

# The consideration of environmental criteria in European and international public procurement law: a conflict of norms analysis

Ass. jur. Rike Krämer  
 Research Assistant  
 Collobaritive Research Center 597  
 Transformation of the State  
 Rike.Kraemer@sfb597.uni-bremen.de

## Abstract

*This paper examines the question how environmental concerns can be considered in multilevel trade institutions like the public procurement regime. It does so by referring to conflict of laws tools. It is argued that a static or a one size fits all solution for the above described conflict can not be found and is also not preferable. However, a procedural solution is, as shall be seen, the most legitimate and convincing respond to the described conflicts. Furthermore, such a solution is to a certain extent already in place at the European and international level.*

1. Introduction .....	2
2. New forms for solving the conflict between environmental and trade concerns .....	3
2.1 Jus cogens.....	4
2.2 Systematic Integration.....	5
2.3 Proceduralization.....	7
3. Government Procurement Law in the European Union .....	7
3.1 The Case Concordia Bus .....	8
3.2 The directive 2004/18/EC .....	11
3.2.1 The award criteria.....	11
3.2.2 Technical specification.....	12
4. Government Procurement Law at the WTO .....	14
4.1 The Award of Contracts .....	15
4.2 Technical Specifications .....	16
5. Conclusion.....	17
6. Bibliography.....	18

# 1. Introduction

„Achieving a *modus vivendi* between liberalization of the economy and the achievement of other non-economic values has proven one of the most difficult issues of this decade in many industrialized countries. Whether it is the tensions between economic efficiency and environmental protection, or labor-market flexibility and fair labor standards, or deregulation and distributive justice, a resolution of this problem seems some way away.”<sup>1</sup>

Through privatisation of former state duties and responsibilities within the last decade, the government procurement law has gained in importance. For many public duties, the state today lacks material expenses and staff appropriations and therefore uses private companies to perform public tasks.<sup>2</sup> Inter alia, the state mandates private companies to build schools, to offer public transport or to realize large infrastructure projects such as airports. The volume of these contracts averages out at 16 % of the GDP in the member states of the European Union.<sup>3</sup> Obviously, the state is the single most important individual consumer. Besides setting a good example, with his purchase decisions alone, the state can substantially influence the demand for sustainably produced goods.<sup>4</sup> This is a reason why the branch of public procurement law became increasingly relevant for goals outside financial and budgetary policy in the last years, especially for environment protection.

But is the state free to decide on environment criteria used in public procurement procedures? In a national procurement procedure, European and international law (WTO) overlap with domestic law and all have to be taken into account. So the above question has to be rephrased. To put it with Joerges the question is: “Can national [ecological] regulatory policies survive WTO [and European] law?”<sup>5</sup> Or how can the conflicts between environmental concerns and economic concerns be solved in a multilevel regime. This is the question that this paper tries to give answers to. The main thesis is that a one size fits all solution cannot be found for the conflicts pictured above. However, a procedural solution is, as shall be seen, the most convincing respond to the described conflicts.

---

<sup>1</sup> C. McCrudden, International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement, *Journal of International Economic Law* 1999, S. 3-48: p. 3

<sup>2</sup> P. Genschel und B. Zangl, *Metamorphosen des Staates — vom Herrschaftsmonopolisten zum Herrschaftsmanager: Transformations of the state. From monopolist to manager of political authority Leviathan* 2008, S. 430-445

<sup>3</sup> [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm) (last checked 05.05.2009)

<sup>4</sup> G. van Calster, Green Procurement and the WTO - Shades of Grey, *Review of European Community & International Environmental Law* 2002, S. 298-305: p. 298

<sup>5</sup> C. Joerges, Conflict of Laws as Constitutional Form: Reflections on International Trade Law and the Biotech Panel Report, RECON Online Working Paper 2007, S.: p. 6

To answer the above raised question, in the next chapter (2) newer forms of conflict resolution are introduced. I discuss, whether these new types can solve the outlined problem. In Chapter three (3) the developments in European procurement law are described, especially regarding the possibility to use environmental criteria in the award criteria and in the technical specification. The following Chapter (4) presents the government procurement law at the international level and tries to work out the similarities and differences at the European and international level also for the award criteria and the technical specification. The paper ends with a conclusion (5).

## 2. New forms for solving the conflict between environmental and trade concerns

The classical conflict of laws doctrine for the multilevel system (international law and national law), the dualism and the monism can not give answers to the conflicts between regulatory policies (environment and trade) also called “diagonal conflicts”<sup>6</sup>. Furthermore in a world of interlegality<sup>7</sup> these two concepts even can not describe the relationship between national and international law. Both fail “to grasp the (post)modern plurality of legal orders at the international level and the complicated inter-connectedness between ‘the international’ and ‘the domestic’”.<sup>8</sup> One reason for their failure is that both assume a “hierarchical structure of the legal system/Stufenbau der Rechtsordnung”<sup>9</sup> and mistake the reality of legal plurality.

In the European legal system, the principle of supremacy does not solve the described conflict either, especially when there is no applicable European law. Moreover it has to be taken into account that the member states on the EU level and on the international level have a legitimate right to regulate national concerns on behalf of their citizens, such as environmental-friendly procurement. The competence norm in art. 175 EC treaty represents no exclusive competence. At the international level (here at the WTO) a competence to regulate environmental concerns does not even exist.

In the following, three proposals from the literature will be discussed, especially their ability to solve the conflict between trade and environmental concerns.

---

<sup>6</sup> C. U. Schmid, Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing, *European Review of Private Law* 2000, S. 153-170: p. 161 ff.

<sup>7</sup> M. Amstutz, In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning, *European Law Journal* 2005, S. 766-784: p. 766f.

<sup>8</sup> A. L. Paulus, The Emergence of the International Community and the Divide between International and Domestic Law, in: Nijman/Nollkaemper (Hrsg.), *New Perspectives on the Divide Between National and International Law*, 2007, S. 1-31: p. 2

<sup>9</sup> H. Kelsen, Introduction to the Problems of Legal Theory : A Translation of the First Edition of the *Reine Rechtslehre* or *Pure Theory of Law*, 2002=1992: p. 63ff.

## 2.1 *Jus cogens*

One possibility to solve the problem between environmental and trade concerns within the procurement law regime would be to classify the principle of sustainability as a *jus cogens* (peremptory norm) norm of general international law. In case of an existing conflict between the principle of sustainability and the trade treaty, a *jus cogens* classification, would according to art. 53 VCLT invalidate the trade treaty. Such a principle would therefore contain the obligation to interpret the treaty in such a way that it does not conflict with the principle of sustainability, otherwise the treaty would be void and not applicable.

The dispute settlement body would be bound by such a principle.<sup>10</sup> The European court of first instance and national courts already exercise a control of the lawfulness of acts with regard to peremptory norms.<sup>11</sup>

The question is if such a principle would solve the conflicts between the two regulatory goals. Such a principle would not contain detailed rules<sup>12</sup> about the extent to which environmental criteria would have to be taken into account in government procurement law. Moreover, such a principle would only prohibit actions that cause serious ecological damage.<sup>13</sup> For instance Paulus ranks among the commands included in such a principle of sustainability „a general duty not to severely and intentionally pollute the environment“<sup>14</sup>. This example shows that such a principle would include only essential standards.<sup>15</sup> The question, whether and especially to which amount ecological criteria could or should be included in a government procurement procedure, could not be answered by it. How far the principle of sustainability is actually attributed to *jus cogens*, requires no further clearance. “In any event, *ius cogens* does not dispose of most ‘ordinary’ value conflicts, e.g. between the promotion of free trade and the protection of the environment.”<sup>16</sup>

---

<sup>10</sup> J. Pauwelyn, Conflict of Norms in Public International Law : How WTO Law Relates to Other Rules of International Law, 2003: S. 467

<sup>11</sup> Decision of the Court of first instance, 21th of September 2005, Case T 315/01, ECR II-03649, para 231. For more cases see Paulus, The Emergence of the International Community and the Divide between International and Domestic Law, S.: p. 14, Fn 67

<sup>12</sup> E. Kornicker, *Ius cogens* und Umweltvölkerrecht: Kriterien, Quellen und Rechtsfolgen zwingender Völkerrechtsnormen und deren Anwendung auf das Umweltvölkerrecht, 1997: 158 J. Neumann, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung, 2002: S. 71, mit weiteren Nachweisen zu der Problematik

<sup>13</sup> Neumann, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung: S. 71f

<sup>14</sup> A. L. Paulus, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, in: I.F. Dekker (Hrsg.), Governance and International Legal Theory, 2004, S. 59-95: S. 73

<sup>15</sup> So auch der IGH in seinem Urteil „Gabcikovi-Nagymaros“ vom 25.09.1997, Report 1997, S. 67, Rn 112.

<sup>16</sup> Paulus, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, S.: p. 74

## 2.2 Systematic Integration

Another option represented in the literature to solve collisions between ecological and economic concerns is the so called systematic integration.<sup>17</sup> It is argued that this principle could open the world trade regime for ecological concerns. The systematic integration is stated in art. 31.3 c VCLT. The requirements of this article are that, a

*“treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.*

Especially paragraph three c states that,

*there shall be taken into account, together with the context:  
any relevant rules of international law applicable in the relations between the parties.*

The applicability of art. 31.3 c VCLT within the WTO-law is not disputed because of the wording in art. 3.2<sup>18</sup> of the Dispute Settlement Understanding (DSU).<sup>19</sup> However, the question is highly contested whether besides the VCLT other norms of international law can be taken into consideration within a trade dispute at the DSU.<sup>20</sup> However, the panels and the appellate body do refer to other international law in their decisions.<sup>21</sup>

When assuming the applicability of other international norms within a trade dispute at the DSB, international law concerning the consideration of ecological criteria is needed. Such a norm for example can be found in the agenda 21 in the points 4.23<sup>22</sup> and 7.74.<sup>23</sup> The agenda was adopted at the Rio-conference in 1992. At the Johannesburg World Summit on

---

<sup>17</sup> *International Law Commission und M. Koskenniemi*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, 2006: § 410-480 *Paulus*, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, S.: p. 79 *H. von Asselt, F. Sindico und M. Mehling*, Global Climate Change and the Fragmentation of International Law, *Law & Policy* 2008, S. 423-449: p. 435

<sup>18</sup> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

<sup>19</sup> *J. Pauwelyn*, The Role of Public International Law in the WTO: How Far Can We Go, *The American Journal of International Law* 2001, S. 535-578: S. 540ff.

<sup>20</sup> Ablehnend *Trachtman J. P. Trachtman*, Institutional Linkage: Transcending "Trade and..." *The American Journal of International Law* 2002, S. 77-93: S. 88. Zustimmend *Pauwelyn*, The Role of Public International Law in the WTO: How Far Can We Go: S. 540ff.

<sup>21</sup> For example in the case WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products. Report of the Appellate Body vom 12.10.1998, WT/DS58/AB/R, paras. 130ff.

<sup>22</sup> Governments themselves also play a role in consumption, particularly in countries where the public sector plays a large role in the economy and can have a considerable influence on both corporate decisions and public perceptions. They should therefore review the purchasing policies of their agencies and departments so that they may improve, where possible, the environmental content of government procurement policies, without prejudice to international trade principles. Available at

<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (last checked 11.05.2009).

<sup>23</sup> Local authorities are called upon to play a pioneering role in promoting the increased use of environmentally sound building materials and construction technologies, e.g., by pursuing an innovative procurement policy. Available at: <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (last checked 11.05.2009).

Sustainable Development in 2002, this goal has been affirmed. The Johannesburg Plan of Implementation in chapter 3 para. 18 calls for actions to

*[e]ncourage relevant authorities at all levels to take sustainable development considerations into account in decision-making, including on national and local development planning, investment in infrastructure, business development and public procurement. This would include actions at all levels to: [...] (c) [p]romote public procurement policies that encourage development and diffusion of environmentally sound goods and services.*<sup>24</sup>

Both documents are only “soft law”.<sup>25</sup> Further they include a constraint regarding international trade law. Only activities “without prejudice to international trade principles” are permitted. The appellate body has however consulted the agenda 21 to interpret indefinite legal terms within WTO law.<sup>26</sup>

Another international norm could be the UNCITRAL Model Law on the Procurement of goods. However this model law does not explicitly include any links for the consideration of environmental concerns.<sup>27</sup>

Against this background, it is asked if the systematic integration solves the conflict between trade and environment concerns within the multilevel-regime of government procurement law. The problem with this principle is, that its ability to solve conflicts between environmental and trade concerns is limited to conflicts of law on the same level, such as conflicts between WTO-law and international environmental law. The principle is not applicable for conflicts between laws of different levels such as between EU law and international law. A general statement about the possibility or legality of a unilateral action of a state is not possible based on this principle. A unilateral action in the case of the consideration of environmental criteria could rely on the agenda 21 and the plan of implementation but both are themselves constrained by international trade principles. They therefore do not expand the possible actions that can be taken in accordance with the WTO law. Other international law to refer to does not exist. The choice would be between idleness and unilateral action, keeping in mind that such a unilateral action can lead to the evolution of a new international norm for the consideration of environment criteria.<sup>28</sup> The principle of

<sup>24</sup> Available at: [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIChapter3.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm) (last checked 11.05.2009).

<sup>25</sup> C. Tietje und S. Wolf, Das Welthandelsrecht als Grenze für Umweltbeihilfen und ökologisierte Auftragsvergabe, in: Schneider (Hrsg.), Beihilfe- und Vergaberecht als Rahmenbedingungen der Umweltpolitik : Zehnte Osnabrücker Gespräche zum Deutschen und Europäischen Umweltrecht am 11./12. November 2004 2005, S. 85-108: S. 88

<sup>26</sup> WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products. Report of the Appellate Body vom 12.10.1998, WT/DS58/AB/R, paras. 130ff.

<sup>27</sup> F. Mechel, Die Förderung des Umweltschutzes bei der Vergabe öffentlicher Aufträge, 2006: p. 62

<sup>28</sup> D. Bodansky, What's so Bad About Unilateral Action to Protect the Environment?, European Journal of International Law 2000, S. 339-347: S. 344

systematic integration does not allow or promote such a pioneering role of a single state. At the international level it only enables recognition and integration of the standard upon which all member states could agree.

Finally, it should be mentioned that the cited references are formulated very vague. Therefore these paragraphs are of no guidance to which extend environmental criteria should be considered in a procurement procedure.

### **2.3 Proceduralization**

Another option to integrate environmental concerns into the trade law is a procedural solution.<sup>29</sup> A detailed description of the different theoretical concepts behind the proceduralization is spared here.<sup>30</sup> The goal of such a concept is to force the nation state to take external effects for third parties into account. The nation state has to justify its regulation with regard to the third party interests.<sup>31</sup> The particularity of such a procedural solution is that no substantial demands such as boundary values are formulated, leaving room for more than one uniform solution. The WTO and the EU system can give consideration to national judgements and regulations.<sup>32</sup> I argue that his principle of proceduralization is a workable solution for the conflict between trade and environmental concerns within a multilevel system. One example for a procedural solution in which both aspects of proceduralization are achieved is the judgement *Concordia Bus* of the ECJ, described below.

## **3. Government Procurement Law in the European Union**

The European commission early assumed the different laws according government procurement in the member states to be an obstacle to trade. So the commission started to regulate on this behalf in the 1960, despite lacking explicit competences.<sup>33</sup> The first directive was the commission directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies. The aim of the commission to liberalise the government procurement law was not successful and so the commission changed the strategy and developed coordinative directives. The first coordination directive was directive

<sup>29</sup> For the category of procedural law see *G.-P. Calliess*, *Prozedurales Recht*, 1999

<sup>30</sup> For one theoretical perspective see *R. Wiethölter*, *Proceduralization of the Category of Law*, in: *Joerges/Trubek* (Hrsg.), *Critical Legal Thought. An American German Debate*, 1989, S. 501-510

<sup>31</sup> *C. Joerges*, *Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische unitas in pluralitate verfasst werden kann*, in: *Führ/Wahl/von Wilmowsky* (Hrsg.), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Reh binder*, 2007, S. 719-747 *A. von Bogdandy*, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization*, in: *Griller* (Hrsg.), *International Economic Governance and Non-Economic Concerns*, 2003, S. 103-148: p. 105

<sup>32</sup> *R. Cooney und A. T. F. Lang*, *Taking Uncertainty Seriously: Adaptive Governance and International Trade*, *European Journal of International Law* 2007, S. 523-551: p. 542f.

<sup>33</sup> Except art. 183 Nr. 4 EC Treaty.

71/305/EEC. Other directives for different sectors followed. These directives and also the procurement law at the WTO level have in common that they only regulate procurement procedures above a certain threshold. The threshold rate is nearly the same for the European and the international level.

After a few amendments of the directives the commission proposed in 2000 two new directives. Legislation took nearly four years. In 2004, the two directives, the directive 2004/18/EC and the directive 2004/17/EC for utilities, finally could be enacted.<sup>34</sup>

The issue of environment-friendly procurement arrived rather late on the European Community's agenda. It was firstly brought up in the Commission communication of 11 March 1998 "Public procurement in the European Union" (Com[1998] 143 final). The commission affirmed that,

*it is legitimate to take environmental considerations into account for the purpose of choosing the economically most advantageous tender overall, if the organiser of the tender procedure itself benefits directly from the ecological qualities of the product*<sup>35</sup>.

More broadly the question reached the commission's agenda in 2001. In the "interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement" the commission discussed the issue more broadly. Still, the commission maintained her attitude that environmental considerations can only be taken into account if the organiser of the tender procedure benefits. Only such criteria shall be used that "generate an economic advantage for the contracting authority [...] like, for instance the energy consumption of a product"<sup>36</sup>.

Through the Judgement *Concordia Bus*<sup>37</sup> in 2002 the issue received a great breakthrough. The findings of this judgement are discussed below (1). The question to what extent the directive 2004/18/EG codifies these findings or includes new changes is subject of the second part (2) of this chapter.

### **3.1 The Case *Concordia Bus***

The first opportunity for the ECJ to give an opinion about the consideration of environmental criteria was the judgement in the case *Concordia Bus*<sup>38</sup>. Subject of the litigation was a tendering of the city of Helsinki for the entire bus transport network of the city. The contract should be awarded to the undertaking whose tender was most economically advantageous. For

---

<sup>34</sup> The last directive, the utility directive, is not discussed in this paper.

<sup>35</sup> Judgement of the Court of 17 September 2002 [*Concordia Bus*], C-513/99, ECR 2002 Page I-07213, para 34.

<sup>36</sup> Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, Brussels, 4.7.2001COM(2001) 274 final, Official Journal C 333 , 28/11/2001 P. 0012 – 0026, para 3.1.

<sup>37</sup> Judgement of the Court of 17 September 2002 [*Concordia Bus*], C-513/99, ECR 2002 Page I-07213.

<sup>38</sup> Judgement of the Court of 17 September 2002 [*Concordia Bus*], C-513/99, ECR 2002 Page I-07213.

the assessment of the most advantageous tender three categories of criteria were established. These three criteria were the price of operation, the quality of the buses and the operator itself and the environment management. Within the second criterion (quality of the buses), additional points were given for the compliance with threshold values for noise and nitrogen oxide emissions. The tenderer Concordia (the complainant) did not receive such additional points and reached the second place. The contract was awarded to the HKL-Bussiliikenne, a city-owned enterprise. Furthermore it was certain that there were only a few enterprises with a bus fleet which complied with the threshold values for noise and nitrogen oxide.

In this procedure three questions were raised before the ECJ. Here only the last two are important. The second question was, if environmental criteria like, the nitrogen oxide emissions and the level of noise, are eligible for consideration within the economically most advantageous tender. The third question was, if the answer to the above question is affirmative, are the Community provisions on public procurement to be interpreted as meaning that the awarding of extra points for the abovementioned characteristics is, however, not permitted if only a few undertakings in the sector are able to receive extra points.

Regarding the general consideration the ECJ elaborates,

*that, as is clear from the wording of that provision, in particular the use of the expression for example<sup>39</sup>, the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender are not listed exhaustively (see also, to that effect, Case C-19/00 SIAC Construction [2001] ECR I-7725, paragraph 35).<sup>40</sup>*

Furthermore this provision

*cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.<sup>41</sup>*

Additionally the court points out, that

*in the light of that objective and also of the wording of [...]Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be*

---

<sup>39</sup> The article which the court referd to is art. 36, I, a of the directive 92/50/EEC:

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting authority shall base the award of contracts may be:

(a) where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and aftersales service, delivery date, delivery period or period of completion, price; or

(b) the lowest price only.

<sup>40</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 54.

<sup>41</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 55.

*concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.*

This does not mean that every criterion concerning the environment is permitted. The court clarifies that there are four additional requirements:

- (1) The award criterion must *be linked to the subject-matter of the contract.*<sup>42</sup>
- (2) An award criterion *having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible.*<sup>43</sup>
- (3) The award criterion *must be applied in conformity with all the procedural rules.*<sup>44</sup>
- (4) The award criterion *must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.*<sup>45</sup>

The first criterion was addressed by the ECJ in his following judgement EVN and Wienstrom. Subject of the procedure was an Austrian tendering about an energy supply contract. One of the award criteria was the volume of renewable energy, produced by the tenderer in the last two years or which the tenderer planned to produce in the following two years. Regarding this criterion, the ECJ points out that

*the award criterion applied does not relate to the service which is the subject-matter of the contract, namely the supply of an amount of electricity to the contracting authority corresponding to its expected annual consumption as laid down in the invitation to tender, but to the amount of electricity that the tenderers have supplied, or will supply, to other customers.*<sup>46</sup>

Furthermore the ECJ found that,

*an award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract.*<sup>47</sup>

Principally the ECJ affirms the use of renewable energy as an award criterion. Therefore with the determination of the first requirement, the link to the subject-matter of the contract, the ECJ did not introduce a distinction between process or product related award criteria.<sup>48</sup> The energy produced by a nuclear power station or by a wind energy plant is as such indistinguishable. (Technically it does not even make sense to say that a consumer who has a “green” power supply contract receives a different sort of energy from her neighbours who

<sup>42</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 59.

<sup>43</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 61.

<sup>44</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 62.

<sup>45</sup> Judgement of the Court of 17 September 2002 [Concordia Bus], C-513/99, ECR 2002 Page I-07213, para 63.

<sup>46</sup> Judgement of the Court of 4 December 2003, C. 448/01, para 67.

<sup>47</sup> Judgement of the Court of 4 December 2003, C. 448/01, para 68

<sup>48</sup>A. Wiedmann, Die Zulässigkeit sozialer Vergabekriterien im Lichte des Gemeinschaftsrechts, 2007: S. 56

are served by conventional suppliers attached to the same power network.) Despite the requirement of a link to the subject-matter of the contract, there exists a variety of possibilities to consider environmental concerns.

The above mentioned third question raised in the Concordia Bus case concerning the small number of tenderers who could achieve additional points was answered by the ECJ to the effect that the principle of non discrimination was not violated.

Consequently the ECJ solves the conflict between environmental and economic concerns with a procedural solution. The requirement of a “link to the subject matter of the contract” serves to secure a non-discriminatory and non-arbitrary procurement procedure, in which external impacts on entities of other countries are taken into account. However, it does not include any substantial requirements like a product-process distinction.

Furthermore, all the restrictions laid down in the judgment allow yet a wide range of possibilities how to consider environmental criteria in the national procurement procedure.

### **3.2 The directive 2004/18/EC**

The enacting of the directive 2004/18/EC<sup>49</sup> took four years. One reason for this long duration was the deep disagreement between the Commission and the European Parliament about the consideration of environmental criteria within the award criteria.<sup>50</sup> This question was also the main point in the above discussed case Concordia Bus; therefore this issue is in the main focus of the following remarks (3.2.1). The paper will discuss the possibilities of using environmental criteria in the technical specification (3.2.2) because both aspects can be compared well on the different levels (EU, WTO).

Concluding, it can be stated that the new directive has not brought huge innovations for the consideration of secondary policies in government procurement law.<sup>51</sup>

#### **3.2.1 The award criteria**

The integration of environmental criteria in the contract award criteria is laid down in the new directive 2004/18/EC in art. 53 I, a. It provides in this respect that:

*Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:*

*(a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter*

<sup>49</sup> See for the entire changes through the new directive *S. Arrowsmith*, An Assessment of the New Legislative Package on Public Procurement, *Common Market Law Review* 2004, S. 1277-1325

<sup>50</sup> *A. Dageförde und M. Dross*, Reform des europäischen Vergaberechts, Umweltkriterien in den neuen Vergaberichtlinien, *Neue Zeitschrift für Verwaltungsrecht* 2005, S. 19-25: S. 23f.

<sup>51</sup> *J. Arnould*, Secondary Policies in Public Procurement: The Innovations of the New Directives, *Public Procurement Law Review* 2004, S. 187-197: S. 190

*of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, **environmental characteristics**, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or  
(b) the lowest price only [emphasis added].*

The environmental characteristics are added, as emphasized above (compared to the old version see footnote 31). The interpretation and the scope of these “environmental characteristics” remain doubtful. Whether it includes the production process, which would be necessary for including the use of renewable energy as an award criterion, is not revealed clearly in the wording. But by reading this passage together with the first recital, the answer must be yes. In the first recital it is said, that the directive

*is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in Recital 2.*

As described above, the Court of Justice has made no distinction between production processes or the product itself. The directive does adopt this approach.<sup>52</sup> An award criterion regarding renewable energy is therefore allowed. The procedural solution developed in the judgement *Concordia Bus* was therefore adopted in the new directive.

### **3.2.2 Technical specification**

The technical specification lays down the definition of the product, construction or service to be purchased. An environment-friendly specification would for example be a definition (for the required product paper) according to which the paper to be purchased must be recovered paper. Environmentally friendly definitions can also be made by reference to eco-labels like the Blue Angel<sup>53</sup>. The norm for such a technical specification is art. 23 of the directive. I restrict myself to discuss only the requirement to refer to standards, because this is most relevant with regard to the question of conflicts between national environmental concerns and international trade concerns. In this respect art. 23 (3) a provides that the technical specification can be formulated,

*either by reference to technical specifications defined in Annex VI and, in order of preference to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when these*

<sup>52</sup> Also *Dageförde und Dross*, Reform des europäischen Vergaberechts, Umweltkriterien in den neuen Vergaberichtlinien: S. 24

<sup>53</sup> Such a reference to an eco-label does not mean that only products with such a label can be supplied. The reference to the label only describes the technical requirements of the product.

*do not exist – to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";*

This paragraph states a hierarchy of standards that can be used in a technical specification. National standards are only possible when European or international standards do not exist. Therefore the using of a higher level of protection stated in a national standard is by formulating the technical specification through standards not possible.

However, the second possibility to describe the technical specification is art. 23 (3) b, it provides that the technical specification can be further formulated

*in terms of performance or functional requirements; the latter may include environmental characteristics.*

Therefore it is possible to formulate in the technical specification a requirement for energy supply only from renewable energy. However the European commission has expressed the opinion that a determination of energy supply only from wind energy has discriminatory effects. Therefore such a narrow definition is not allowed.<sup>54</sup>

The question is “whether a purchaser may insist on higher standards (for example, of safety) than those in a European standard”<sup>55</sup>. Art. 23 (5) refers to this question:

*Where a contracting authority uses the option laid down in paragraph 3 to prescribe in terms of performance or functional requirements, it may not reject a tender for works, products or services which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down. In his tender, the tenderer must prove to the satisfaction of the contracting authority and by any appropriate means that the work, product or service in compliance with the standard meets the performance or functional requirements of the contracting authority. An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognised body.*

There are two possible interpretations of the wording “address” here. The first one is that the wording could suggest that tenders can not be rejected when the standard in question deals with the referred characteristic of the required product as laid down in the performance or functional requirement.<sup>56</sup> Consider an example where in the functional requirement a special restriction regarding air pollution from public transport is established. If a European standard with thresholds for air pollution exists can the purchaser go any further and reject the tenderer which only fulfil the European standard? The first interpretation would not allow this. The second possible interpretation is that the European standard must have the same level of

<sup>54</sup> Arnould, Secondary Politics in Public Procurement: The Innovations of the New Directives: S. 190

<sup>55</sup> Arrowsmith, An Assessment of the New Legislative Package on Public Procurement: p. 1304

<sup>56</sup> Ebd. : p. 1304

protection.<sup>57</sup> Higher standards would than be possible. This second interpretation has a better fit within the overall system of European Law, because the system in European law suggests that to go beyond a European standard, the relevant standard has to be justified in accordance with the exceptions or the mandatory requirements.<sup>58</sup> This is a procedural solution, because the nation state has to justify its own regulation with regard to external effects.

Another argument for such an interpretation is the possibility to refer to eco-labels in the technical specification. The requirements for such a reference are laid down in paragraph 6 of art. 23.<sup>59</sup> This paragraph does not state any preference to European standards, also national eco-labels can be used.

#### 4. Government Procurement Law at the WTO

The rules governing public procurement in the WTO are laid down in the General Procurement Agreement (GPA). The GPA is unlike the GATT not a multilateral<sup>60</sup>, agreement, but a plurilateral<sup>61</sup> one, to which the EU, the USA and Japan are parties.<sup>62</sup> The rules regarding the material coverage of the GPA contain five points of contact for the consideration of environmental concerns. These are the non-discrimination rule in art. III GPA, the requirements for suppliers in art. VIII GPA, the exceptions in art. XXIII (2) GPA, the awarding criteria in art. XIII GPA and the technical specifications in art. VI. Both the awarding criteria (4.1) and the technical specifications (4.2) are discussed below and compared to the European system.

---

<sup>57</sup> Ebd. : p. 1304

<sup>58</sup> *J. Scott*, International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO, *European Journal of International Law* 2004, S. 307-354

<sup>59</sup> Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

- those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,
- the requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and
- they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognised body.

<sup>60</sup> Such an agreement is meant within the WTO regime, when the agreement is binding upon all WTO-members  
*S. Hobe und O. Kimminich*, Einführung in das Völkerrecht, 8, 2004: 374

<sup>61</sup> Such an agreement is only binding upon those states, who signed the agreement.

Abkommen sind nur für die unterzeichnenden Staaten verbindlich Ebd. : 375.

<sup>62</sup> Further members are Canada, China, Island, Israel, Korea, Lichtenstein, Norway, Singapore, Switzerland and the Netherlands with respect to Aruba, [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last checked 13.05..2009).

## 4.1 The Award of Contracts

The relevant norm for the award criteria within the GPA is art. XII (4) b. The wording is,

*unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.*

So for the awarding of the contract the public entity can choose the **lowest** or the **most advantageous** offer. Like in the directive 2004/18/EC the lowest-price-principle or the best-price-principle are applied.<sup>63</sup> However despite the same principles in the GPA and in the directive, the question whether both should be interpreted the same way is highly disputed.<sup>64</sup> No one really maintains that environmental criteria cannot be considered at all. Only the scale of consideration is questioned. A restrictive opinion states that for the determination of the most advantageous tender only such criteria can be used that have an economic reference.<sup>65</sup> The argument is that “most advantageous” actually means “economically most advantageous”.<sup>66</sup> In line with this, Prieß and Pitschas point out: „As the award criterion of the lowest tender is unequivocally based on pure economic considerations, the other award criterion, that is, the most advantageous tender, must be of the same nature.” In this view only such criteria can be considered that may be more expensive at first glance but cheaper in the long run. This would for example be true of products with low energy consumption. An award criterion considering renewable energy supply would only be possible if renewable energy supply would be cheaper than other energy forms. The aspect that renewable energy is produced sustainably could by such a restrictive interpretation not be considered.

The main part of the literature however holds a less restrictive view. According to Gaedkte, the most advantageous tender has to be understood subjectively. So it is the tender which mostly correspond to the set out criteria according to the view of the entity. The criteria are

---

<sup>63</sup> G. Kunnert, WTO-Vergaberecht: Genese und System sowie Einwirkungen auf das EG-Vergaberegime, 1998: 274.

<sup>64</sup> Einschlägige gerichtsförmige Entscheidungen zum GPA gibt es bezüglich dieser Frage nicht. Der einzige Fall, der diesbezüglich an das DSB herangetragen wurde und bei dem ein Panel eingerichtet wurde, war das Verfahren über das Massachusetts Burma Law. Dieses Verfahren wurde jedoch nicht zu Ende geführt, da das streitige Gesetz vorher vom US Supreme Court aufgehoben wurde. Ausführlicher zu diesem Fall K. Fischer, Erlaubt das WTO-Vergaberecht die Verfolgung politischer Ziele im öffentlichen Auftragswesen?, *Recht der internationalen Wirtschaft* 2003, S. 347-352: S. 348

<sup>65</sup> C. Pitschas und H.-J. Prieß, Secondary Policy Criteria and Their Compatibility With EC and WTO Procurement Law. The Case of the German Scientology Declaration, *Public Procurement Law Review* 2000, S. 171-195: S. 189 So auch Tietje und Wolf, *Das Welthandelsrecht als Grenze für Umweltbeihilfen und ökologisierte Auftragsvergabe*, S.: S. 99f

<sup>66</sup> G. De Graff und M. King, Towards a More Global Government Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round, *The International Lawyer* 1995, S. 435-: p. 439

freely selectable.<sup>67</sup> This freedom is only restricted through the principle of non-discrimination in art. III GPA and through the rule of procedure, especially the requirement of publicity. This view should be approved. The restrictive view contradicts the wording of art. XI (4) b. An economic requirement is not stated in art. XII 4 (b). Furthermore an analogy to the European level can be drawn. Here the wording includes “most economically advantageous” but the ECJ and the new directive subsume under the wording also non-economic criteria.

Consequently this solution is very similar to the European directives. Therefore it is also a procedural one. For the environmental criteria no material requirements are laid down. Furthermore the GPA renounces the link to the subject-matter of the contract, which is required in the directive.<sup>68</sup>

## 4.2 Technical Specifications

The requirements for technical specifications in the GPA are laid down in art. VI. In the first paragraph of this article the characteristics of a technical specification are described.<sup>69</sup> The technical specifications shall, where appropriate

*(b) be based on international standards, where such exist; otherwise, on national technical regulations,<sup>70</sup> recognized national standards<sup>71</sup>, or building codes .*

From this wording can be concluded that technical specification can also be based on non-international standards.<sup>72</sup> The question is however if a higher level of protection than the one set out in an international standard (if such a standard exist) is allowed. The wording “where such exist” is not clear. Firstly it could indicate a prevention to use higher standards. Secondly it could indicate that a higher national standard can be used when there is no no international

---

<sup>67</sup> J.-C. Gaedtke, Politische Auftragsvergabe im Welthandelsrecht, 2006: S. 123f. So auch S. Arrowsmith, Government Procurement in the WTO, 2003: S. 344.

<sup>68</sup> Arrowsmith spricht diese Problem kurz an, verneint dann aber eine solche Einschränkung Arrowsmith, Government Procurement in the WTO: S. 344

<sup>69</sup> Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities.

<sup>70</sup> For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method

<sup>71</sup> For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

<sup>72</sup> G. van Calster, Green Procurement and the WTO - Shades of Grey, Review of European Community and International Environmental Law 2002, S. 298-305: p. 302

standard with an equivalent level of protection. However the last part of the first paragraph states that technical specifications,

*shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade [emphasis added].*

A higher standard could be such an unnecessary obstacle to trade. But here a similar interpretation than at the European level should be applied. The higher standard should be only then an obstacle to trade when this standard lacks justification.<sup>73</sup> This solution would again be procedural solution like its European counterpart.

## 5. Conclusion

The conflict between environmental concerns or free trade can not be solved by establishing a new “hierarchical structure of the legal system” through referring to the principle of jus cogens in a multilevel regime. Furthermore the horizontal principle of systematic integration is not of any guidance for the solution of the conflict in a multilevel system. A possible solution for the conflict between free trade and environmental policy goals at the different levels is proceduralization. First of all a procedural solution takes the legitimate policy goal of sustainable procurement seriously. Secondly, to prevent bare protectionism, it requires an obligation to justify ones own regulations with regard to possible external effects. Within the European and international procurement law, a tendency to use a procedural approach can be seen.

As regards the leeway to consider environmental criteria in public procurement, it can be summed up that the WTO-law and the European law for government procurement both include possibilities to consider environmental concerns. However the European law goes much more in detail than the GPA. The directive 2004/18/EC explicitly mentions environmental characteristics in the award criteria and in the technical specifications. The remarks concerning the GPA are based on a text-analysis of the agreement only, because these questions have not yet been subject to a dispute. It is therefore questionable whether an appointed panel would go the proposed way here proposed. This is also because „specialized judicial bodies have difficulty in balancing the values embodied in other institutions“<sup>74</sup> and also in the nation state. If a panel were to decide on this conflict, it should consider that the further development of international law is dependent on the impulses of national forerunners

---

<sup>73</sup> Arrowsmith, An Assessment of the New Legislative Package on Public Procurement:p. 319

<sup>74</sup>Paulus, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, S.

## 6. Bibliography

*Amstutz, Marc*, In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning, *European Law Journal* 2005, p. 766-784.

*Arnould, Joel*, Secondary Policies in Public Procurement: The Innovations of the New Directives, *Public Procurement Law Review* 2004, S. 187-197.

*Arrowsmith, Sue*, An Assessment of the New Legislative Package on Public Procurement, *Common Market Law Review* 2004, p. 1277-1325.

*Arrowsmith, Sue*, *Government Procurement in the WTO*, The Hague 2003.

*Bodansky, Daniel*, What's so Bad About Unilateral Action to Protect the Environment?, *European Journal of International Law* 2000, p. 339-347.

*Calliess, Graf-Peter*, *Prozedurales Recht*, Baden-Baden 1999.

*Cooney, Rosie/Lang, Andrew T.F.*, Taking Uncertainty Seriously: Adaptive Governance and International Trade, *European Journal of International Law* 2007, p. 523-551.

*Dageförde, Angela/Dross, Miriam*, Reform des europäischen Vergaberechts, Umweltkriterien in den neuen Vergaberichtlinien, *Neue Zeitschrift für Verwaltungsrecht* 2005, p. 19-25.

*De Graff, Gerard/King, Matthew*, Towards a More Global Government Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round, *The International Lawyer* 1995, p. 435.

*Fischer, Kristian*, Erlaubt das WTO-Vergaberecht die Verfolgung politischer Ziele im öffentlichen Auftragswesen?, *Recht der internationalen Wirtschaft* 2003, p. 347-352.

*Gaedtke, Jens-Christian*, *Politische Auftragsvergabe im Welthandelsrecht*, Berlin 2006.

*Genschel, Philipp/Zangl, Bernhard*, Metamorphosen des Staates — vom Herrschaftsmonopolisten zum Herrschaftsmanager: Transformations of the state. From monopolist to manager of political authority *Leviathan* 2008, p. 430-445.

*Hobe, Stephan/Kimminich, Otto*, *Einführung in das Völkerrecht*, 8 ed. Tübingen Basel 2004.

*International Law Commission/Koskenniemi, Marti*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Geneva 2006.

*Joerges, Christian*, Conflict of Laws as Constitutional Form: Reflections on International Trade Law and the Biotech Panel Report, *RECON Online Working Paper* 2007.

*Joerges, Christian*, Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische unitas in pluralitate verfasst werden kann, in: M. Führ/R. Wahl/P. von Wilmowsky (Hrsg.), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehbinder*, Berlin 2007, p. 719-747.

*Kelsen, Hans*, *Introduction to the Problems of Legal Theory : A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Oxford 2002=1992.

*Kornicker, Eva*, Ius cogens und Umweltvölkerrecht: Kriterien, Quellen und Rechtsfolgen zwingender Völkerrechtsnormen und deren Anwendung auf das Umweltvölkerrecht, Basel u.a. 1997.

*Kunnert, Gerhard*, WTO-Vergaberecht: Genese und System sowie Einwirkungen auf das EG-Vergaberegime, Baden Baden 1998.

*McCrudden, Christopher*, International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement, *Journal of International Economic Law* 1999, p. 3-48.

*Mechel, Friederike*, Die Förderung des Umweltschutzes bei der Vergabe öffentlicher Aufträge, Baden-Baden 2006.

*Neumann, Jan*, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen: Konflikte des materiellen Rechts und Konkurrenzen der Streitbeilegung, Berlin 2002.

*Paulus, Andreas L.*, The Emergence of the International Community and the Divide between International and Domestic Law, in: J. Nijman/A. Nollkaemper (Hrsg.), *New Perspectives on the Divide Between National and International Law*, Oxford 2007, p. 1-31.

*Paulus, Andreas L.*, From Territoriality to Functionality? Towards a Legal Methodology of Globalization, in: W. G. W. I.F. Dekker (Hrsg.), *Governance and International Legal Theory*, Leiden Boston 2004, p. 59-95.

*Pauwelyn, Joost*, Conflict of Norms in Public International Law : How WTO Law Relates to Other Rules of International Law, Cambridge 2003.

*Pauwelyn, Joost*, The Role of Public International Law in the WTO: How Far Can We Go, *The American Journal of International Law* 2001, p. 535-578.

*Pitschas, Christian/Prieß, Hans-Joachim*, Secondary Policy Criteria and Their Compatibility With EC and WTO Procurement Law. The Case of the German Scientology Declaration, *Public Procurement Law Review* 2000, p. 171-195.

*Schmid, Christoph U.*, Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing, *European Review of Private Law* 2000, p. 153-170.

*Scott, Joanne*, International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO, *European Journal of International Law* 2004, p. 307-354.

*Tietje, Christian/Wolf, Sebastian*, Das Welthandelsrecht als Grenze für Umweltbeihilfen und ökologisierte Auftragsvergabe, in: J.-P. Schneider (Hrsg.), *Beihilfe- und Vergaberecht als Rahmenbedingungen der Umweltpolitik : Zehnte Osnabrücker Gespräche zum Deutschen und Europäischen Umweltrecht am 11./12. November 2004* Köln et al. 2005, p. 85-108.

*Trachtman, Joel P.*, Institutional Linkage: Transcending "Trade and..." *The American Journal of International Law* 2002, p. 77-93.

*van Calster, Geert*, Green Procurement and the WTO - Shades of Grey, *Review of European Community & International Environmental Law* 2002, p. 298-305.

*von Asselt, Harro/Sindico, Francesco/Mehling, Michael*, Global Climate Change and the Fragmentation of International Law, *Law & Policy* 2008, p. 423-449.

*von Bogdandy, Armin*, Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization, in: S. Griller (Hrsg.), *International Economic Governance and Non-Economic Concerns*, Wien 2003, p. 103-148.

*Wiedmann, Ariane*, Die Zulässigkeit sozialer Vergabekriterien im Lichte des Gemeinschaftsrechts, Baden-Baden 2007.

*Wiethölter, Rudolf*, Proceduralization of the Category of Law, in: C. Joerges/D. M. Trubek (Hrsg.), *Critical Legal Thought. An American German Debate*, Baden-Baden 1989, p. 501-510.