ECHR.⁵¹ This would result in the territorial extension of the Charter's standards in the context of public procurement in a way that may not have been anticipated and that could result in practical difficulties (see below, Section 3).

2.2. Country-level territorial extension through FTAs

Similar, albeit more indirect, effects of the Court of Justice's case law will also emerge in the context of less stringent FTAs signed by the EU and third countries, such as Canada, which follow a 'WTO GPA plus' blueprint and include specific structures for the joint consideration of regulatory issues. In the case of the Comprehensive Economic and Trade Agreement (CETA),⁵² for example, the EU and Canada have agreed to establish a Committee on Government Procurement,⁵³ which is to be a joint forum for information exchange and policy development.⁵⁴ It can also undertake joint work on any issues regarding public procurement that are referred to it by either the EU or Canada,⁵⁵ and consider the promotion of coordinated activities to facilitate access for suppliers to procurement opportunities in the EU and Canada.⁵⁶ It seems clear that this is a forum where the EU could, in the future, try to facilitate regulatory convergence around issues derived from new case law of the Court of Justice,⁵⁷ including in the area of procedural guarantees. This is not only a matter of policy choice, but also an indication of the fact that the Charter also applies to the external action of the EU.⁵⁸ Given that the EU regulatory standard on procurement remedies (including the Court of Justice's case law) sets a more demanding standard than the alternative regulatory baseline in the WTO GPA,⁵⁹ on which CETA is based,⁶⁰ this could be an area where the EU pushes for further regulatory convergence toward its standards.⁶¹ Thus, at least in terms of agenda-setting and indirect influence on third-country regulation of public procurement, CETA-like technical committees can also be a platform for territorial extension of the case law of the Court of Justice.⁶² Even if less formalised, similar dynamics can emerge in the context of other FTAs signed by the EU, as the case law of the Court of Justice will unavoidably shape the EU's position in technical regulatory matters.

By contrast with the case of the DCFTAs, where the EU's counterparties are (and are likely to always be) members of the ECHR, the territorial expansion of the Court of Justice's case law in this second setting of FTAs can take place vis-à-vis non-ECHR jurisdictions (e.g. Canada and Singapore), which creates a greater potential for more significant difficulties, as well as for the potential extraterritoriality of the ECHR standards.⁶³ These risks are likely to be mediated (and possibly prevented) through the

⁵¹ See discussion above (n 45).

⁵² EU-Canada Comprehensive Economic and Trade Agreement (n 28).

⁵³ *ibid.*, art 26(2)(e).

⁵⁴ *ibid.*, art 19(19).

⁵⁵ *ibid.*, art 19(19)(2)(a).

⁵⁶ *ibid.*, art 19(19)(2)(e).

⁵⁷ Cfr Eric White, 'The Obstacles to Concluding the EU-Canada Comprehensive Economic and Trade Agreement and Lessons for the Future' (2017) 12(5) *Global Trade and Customs Journal* 176.

⁵⁸ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2010 Report on the Application of the EU Charter of Fundamental Rights, COM(2011) 160 final, at 3. See *Guidelines on the Analysis of Human Rights Impacts in Impact Assessment for Trade-Related Policy Initiatives*, 2015, at 5 <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf> accessed 23 November 2017. See also Oliver De Schutter's report for the European Parliament on *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework*, PE 571.397, 2016, at 61 <[www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU\(2016\)571397_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571397/IPOL_STU(2016)571397_EN.pdf)> accessed 1 December 2017.

⁵⁹ For discussion of the differences between WTO GPA and EU standards, see P Telles and A Sanchez-Graells, 'Examining Brexit through the GPA's Lens: What Next for UK Public Procurement Reform?' (2017) 47(1) *Public Contract Law Journal* 1.

⁶⁰ EU-Canada Comprehensive Economic and Trade Agreement (n 28), art 19(17). Cfr art XVIII WTO GPA.

⁶¹ This is the logical conclusion of art 19(17)(8) CETA, whereby the EU and Canada agreed that '[n]ot later than ten years after the entry into force of this Agreement, the Parties will take up negotiations to further develop the quality of remedies, including a possible commitment to introduce or maintain pre-contractual remedies.'

⁶² And, to the extent that the cooperation exceeded the framework of the underlying treaty or resulted from a trade dispute, there could be risks of extraterritoriality.

⁶³ One prominent example of potential difficulties could concern, e.g. the recognition of human rights of corporate entities, which is a contentious area of ECHR protection. For discussion in the context of procedural guarantees in the enforcement of

bilateral negotiations required before any regulatory change takes place in the non-EU jurisdiction, which would mitigate the problems of the more indirect territorial extension of EU procurement law (and Court of Justice case law) in this setting (as discussed below, Section 3).

2.3. Potential extraterritoriality through the planned UTI

Finally, outside the scope of FTAs and DCFTAs (and their specific dispute settlement mechanisms), the EU is seeking to unilaterally create a framework (a planned UTI) for engagement in similar discussions around market access and regulatory convergence with third countries. The lack of an underlying international treaty between the EU and the third countries concerned in a UTI-related case would fall squarely in the boundary between the legitimate territorial extension and the extraterritoriality *stricto sensu* of EU public procurement law. Indeed, in its 2016 revised proposal for a regulation on third country access to the EU's internal market in public procurement (which aims to support negotiations on access of EU goods and services to the public procurement markets of third countries),⁶⁴ the European Commission advanced detailed rules for the creation of a power to react to 'alleged restrictive and discriminatory procurement measures or practices adopted or maintained by third countries against [EU] economic operators, goods and services, and to enter into consultations with the third countries concerned'.⁶⁵ In that proposal, a relevant 'restrictive and/or discriminatory procurement measure or practice' is defined as any

legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, that result in a serious and recurrent impairment of access of [EU] goods, services and/or economic operators to the public procurement or concession market of that country.⁶⁶

Such situation could be, for example, a measure or practice imposing a blanket deprivation of due process rights against EU economic operators should they not be allowed to challenge procurement decisions and have them subjected to judicial review (i.e. a rule or practice excluding the active standing of EU economic operators in bid protest and review procedures). It seems clear, then, that even in the absence of a general framework regulating the territorial extension of the EU procurement rules (and the interpreting case law of the Court of Justice) to the jurisdiction of the third country, relevant EU standards (of protection of due process rights) will inform the European Commission's activity under the planned instrument. Consequently, any technical negotiations between the EU and a third country could be similar to those foreseen in the context of FTAs (above Section 2.2), albeit they probably would take place in a less cooperative and constructive setting. In that situation, and even more so in the case of a full-on dispute between the third country and the European Commission, the EU procurement rules and the Court of Justice's case law could end up affecting the third jurisdiction, which seems like a potential case of illegitimate extraterritoriality of those norms (as also discussed below, Section 3).

3. Outward implications

This section assesses the outward implications of the territorial extension of EU procurement law and maps the ways in which the EU's approach could mean the case law of the Court of Justice had some effect on third-country regulation of procurement, both directly (Section 3.1) and through the mediated intervention of the European Commission (Section 3.2). The analysis stresses how, in this outward direction, the effects are primarily on the legal system of the non-EU jurisdiction and/or on the governance of the underlying FTA, if there is one. In some cases, these outward effects will generate extraterritoriality risks. These implications are recapitulated at the end of the section (Section 3.3).

competition law, see A Sanchez-Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?' in V Kosta, N Skoutaris and V Tzevelekos (eds), *The Accession of the EU to the ECHR* (Hart 2014).

⁶⁴ Amended proposal for a Regulation on third country access (n 38).

⁶⁵ *ibid.*, art 1.

⁶⁶ *ibid.*, art 2(1)(f).

3.1. Direct territorial extension of the Court of Justice's case law to third countries under a semi-strong duty to approximate (DCFTAs)

In the context of DCFTAs imposing a duty to approximate the non-EU jurisdictions' regulation of procurement to EU standards (above, Section 2.1), the contracting authorities, review bodies and courts of the non-EU jurisdiction are under an obligation to approximate the regulation and practice of public procurement to the EU *acquis*, taking into due account the case law of the Court of Justice. This can be conceptualised as a 'semi-strong' duty to give effectiveness to the case law.⁶⁷ Therefore, it is necessary to explore the extent to which the territorial extension of the case law beyond the strict boundaries of the EU system can create difficulties, particularly where the process of legislative and institutional approximation or harmonisation toward the EU standards has not resulted in full functional equivalence under the third country's regulation,⁶⁸ or where the case law can have a significant impact on alternative policy or legislative options.⁶⁹

In the particular context of due process guarantees, it is worth remembering that the Court of Justice's case law is shaped by common elements of the EU and EU Member States' legal frameworks and common legal traditions, which can be foreign or difficult to coordinate with those of third countries. Recently, there have been contentious cases concerning the interaction between EU public procurement law and the general administrative or public law of the Member States that illustrate this concern. For example, in *Pizzo*,⁷⁰ the Court of Justice determined that non-compliance with general Italian administrative law obligations could not be used as a ground to automatically exclude a tenderer from a procurement procedure because the lack of transparency of such obligations triggered a procedural right to remedy the situation and to be heard prior to any decision on exclusion. Conversely, in *Connexion Taxi Services*,⁷¹ the Court of Justice prevented the application of a general duty of proportionality under Dutch administrative law to temper the harshness of the exclusion grounds foreseen in the tender documentation.

Granted, these cases can generate problems of reception and application at domestic level for both EU Member States and third countries. However, for third countries, the difficulties can be larger – both from a formal perspective, given the absence of principles such as primacy or the duty of consistent interpretation (which can limit the domestic courts' ability to adjust the domestic system to the EU's standards), and from a material perspective, as the underlying administrative architecture may be rather different from that of the EU Member States.⁷² Therefore, the difficulties could be even greater in cases concerning constitutional law protections in the context of criminal and quasi-criminal adjudication,⁷³ such as cases involving exclusion of tenderers because of previous criminal convictions, or in cases about the procedural guarantees applicable to procurement review procedures, which can be derived, in particular, from the right to good administration in the Charter,⁷⁴ without necessarily finding a similar ultimate source in the regulatory setting of third countries (some aspects of this issue are discussed in more detail below, Section 4). Thus, it seems clear that the DCFTA framework creates territorial extension

⁶⁷'Semi-strong' is used to conceptually place this duty in an intermediate space between, on the one hand, the absolute duty that befalls EU Member States as a result of the requirements of arts 263 and 267 of the TFEU (OJ 2012 C326/47, TFEU) and, on the other hand, the weak obligations discussed below in Section 3.2.

⁶⁸This would be the case concerning the rules on product standardisation and normalisation. For the type of cases that would create difficulties in the interpretation and application of the Court of Justice's case law outside the internal market, see *Medipac – Kazantzidis*, C-6/05, EU:C:2007:337; and *Commission v Greece*, C-489/06, EU:C:2009:165.

⁶⁹This could, for example, be the case concerning the use of procurement to enforce labour standards. For in-depth discussion of the thorny issues that derive from the interaction of EU procurement law and other areas of EU economic law (notably, employment law), see the contributions to A Sanchez-Graells (ed), *Smart Public Procurement and Labour Standards. Pushing the Discussion after RegioPost* (Hart 2018).

⁷⁰*Pizzo*, C-27/15, EU:C:2016:404.

⁷¹*Connexion Taxi Services*, C-171/15, EU:C:2016:948.

⁷²Of course, it is acknowledged that there can be closer proximity between some non-EU jurisdictions and a specific EU jurisdiction, than between the latter and another EU jurisdiction. However, assessing such an argument in detail exceeds the scope of this paper.

⁷³These difficulties could arise given the increasing relevance of criminal law or quasi-criminal law considerations in public procurement, in particular in relation to the rules on exclusion of tenderers and their procedural implications at domestic level. For a similar difficulty, but squarely in the field of criminal law, see the *Ognyanov*, C-614/14, EU:C:2016:514.

⁷⁴See discussion above (n 45).

of the case law of the Court of Justice (and the underlying effectiveness of the Charter) through the ‘semi-strong’ duty discussed above.

Importantly, given the specific dispute resolution mechanisms in the DCFTAs, which ensure that any disputes concerning the interpretation of the rules on judicial protection in the context of procurement are adjudicated by the Court of Justice itself,⁷⁵ the functional territorial extension of the Court’s own case law concerning due process guarantees is indirectly reinforced by the European Commission’s ability to take issue with the reaction (or its absence) to any developments by the DCFTA counterparty and, where a lack of sufficient approximation to the EU standards is found, to initiate a dispute. This compounds the problem by adding a layer of complexity that is functionally equivalent to the situation discussed below.

3.2. Mediated territorial extension or extraterritoriality of the Court of Justice’s case law for third countries under a weak duty or no duty to approximate (FTAs and UTI)

Using the same line of reasoning as in the previous subsection, it is worth stressing that the effectiveness of the Court of Justice’s case law beyond the EU territory will be mediated or filtered by the activities of the European Commission. Both in the case of DCFTAs requiring the EU’s partner third country to adjust its procurement legislation to accommodate new case law of the Court of Justice, and in the case of FTAs implying a formal or informal forum for technical coordination (above Section 2.2), the EU’s position in negotiations or disputes with the relevant third country will be formed and represented by the European Commission. In the first situation (DCFTAs), this will include both an assessment of whether EU case law requires legal reform in the non-EU jurisdiction, and whether any reforms have ensured compliance. In the second situation, (FTAs and UTI) this will inform the negotiating position of the EU. While in the first case the DCFTAs include explicit mechanisms allowing the third country (as well as the EU) to refer any disputes for adjudication by the Court of Justice,⁷⁶ in the case of FTA- and UTI-related disputes the involvement of the Court of Justice is more difficult to structure.

In the context of DCFTAs, jurisdiction-specific issues related to difficulties in the reception of the Court of Justice’s case law in the third country may arrive at the Court via the roundabout process of an interpretive referral derived from a dispute between the third country and the EU on that specific aspect. The Court of Justice’s control of the Commission’s interpretation of its case law could be seen as a guarantee for the third country that the Commission cannot extend the scope of the territorial extension of EU procurement law in an unsupported manner. However, such a situation where the Court of Justice assessed issues concerning jurisdiction-specific issues of the third country would, of course, only arise where the third country decided not to follow the Court of Justice’s procurement case law or was unable to do so in a way that complied with the Commission’s wishes. Given the political nature of the issues arising from the implementation of these DCFTAs and the parties’ likely goodwill and effort to ensure legislative approximation (in particular if accession to the EU is on the horizon), it may well be that those issues will, in practice, not reach the Court of Justice, but instead create potentially excessive territorially extended effects in the procurement system of the host country.

Differently, in the context of FTAs, the case law of the Court of Justice can only be used to generate territorial extension of EU procurement standards in a mediated manner and with agreement of the third country (absent which, the EU can only trigger a trade dispute). In this context, however, any interpretations by the Commission that deviated from the meaning intended by the Court of Justice would only be susceptible to control by the Court in an indirect manner – for example, if a Member State or other interested party⁷⁷ challenged the Commission’s acts. Thus, trade bargains could result in the territorial extension of the Court of Justice’s case law (including the territorial extension of norms that go beyond that case law, should the Commission overstep its limits in a way that is unchallenged by the third jurisdiction).

In the context of potential disputes based on the planned UTI (above, Section 2.3), if the Commission took issue with a third country’s restrictive practices concerning due process guarantees available to EU economic operators tendering for contracts in that jurisdiction on the basis that the standards were

⁷⁵See art 322 of the EU-Ukraine Association Agreement (n 30) art 403 of the EU-Moldova Association Agreement (n 31) and art 267 of the EU-Georgia Association Agreement (n 32).

⁷⁶ibid.

⁷⁷Although the rules for active standing of non-privileged applicants under art 263 TFEU will not facilitate this.

not reciprocal with those of the EU (that is, those of the Charter, as interpreted in the case law of the Court of Justice), there would be a risk of extraterritoriality of the EU norms to the extent to which the EU procedural standards were effective in relation to procurement in the third jurisdiction. In such a setting, similarly to the FTA situation, the effectiveness of the EU rules in the foreign jurisdiction would be dependent on the agreement of the third country, absent which the Commission could only ensure effectiveness of the EU rules within the EU through exclusionary retaliatory measures. In this context, though, and more closely to the situation under DCFTAs, the decision of the Commission imposing sanctions would be reviewable by the Court of Justice,⁷⁸ which would then assess whether the Commission's position properly reflected its own case law.

Overall, then, it seems that the scope for the territorially extended application (or potential extraterritoriality) of the Court of Justice's case law in the area of public procurement is rather wide and that its extent will depend, in good measure, on (i) the position taken by the European Commission when it interprets that case law and translates it into actionable policy, and (ii) on the effectiveness of the dispute resolution mechanisms of the DCFTAs and FTAs signed by the EU, and of any direct challenges of enforcement acts derived from the planned UTI, which would still trigger a significant number of issues, the analysis of which, however, exceeds the scope of this paper.

3.3. Restating of outward implications

The discussion in this section has shown how third countries need to engage with the Court of Justice's case law when designing their own regulatory systems relating to public procurement and, in particular, in relation to review procedures and procedural guarantees. Under DCFTAs, this results in territorial extension of the Court of Justice's case law (and the underlying effectiveness of the Charter and, in particular, the right to good administration in Article 41); it also results in additional territorial extension derived from the Commission's assessment of the DCFTA counterparty's compliance with its treaty obligations. In the context of FTAs and the planned UTI, the implications are territorial extension (FTAs) and potential extraterritoriality (UTI), to the extent the third country accepts and enforces EU standards (as interpreted by the Court of Justice's case law) as part of a trade bargain or as a consequence of losing a trade dispute. In these cases, it is possible to argue that, ultimately, the effect derives from an independent regulatory decision of the third country – which would exclude issues of *stricto sensu* extraterritoriality – but, in my view, and from a functional perspective, these situations of regulatory export would be examples of territorial extension of potentially dubious legitimacy.

The discussion has also shown how, in the different contexts, there is variation as to whether a third country can challenge the Commission's interpretation of the case law (which is the lever for the creation of mediated territorial extension) in front of the Court of Justice. In the context of a DCFTA or the planned UTI, the third country can directly ask the Court of Justice for an interpretation of EU law or, in the context of the planned UTI, for a review of the legality of the Commission's act. In the context of FTAs, it is more difficult for third parties to approach the Court of Justice, and whether they can seek the Court's help will depend on the dispute settlement architecture of the particular FTA. Each of these situations raises important issues about the procedural rules applicable to the resolution of disputes. The next section assesses some of the recursive effects of such territorial extension in the way the Court of Justice deals with procurement-related trade disputes. It also considers the extent to which the Court will then be faced with difficulties in relation to the need to interpret third country procurement laws.

4. Inward implications and challenges for the interpretation of third country procurement laws by the Court of Justice

In this section, the paper reverses the perspective of the analysis and seeks to identify some recursive effects derived from the territorial extension of the EU public procurement and the case law of the Court of Justice (as discussed above, Section 3.3). The section concentrates on two main effects. One effect

⁷⁸The measures would be imposed through an 'implementing act' (see art 7(3)(ii) of the Amended proposal for a Regulation on third country access (n 38)), which can be challenged before the Court of Justice by virtue of art 263 TFEU. Discussing the specific difficulties of such a challenge exceeds the scope of this paper.

concerns the process for the formation of new case law of the Court of Justice in a context where EU public procurement law does not generate effects only within the EU, but does so also in countries bound by a DCFTA (direct effects) and in countries bound by FTAs or targeted by the planned UTI (indirect effects) (Section 4.1). The other effect concerns the unavoidable (future) need for the Court of Justice to interpret third country procurement rules (that is, foreign law) in the context of disputes under a DCFTA or the UTI (Section 4.2).

4.1. Shortcomings in the procedures for the formation of new case law

Given the fact that the Court of Justice's case law will have effects in non-EU jurisdictions as a result of its territorial extension (above Section 3.3), it is worth considering the extent to which the likely impact of such case law on third countries will (or ought to) form part of the legal arguments presented to the Court when it makes new case law, in particular, in the context of references for preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union (TFEU).⁷⁹ Given that the Court of Justice's interpretation of EU law in an Article 267 TFEU judgment will have material effects in those jurisdictions, considering the likely impact of such case law on third countries seems a priori desirable. However, except in those cases where relevant third country actors are involved in litigation within the EU triggering those references for preliminary rulings,⁸⁰ it will be difficult to find ways to channel such input on the likely impact on third countries toward the Court of Justice.⁸¹

In that regard, from a normative perspective, it is worth stressing that the procedural design of the preliminary ruling mechanism⁸² ensures that EU Member States and, where relevant, European Economic Area (EEA) Member States and third States that are parties to an agreement concluded with the Council relating to a specific subject matter,⁸³ are authorised to submit observations to the Court of Justice. This follows the logic that those States where the ruling will have an effect should be able to make relevant representations to the Court of Justice, including on the impact that different interpretations could have in their jurisdictions. It also facilitates dialogue between the Court and the Member States, which can be particularly useful where the Court needs to draw from the common elements of the different legal traditions in the EU/EEA. Ultimately, it also allows the participating States to influence the development of the Court of Justice's case law through the observations they submit.⁸⁴

Conversely, in relation to countries that have entered into a DCFTA with the EU, it seems that the existing procedural rules do not allow for their intervention before the Court of Justice, in as much as this is not foreseen in the DCFTAs themselves.⁸⁵ The impossibility of being included in the preliminary

⁷⁹ Art 267 TFEU establishes that 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; [and] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.'

⁸⁰ Some of these issues are similar to those raised in litigation such as that leading to *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864.

⁸¹ On the related issue of the value of third-country input into EU law and policy formation, see E Korkea-Aho, "'Mr Smith Goes To Brussels": Third Country Lobbying and the Making of EU Law and Policy' (2016) 18 *Cambridge Yearbook of European Legal Studies* 45.

⁸² See art 23 of the Statute of the Court of Justice of the European Union, and art 96(1) of the Rules of Procedure of the Court of Justice. Consolidated versions of both documents <<https://curia.europa.eu/>> accessed 30 November 2017.

⁸³ In particular, art 96(1)(f) refers to 'non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement'. See also *Orizzonte Salute*, C-61/14, EU:C:2015:655, para 31: 'so far as concerns participation in preliminary ruling proceedings, in accordance with Article 96(1) of the Rules of Procedure read in conjunction with Article 23 of the Statute of the Court, the parties to the main proceedings, the Member States, the Commission and, where relevant, the institution, body, office or agency of the European Union which adopted the act the validity or interpretation of which is in dispute, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and the EFTA Surveillance Authority and the non-Member States concerned are authorised to submit observations to the Court.'

⁸⁴ For a review of the empirical evidence in that regard, and critical discussion of the feedback effects that the case law of the Court of Justice creates at domestic level, see Michael Blauberger and Susanne K Schmidt, 'The European Court of Justice and its Political Impact' (2017) 40(4) *West European Politics* 907.

⁸⁵ To the best of my knowledge, no such possibility exists under the EU-Ukraine Association Agreement (n 30), the EU-Moldova Association Agreement (n 31), or the EU-Georgia Association Agreement (n 32).

reference procedure is even clearer in the case of countries with FTAs or with no relevant agreement with the EU. It is also clear that courts of all the third countries will not be able to refer questions for preliminary interpretation to the Court of Justice, and that their role in relation with the EU procurement case law will be merely passive or receptive (see above, Section 3). This could be particularly problematic where the application of the case law triggers jurisdiction-specific issues⁸⁶ that may never be presented to the Court of Justice for consideration, because of the asymmetrical structures that ensure only *outward* effects of the case law (but see below, regarding infringement procedures).

Absent a possibility for direct intervention in front of the Court of Justice, the availability of indirect ways to input into the process of formation the Court of Justice's case law is rather limited. The extent to which the European Commission will be willing (or competent) to submit observations concerning the impacts of specific potential interpretations of EU law on third country jurisdictions seems unclear. It is also unclear whether Advocates General may incorporate any of these issues in their Opinions, or whether there can be alternative paths for the consideration of some of the aspects of the emerging functional territorial extension or extraterritoriality of the Court of Justice's case law in this area, in particular if the courts of some EU Member States pick up on those issues and refer preliminary questions to the Court of Justice with the objective of clarifying similar situations in their jurisdictions.⁸⁷ Though unclear, the extent to which there can be flexibility in the existing interpretive and judicial infrastructure to address any of these issues seems extremely limited.

On the whole, the fact that the procedural design of the preliminary reference mechanism is inadequate in that it does not expose the Court of Justice to the implications of its interpretive function beyond the jurisdictions of the EU/EEA Member States seems to create a significant shortcoming in terms of enabling the Court of Justice to consider the whole spectrum of impacts that its decision-making can create. Addressing this shortcoming exceeds the scope of this paper, which can only offer some reflections in the conclusion (below, Section 5).

4.2. *The need to engage in the interpretation of foreign law in the context of trade-related procurement disputes*

To add to the discussion in the previous subsection, it is also worth assessing the extent to which the Court of Justice will need to interpret third country procurement laws as a result of the EU's expansive approach to the regulatory export of procurement rules. So far, the Court of Justice has generally not needed to interpret foreign law. Other than in relation to international public law,⁸⁸ the Court's engagement with non-EU law has largely been confined to its use of the comparative law method.⁸⁹ Moreover, in the few cases where the Court has taken into consideration foreign law, much in the tradition of international law⁹⁰ it has claimed to do so as a point of factual rather than legal analysis.⁹¹ As emphatically put by a current Judge of the Court, 'the law of third countries, including their case law, does not have legal

⁸⁶For a cautionary example of the further recursive effects that similar situations can create, in particular in the context of case law regarding procedural guarantees and right to access to justice, see the discussion of *Osman v United Kingdom* [1998] EHRR 101 in Paula Giliker, *The Europeanisation of English Tort Law*, (Hart Studies in Private Law, Hart 2014) 143 ff.

⁸⁷However, this seems unlikely when the need for the questions to have a sufficient bearing on the case at hand at the national level is taken into account.

⁸⁸For discussion, see e.g. Gráinne de Búrca, 'International Law before the Courts: The European Union and the United States Compared' (2015) 55(3) *Virginia Journal of International Law* 685.

⁸⁹See e.g. Koen Lenaerts, 'The European Court of Justice and the Comparative Law Method' (2017) 25(2) *European Review of Private Law* 297, and Koen Lenaerts and Kathleen Gutman, 'The Comparative Law Method and the European Court of Justice: Echoes across the Atlantic' (2016) 64(4) *American Journal of Comparative Law* 841.

⁹⁰This refers back to the dictum that '[f]rom the standpoint of International Law . . . municipal laws are merely facts'; see the 1926 judgment of the Permanent Court of International Justice in the *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ Series A Number 7, page 19. See also Giorgio Gaja, 'Loi (nationale): *un simple fait*', in H Ascensio, P Bodeau-Livinec, M Forteau and F Latty (eds), *Dictionnaire des idées reçues en droit international* (Pedone 2017).

⁹¹This was the situation in *Schrems*, C-362/14, EU:C:2015:650. For discussion, see C Kuner, 'Reality and Illusion in EU Data Transfer Regulation Post *Schrems*' (2017) 18(4) *German Law Journal* 881, 899 ff. And, with particular emphasis on the issue of the consideration of foreign (US) law in that case, C Kuner, 'Third Country Law in the CJEU's Data Protection Judgments' (*European Law Blog*, 12 July 2017) <<http://europeanlawblog.eu/2017/07/12/third-country-law-in-the-cjeus-data-protection-judgments/>> accessed 30 November 2017.

significance as a formal element of adjudication [by the Court of Justice] and can only be considered as a fact and as a part of the referential framework of judges'.⁹² This shows clear reluctance to engage in the interpretation of foreign law by the Court of Justice. However, this situation may change because of pressures that can result from the need to assess compatibility between EU and foreign law in the context of territorial extension of EU law – and, for the purposes of our discussion, in the context of future procurement disputes brought to the Court of Justice under a DCFTA or the planned UTI.

Indeed, the need for the Court of Justice to interpret foreign law to assess whether it is 'essentially equivalent' with⁹³ (or has sufficiently adapted to) the EU standard would emerge, for instance, where a third country with a DCFTA referred a dispute concerning procurement issues to the Court of Justice, for example, a dispute on whether the third country has ensured the effectiveness of the EU *acquis* on procurement remedies through domestic rules.⁹⁴ It is also possible that, should the EU instrument on third country access to the EU procurement markets (UTI)⁹⁵ enter into force, the Court of Justice would then face the need to interpret whether procurement measures or practices in third countries are actually restrictive of access by EU undertakings, goods or services, as part of an assessment of the validity of the Commission's decisions to apply retaliatory price measures through implementing acts. These disputes could reach the Court of Justice not solely on the initiative of the third country concerned (which may not have the incentives to do so, or seek other avenues for international dispute settlement), but also as challenges to the implementing acts adopted by the Commission – for example, by EU Member States with economic interests negatively affected by the EU-level action against the third country.⁹⁶ This is particularly clear bearing in mind that, should EU Member States not follow the retaliatory measures adopted at EU level, the Commission can seek a declaration of ineffectiveness of any contracts awarded by the recalcitrant Member State to economic operators of the third country concerned,⁹⁷ which can 'domesticise' the dispute for the purposes of the review of the Commission's trade policy by the Court of Justice.

In each and any of these cases, the Court of Justice would face the need to interpret third country laws, or at least have to find ways of accepting a given interpretation of the foreign laws, in order to reach conclusions that allow for the resolution of the dispute at hand. Functionally, this may not seem very different from the Court of Justice's assessment of the domestic law of the Member States, in particular in infringement procedures (following Article 258 or 259 TFEU). However, this is a rather different exercise when it involves third country jurisdictions. The way in which supremacy of EU law and the boundaries of the powers of the Court of Justice will be interpreted and applied in a setting not covered by *Costa v ENEL*⁹⁸ raises important questions. When the Court of Justice engages with the law of a Member State (as a specific type of 'foreign law', understood as non-EU law), it has been pointed out that '[a]s to the question of whether the CJEU will consider them as law or as fact, the answer is that it depends on the rule under consideration and on applicable procedure (preliminary reference, direct action, action for infringement of EU law, or possibly appeal from the General Court).'⁹⁹ In that regard, and more specifically, it has been stressed that

It is a common place that, under Article 267 [TFEU] the CJEU considers itself bound by legal interpretations of national law submitted to it by a referring national court. And it is precisely for this reason that the CJEU understands the national law of member states as fact, not as law . . . However, there are important situations where the law of the member states is primarily considered as law, such as whenever EU law provides for mutual recognition or coordination of national systems.¹⁰⁰

⁹²Siniša Rodin, 'Constitutional Relevance of Foreign Court Decisions' (2016) 65 *American Journal of Comparative Law* 815, 824.

⁹³Kuner, 'Reality and Illusion' (n 91) 899–902.

⁹⁴There are other situations where similar issues would arise, in particular, in relation to domestic procurement decisions involving an assessment of compliance with the law of third countries – e.g. in relation with the enforcement of social or environmental obligations. These issues, however, fall outside the scope of this paper. See above, Section 1.

⁹⁵Amended proposal for a Regulation on third country access (n 38).

⁹⁶The extent to which undertakings from the third country would have direct access to the Court of Justice is much less clear, but direct access cannot be fully excluded.

⁹⁷See art 13 of the Amended proposal for a Regulation on third country access (n 38).

⁹⁸Which established the primacy of EU law; see *Costa v E.N.E.L.*, C-6/64, EU:C:1964:66.

⁹⁹Rodin (n 92) 824.

¹⁰⁰*ibid.*, 825–26.

This creates a clear contrast in the approach the Court of Justice may follow in cases requiring an assessment of legal harmonisation obligations imposed on an EU Member State (where the Court will engage in a legal interpretation of the domestic rules, not treat them as mere facts) and those imposed on a non-EU State (where it will treat the domestic foreign law as fact). For example, the difference in approach can be seen in the reaction to unclear domestic rules. In a case involving an EU Member State, and because of the specific constitutional duties incumbent upon them, where there is uncertainty as to whether the existing domestic rules give effect to the relevant EU standard, and even if the Member State submits that, as interpreted by the national courts, the rules achieve the intended result, the Court of Justice can sidestep the need to reach a firm position on the interpretation of the domestic law of the Member State and establish, for example, an infringement based on a reduction in the effectiveness of EU law that ensues from that uncertainty.¹⁰¹ However, if a similar situation concerns a non-EU Member State, the Court of Justice needs to reach a firm position on the interpretation of the domestic law of the non-EU jurisdiction to be able to assess whether or not there is a breach of any positive obligations (for example, in the case of a DCFTA), or whether the imposition of retaliatory measures is otherwise justified (for example, in the case of the planned UTI). Therefore, in a setting where the Court of Justice cannot rely on constitutional arguments, the possibility of treating ‘foreign law’ as mere fact without engaging in its interpretation as a legal norm for the purposes of assessing the extent to which it is compatible with, or ‘sufficiently approximated’ to, the EU standard is non-existent. This is, in my view, problematic.

It is of course possible (and probably likely) that the Court of Justice would try to stay away from the need to interpret foreign law for as long as possible – for example, by adopting a light-touch approach to an assessment of the Commission’s interpretation of foreign law.¹⁰² However, this could undermine the confidence of third countries in any dispute resolution mechanism requiring the involvement of the Court of Justice (either under the specific DCFTA or, even more clearly, under the planned UTI) and have long-lasting effects on the EU’s trade and foreign policies. Conversely, the Court of Justice could defer to the interpretation of the domestic law presented by the third country, but this would also undermine the dispute settlement mechanism.

Thus, it would seem necessary to devise a workable approach that allowed for the Court of Justice’s *more direct* engagement with the interpretation of foreign law – at a minimum, by boosting the role of the Advocate General in the interpretation and use of foreign law.¹⁰³ However, there are thorny issues that require detailed assessment and, for the purposes of the discussion in this paper, all that can be said is that ensuring that the territorial expansion of the EU public procurement rules does not create difficulties will require changes in the procedures and approaches of the Court of Justice, or else the EU’s expansive regulatory policy will be reduced to a paper tiger. This would not be too surprising as the underlying issues reflect the broader difficulties around the justiciability of international trade law,¹⁰⁴ but with the peculiarity that the concentration on EU rules moves the focus from the international arena (including the dockets of international dispute settlement bodies) to the turf of the Court of Justice.

5. Conclusions

This paper has used the EU’s policy of fostering regulatory convergence toward its own regulatory standards in the area of public procurement – and in particular in the area of remedies and administrative and procedural guarantees as established in the Charter and interpreted in the case law of the Court of

¹⁰¹This is akin to the situation that emanates from the line of case law of the Court of Justice requiring explicit transposition of consumer protection directives. See *Commission v Netherlands*, C-144/99, EU:C:2001:257, para 21; *Commission v Belgium*, C-421/12, EU:C:2014:2064, para 46. For discussion of the impact of this approach to adjudication on the domestic legal system of EU Member States, see M Hesselink, ‘The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience’ (2006) 12(3) *European Law Journal* 279.

¹⁰²As was the case in *Schrems* (n 91), where the Court of Justice relied on the Commission’s assessment, see para 90 in particular. See also Kuner, ‘Third Country Law in the CJEU’s Data Protection Judgments’ (n 91), who considers that it is ‘surely disingenuous to claim that the *Schrems* case did not involve evaluation of US legal standards’ on that basis.

¹⁰³On which there is some experience, see Lee F Peoples, ‘The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities’ (2008) 35(2) *Syracuse Journal of International Law & Commerce* 219.

¹⁰⁴For discussion, see Thomas Cottier, ‘International Trade Law: The Impact of Justiciability and Separations of Powers in EC Law’ (2009) 5(2) *European Constitutional Law Review* 307.

Justice – to critically assess whether the EU is engaging in illegitimate extraterritoriality of its norms or pursuing legitimate territorial extension thereof. The paper has mapped the different ways in which the EU is seeking to boost the effectiveness of its procurement standards beyond its own territory, some of which raise risks of extraterritoriality, in particular in the context of the planned unilateral trade-retaliatory instrument regulating third country access to EU procurement markets (the UTI). In other contexts, where the EU has entered into DCFTAs with neighbouring countries (such as Ukraine, Moldova and Georgia), or FTAs with selected trade partners (such as Canada and Singapore), the risk is not of extraterritoriality or illegitimate territorial extension. However, from a functional perspective, the same issues and difficulties linked to the enforcement of extraneous norms in a third jurisdiction arise, either directly (in the case of DCFTAs) or in a mediated form (as is also the case in FTAs and, in some circumstances, the UTI). The paper has shown how this regulatory strategy of the EU creates outward effects that can result in negative or challenging situations on the legal system of the non-EU jurisdiction and/or on the governance of the underlying FTA.

Beyond that, and taking the opposite perspective, the paper has also explored the extent to which the existence of any functional territorial extension of the EU public procurement rules can generate recursive effects on the way EU norms are created and, in particular, on the way the case law of the Court of Justice is formed and the way in which it engages (or not) in the interpretation of foreign law. The analysis in the paper has shown how the territorial extension of the EU public procurement rules is creating areas of potential legal uncertainty about the fitness for purpose of the mechanisms of formation of new case law that can have a significant impact on third country jurisdictions, and of the ability of the Court to engage with foreign law. More importantly, most of the issues discussed in the case study of EU public procurement law and, in particular, the Court of Justice's case law on good administration and access to justice in procurement, are reflective of much broader trends of application across several areas of EU economic law.

In my view, all of this points toward the need to reconsider whether the EU's judicial architecture is fit for the interpretive challenges that come with the territorial extension of EU substantive norms, be they related to human rights standards or not – but maybe with a special relevance in the latter case. Of course, even starting to formulate a blueprint for such assessment far exceeds the scope of this paper. My only hope is that the paper serves to provide some indication of new areas deserving thorough analysis. If I had to identify my priorities in that regard, they would be the control of the discretion of the Commission when it acts as a mediating agent in the context of territorial extension of EU rules (in the procurement example, in the context of DCFTA monitoring, FTA technical collaboration and UTI enforcement), the revision of the preliminary reference mechanism in the context of DCFTAs and developed FTAs, and the issue of the Court of Justice's ability and jurisdiction to interpret foreign law. Incidentally, all of these issues will be of great relevance in the context of Brexit – depending on the framework for future EU-UK relationships – so these may be areas of particular interest for EU lawyers based in the UK.

Declarations and conflict of interests

The author declares no conflicts of interest.