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Rike U. Krämer

**“Trade and” Environment:
Diagonal Conflicts in
WTO, EU and U.S. Procurement Law**

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**“TRADE AND” ENVIRONMENT:
DIAGONAL CONFLICTS IN WTO, EU AND U.S. PROCUREMENT LAW**

By Rike U. Krämer*

Abstract

Until now, the trade and environment interdependence in multi-level-governance settings has been mostly addressed through a transfer of old concepts, bound to a central nation state, onto other levels of governance, framing the trade and environment debate as a solely horizontal issue. These approaches missed the potential vertical aspect of trade and environment conflicts in multi-level-governance settings. The thesis of this paper is that a comparative analysis of federal-type legal structures and how they address the trade and environment issue can enhance the trade and environment debate and help to find feasible solutions for diagonal conflicts in multi-level-governance settings. For this analysis the paper chooses a largely neglected field of liberalization, the EU, U.S. and WTO procurement regime.

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"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."¹

1. Introduction

The experiences of the Great Depression and the economic crises in 1920-21 lead to the conclusion of trade agreements and the creation of multi-level-governance structures in the area of trade. During the last decades, the focus of such trade agreements shifted towards national regulatory issues. In their early stages, GATT, the ECSC and the EC focused their efforts on the reduction of tariffs as barriers to trade. Ever since a substantial reduction of such tariffs has been completed in the early 1970s, the removal of non-tariff-barriers to trade (NTBs) has become the primary objective of trade agreements. But while NTBs may be used for protectionist purposes, they also serve national regulatory goals such as health and environmental protection. As a consequence, *diagonal conflicts*, between different levels of governance (*vertical*) pursuing different policy goals, such as economic liberalization and environmental protection (*horizontal*), occur more frequently.

One way to deal with these new issues and new types of conflicts within a multi-level-governance structure, addressed in the "trade and" literature, has been a transformation of old concepts, generally bound to a central nation state, applied towards the new levels of governance.² The result being that most of the solutions addressed in the literature so far suffer from the conceptualising either of the European Union as a central state or the international sphere as having a central comprehensive government. These approaches only frame the conflict as a *horizontal* one, between the two goals trade and environment, they miss the potential *vertical* conflict between the different levels of governance and the different problem-solving capacities. Who should

¹ McCrudden, Christopher. 1999. "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* 2(1):3-48.

² For a general overview of the "trade and" literature see Pauwelyn, Joost. 2004. "Recent Books on Trade And Environment: Gatt Phantoms Still Haunt the WTO." *European Law Journal* 15(3):575-92.

decide upon the adequate level of environmental protection? Where could an agreement about this possibly be reached?

The tension between different levels of governance, the vertical aspect, is a recurring issue in federalism research. The thesis of the paper is that a comparative analysis of federal-type legal structures and institutions and how they address the trade and environment interdependence can enhance the trade and environment debate and help to address *diagonal conflicts* in a more comprehensive way. In addition, a comparative analysis bears the possibility to foresee institutional necessities or restraints for the solutions of diagonal conflicts. For this analysis, the paper chooses a largely neglected field of liberalization: the EU, U.S. and WTO procurement regime. However, lately this field of law has become more important. Instead of command-and-control instruments, incentive-based or market-based regulations are gaining importance in environmental policy today. This shift in instruments has further increased the possibility of trade and environment conflicts.³

As a background, the next section briefly describes the reasons for potential horizontal conflicts between trade and environmental policies and - more specific - between regulations which aim to strengthen environmental protection and regulations which aim to create free markets. In a second step, the concept of diagonal conflicts is elaborated. In the third section, some of the ways diagonal conflicts have been addressed so far and the lack to address the vertical dimension in diagonal conflicts are highlighted. Federalism is presented as an additional prism to deal with diagonal conflicts. The EU and the U.S. procurement regime and the different ways they deal with diagonal conflicts are analysed with regard to the two main federalism paradigms: dual and cooperative federalism. Even so in procurement law, the EU follows the cooperative approach and the U.S. the dual approach, the comparison shows that diagonal conflicts are mainly addressed in a cooperative manner in administrative procedures. Due to that fact, the view from the WTO-level towards Brussels or the U.S. for guidance is problematic as the needed administrative capacities and structures are absent at the WTO-level.

³ Williams III, Robert C. 2010. "Growing State-Federal Conflicts in Environmental Policy: The Role of Market-Based Regulation." *NBER Working Paper No. 16184*:1-25.

2. The potential conflict between trade and environmental policies

The relationship between free trade and environmental protection is complex. In the literature, five mechanisms have been recognized through which the liberalisation of markets can affect environmental performance: (1) by new products being invented and produced as a result; (2) by transferring new production technologies across borders; (3) by raising the overall level of economic activity; (4) by changing the structure of a country's economy; and (5) by affecting the room to manoeuvre for environmental regulatory options.⁴ Each of these mechanisms can have either positive, negative or no impact on the level of environmental protection.⁵ In short, trade does not automatically harm the natural environment but an increase in trade has the potential to lead to a *horizontal* conflict between trade and environmental policy goals.

Because this paper presents a legal analysis, it focuses only on the last effect: the room to manoeuvre for environmental regulatory options also called the policy space. What does this mean in more general terms? First of all, whether a positive relationship between the two policies (trade vs. environment) is achieved, strongly depends on the environmental regulations enacted to accompany the free trade regulation. Free trade alone, generally, does not lead to high environmental performance. Secondly, enacted trade regulation can minimise the policy options of the regulator to enact such mitigating environmental policies, for example the so called regulatory chill effect of trade agreements.⁶ Therefore, there is a potential conflict between free trade regulations and environmental regulations. E.g. in the discussion about the procurement directives in the EU from 2000-2004, the European Commission argued that any further consideration of environmental criteria in the proposed directive would violate the WTO obligations laid down in the General Procurement Agreement (GPA).⁷ Thirdly, free trade favours one set of harmonized regulation. Instead of favouring various national

⁴ UNEP. 2001. *Reference Manual for the Integrated Assessment of Trade-Related Policies*. New York u.a.: United Nations. For an overview and a new empirical assessment see John W. Porges, Amelia, and Joel P. Trachtman. 2003. "Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects." *Journal of World trade* 37(4):783-99.

⁵ Ibid.

⁶ See for an example Barret Lydgate, Emily 2012. "Biofuels, Sustainability, and Trade-Related Regulatory Chill." *Journal of International Economic Law* 15(1):157-80.

⁷ Haag, Steffen. 2005. "Diskussionsbericht (II)." Pp. 107-08 in *Beihilfe- und Vergaberecht als Rahmenbedingungen der Umweltpolitik: Zehnte Osnabrücker Gespräche zum Deutschen und Europäischen Umweltrecht am 11./12. November 2004*, edited by Jens-Peter Schneider. Köln u.a.: Heymanns Verlag.

standards, in the WTO and the EU international or supranational standards are privileged. Different regulations in different countries or at different levels of governance can create barriers to trade.

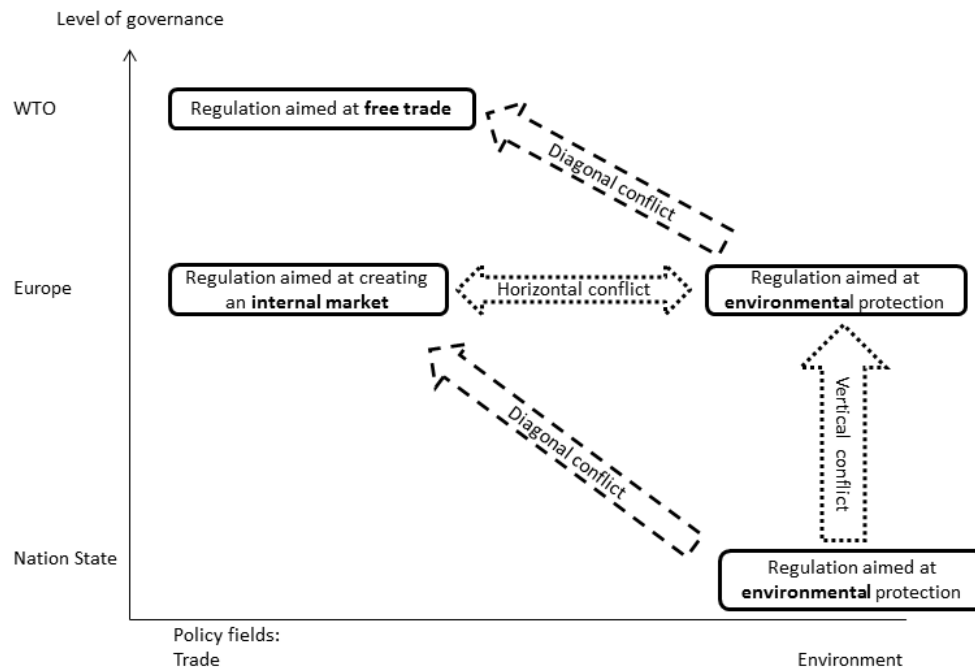
In addition, the problem-solving capacity for the balancing of trade and environment issues at the different levels of governance varies and especially at the international level there are some limits of governing.⁸ More often than not the accompanying environmental regulation is enacted at a different level of governance, generally the smaller unit. Therefore the free trade regulation, for example at the international level, conflicts with environmental policies enacted at the Member State level. *Diagonal conflicts* arise.

⁸ Esty, Daniel C. 2008. "Governing at the Trade-Environment Interface." Pp. 115-27 in *The WTO and Global Governance: Future Directions*, edited by Gary P. Sampson. Tokyo: United Nations University Press. Esty, Daniel C. 2006. "Good Governance at the Supranational Scale: Globalizing Administrative Law." *Yale Law Journal*:1490-562.

3. Diagonal conflicts in multi-level trade-governance

Diagonal conflicts span across two dimensions at the same time. First, they span across multiple levels of governance (*vertical*). Second, across these levels, different policy goals conflict with each other (*horizontal*).

Diagonal Conflict



Diagonal conflicts are therefore one specific type of vertical conflicts. In *Tuna-Dolphin*⁹, to give a prominent example, economic liberalization at the WTO-level and the protection of dolphins at the Member State level were in conflict. The concept of

⁹ *United States-Restrictions on imports of tuna*, panel report circulated on 3 September 1991, DS21/R - 39S/155 unadopted and *United States-Restriction on imports of tuna*, panel report circulated on 16 June 1994 DS 29 R unadopted. Another recent Tuna-Dolphin case is *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, panel report circulated on 15 September 2011 DS381.

diagonal conflicts has been developed and fruitfully employed to understand what is special and what is at stake in these new conflict constellations.

The term diagonal conflict¹⁰ can be defined either narrowly as a conflict of competences or more broadly. As *Joerges* and *Schmid* explain, diagonal conflicts occur because Member States “have delegated legislative competences only in limited fields”, for example trade policy. Therefore, “responses to functionally interdependent problem constellations often require a co-ordination of different, semi-autonomous levels of governance”.¹¹ According to this description, diagonal conflicts reflect a lack of authority at the international level to regulate in a given policy area. By implication, whenever comprehensive supranational competence exists, diagonal conflicts cannot arise. This view is too narrow, because particularly in the European Union it is often not the lack of an explicit competence that inhibits a transnational coordination, but the EU’s narrow problem-solving capacity. Therefore diagonal conflicts should be more broadly defined, as conflicts between different policy goals pursued at different levels of governance.¹² In this paper those different goals are: free trade and environment. As described above, free trade favours international or supranational solutions and harmonized standards, however, not for every question an international solution is possible or feasible.

Public procurement is the process by which government bodies purchase goods and services from the private market; the purchase varies from buying pencils to airports or school buildings. Starting in the mid-1990s, the use of public procurement to promote environmental goals, for example by purchasing green energy, has been highly debated. Procurement law is a market-based regulation with a strong potential to

¹⁰ The term was developed by Christian Joerges and Christoph Schmid. Joerges, Christian. 2009. "Integration Through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation." in *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, edited by Rainer Nickel. Oslo: ARENA, Schmid, Christoph U. 1998. "Vertical and Diagonal Conflicts in the Europeanisation Process: Preliminary Thoughts on a Methodological Reconstruction of the Interface between European and National Law on a Conflict of Laws Basis." Pp. 185-90 in *Private Governance, Democratic Constitutionalism, and Supranationalism*, edited by Christian Joerges and Oliver Gerstenberg. Brussels: European Commission, Schmid, Christoph U. 2000. "Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing." Pp. 153-70 in *European Review of Private Law*.

¹¹ Joerges, Christian. 2007. "Conflict of Laws as Constitutional Form: Reflections on International Trade Law and the Biotech Panel Report." *RECON Online Working Paper* (03):1-14.

¹² Krämer, Rike U. 2011. "The Notion of Diagonal Conflicts as a Key Concept of European Conflicts Law. ." Pp. 145-58 in *After Globalisation, New Patterns of Conflict and their Sociological and Legal Reconstructions*, edited by Christian Joerges: ARENA Report No 4/11.

enhance environmental protection. By including sustainable development as a goal of procurement law, a positive impact on environmental protection is expected. At the present day, green procurement is seen in Europe as one instrument to achieve a resource-efficient Europe.¹³ This indicates that procurement law is not only an instrument dealing with economic concerns, but that environmental interests can also be pursued with it. So the question is: Why do diagonal conflicts occur and how do they look like in the procurement regimes?

Diagonal conflicts may occur in this area, because at one level of governance, procurement law is liberalized in accordance with economic principles, while on another level of governance, procurement law is used as an instrument to pursue environmental goals. Those environmental goals can be reached through diverse mechanisms, e.g. lower content requirements of raw materials in the purchased products, absence of toxic chemicals or life-cycle cost analysis. For the assessment of life-cycle costs different methods are available. If every Member State uses a different method or attempt, an economic operator has to know all the different procurement details of each Member State. This makes shifting from one Member State to another difficult and causes trade distortion. *Kunzlik* therefore states:

In policy terms, however, green procurement sits at one of the many intersections between the objectives of environmental protection and of the maintenance of the integrity of the Internal Market and, as such, reflects the tensions that can exist between those competing policy objectives.¹⁴

However, green procurement does restrict free trade differently than regulation. Imagine a regulation requiring minimum recycled content of all paper to be sold on the national market. Such a regulation would lead to the exclusion of paper lacking this minimum requirement on the national market. A similar goal in a procurement regime would only exclude paper lacking this minimum requirement from being bought by the government. "Normal" consumers would still be able to buy not recycled paper on the

¹³ European Commission, Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, COM (2010) 2020, p. 15.

¹⁴ Kunzlik, Peter. 2003. "Making the Market Work for the Environment: Acceptance of (Some) 'Green' Contract Award Criteria in Public Procurement." Pp. 175-201 in *Journal of Environmental Law*.

national market. In general, procurement requirements are less trade restrictive than market regulation.

4. Dealing with diagonal conflicts

Even so the term diagonal conflict has not been used in the “trade and” literature. The conflict between trade and environment has been addressed and different solutions have been discussed. However, most of the solutions do not even consider the trade and environment conflict as a multi-level-governance issue. Instead, the trade and environment conflict is framed as a purely horizontal one. The solutions provided for this horizontal conflict can be divided into two broad categories: hierarchical solutions and coordinative solutions. The first category proposes to classify the principle of sustainability as *jus cogens*¹⁵ or to include “trumping clauses” into multilateral environmental agreements.¹⁶ One example for such a trumping clause is Article 104 of the North American Free Trade Agreement (NAFTA) which provides that in a case of conflict certain multilateral environmental agreements prevail over NAFTA. For the EU, some argue that the environmental protection clause in Art. 11 TFEU is superior to other goals in the treaty.¹⁷ The basic idea is that environmental policy goals should supersede or trump trade policy goals. The problem of environmental protectionism or the principle of common but differentiated responsibilities is overlooked and not taken into consideration by these approaches.

The second category tries to integrate the aspect of environmental protection into trade policies by using the concept of systematic integration (Article 31.3 of the VCLT)¹⁸ or for the EU by also applying Art. 11 TFEU as a balancing tool. Both attempts do not address the vertical aspect and the different levels of governance involved. The provided solutions are found in the European legal order or in the international legal order, without any interaction with the national legal orders surrounded by them. Only goals

¹⁵ Kornicker, Eva. 1998. "State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms." Pp. 101-35 in *Georgetown International Environmental Law Review*.

¹⁶ Schultz, Jenny. 1995. "The GATT/WTO Committee on Trade and the Environment - toward Environmental Reform." *American Journal of International Law* 89:423-39.

¹⁷ Scheuing, Dieter H. 1989. "Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte." *Europarecht* 24(2):152-92.

¹⁸ van Asselt, Harro, Francesco Sindico, and Michael A. Mehling. 2008. "Global Climate Change and the Fragmentation of International Law." *Law & Policy* 30(4):425-49.

or policies, for which a Europe-wide or even an international consent exists, can be integrated.

The failure of these solutions to address the vertical aspect can further be illustrated by one specific reading of the *Beef-Hormones* dispute. In this reading, the dispute is seen as one between the WTO and international environmental law.¹⁹ The regulatory autonomy of the Member States, the vertical dimension, is somehow not addressed. In the famous European procurement case dealing with environmental consideration in European procurement law *Concordia Bus*²⁰, the ECJ refers to Article 11 TFEU²¹ without explicitly mentioning the regulatory autonomy or the policy space of the Member States.

To conclude, the "trade and" literature mainly tries to solve diagonal conflicts through a balancing approach between the two goals trade and environment, thereby lacking the balancing between the different levels of governance. This perspective disables the view for a more comprehensive look at the interaction between the two goals and the different levels of governance. A federal comparison can fill this blind spot.

¹⁹ Dunoff, Jeffrey L., and Joel P. Trachtman. 2009. "Functional Approach to International Constitutionalization." Pp. 3-35 in *Ruling the World: Constitutionalism, International Law, and Global Governance*, edited by Jeffrey L. Dunoff and Joel P. Trachtman. Cambridge: Cambridge University Press.

²⁰ *Concordia Bus Finland OyAb v Helsinginkaupunki, HKL-Bussiliikenne* [2002] **ECR** 2002 Page I-07213.

²¹ Article 6 EC at the time of the decision.

4.1 Comparative Federalism

Why federalism? Federalism research has dealt with the interaction of different levels of governance for a long time. Instead of using *sui generis* constructs or *multi-level-governance* to describe a situation in which different levels of governance are in place, by choosing federalism as a point of reference for comparing, we can build upon an old strand of literature and theoretical work that already exists. In addition, we have a much broader range of comparing options. We could argue that multi-level-governance is different from federalism in a nation state, but the general idea of federalism is not bound to a nation state.²²As *Pescatore* has said:

[T]he methods of federalism are not only a means of organising states. [F]ederalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and the international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity combined with genuine respect for the autonomy and the legitimate interests of the participant entities.²³

The normative idea behind federalism is the value of combining unity with diversity: seeking harmonization where necessary and giving discretion to the lowest level where possible. Descriptively, federalism is not one single concept. Different types of federalism or “federal arrangements” can be found and there is not just one definition of federalism.²⁴On the one end of the federal continuum we can find the confederation, on the other the federation.²⁵ Broadly defined, common features of federalism are the division of power between two or more levels of governance and an interaction in between. These descriptive features are also true for many *sui generis* or multi-level-governance settings.

Why compare? “Comparing is ‘learning’ from the experience of others.”²⁶The goal of a comparison is of course gaining knowledge. Instead of studying one legal regime, the comparative analysis may enable us to see similarities and differences that otherwise

²² Elazaar, Daniel J. 1987. *Exploring Federalism*. Tuscaloosa: The University of Alabama Press.

²³ Pescatore, Pierre. 1982. "Foreword." in *Courts and Free Markets: Perspectives from the United States and Europe*, edited by Eric Stein and Terrence Sandalow. New York: Clarendon Press.

²⁴ Watts, Ronald L. 1996. *Comparing Federal Systems in the 1990s*. Ontario: Institute of Intergovernmental Relations.

²⁵ Elazaar, Daniel J. 1987. *Exploring Federalism*. Tuscaloosa: The University of Alabama Press.

²⁶ Sartori, Giovanni. 1991. "Comparing and Miscomparing." *Journal of Theoretical Politics* 3(3):243-57.

might be overlooked. In addition, this perspective facilitates the possibility to foresee institutional necessities for diagonal conflicts that are advocated. It further provides lessons from the failure as well as the success of other systems or solutions.²⁷Comparative law can highlight areas worth harmonizing as well as areas in which harmonization is not at all feasible.

Comparison can help us assess where we came from, where we are, and where we go from here. By making this kind of comparison, we obtain some perspective about whether we are what we want to be, or how we can find a way to be all that we want to be.²⁸

However, important for the comparison and for understanding the federal arrangement in place is not only the division of competences or the legal text but also the social and political context in which these norms and rules are applied.²⁹

Not only has the literature dealing with multi-level governance setting neglected comparative federalism research for some time, the general comparative law literature has also neglected international developments and the international arena.³⁰The "orthodox comparative law continues to function as if the world still consisted only of national legal systems existing independently side by side"³¹. National laws as well as international ones overlap and influence each other. This is especially true for international trade agreements like the WTO, e.g. think about the regulatory chill argument³². This federal comparative law approach is therefore not only an attempt to broaden the trade and environment debate but also to fill in the comparative law literature gap from a particular angle.

Why compare the WTO, the EU and the U.S.? The question here really is whether those three institutions are comparable. Institutions are comparable if they have

²⁷ Watts, Ronald L. 1996. *Comparing Federal Systems in the 1990s*. Ontario: Institute of Intergovernmental Relations.

²⁸ Eberle, Edward J. 2009. "The Method and Role of Comparative Law." *Washington University Global Studies Law Review* 8(3):451-86.

²⁹ Livingston, William S. 1952. "A Note on the Nature of Federalism." *Political Science Quarterly* 67(1):81-95.

³⁰ Reimann, Mathias. 2001. "Beyond National Systems: A comparative Law for the International Age." *Tulane Law Review* 75:1103-19.

³¹ Ibid.

³² Barret Lydgate, Emily 2012. "Biofuels, Sustainability, and Trade-Related Regulatory Chill." *Journal of International Economic Law* 15(1):157-80.

something in common, if they face similar problems and if they share certain properties.³³ All three institutions or settings differ in various ways but they also share those broad common features of federalism; the division of power between two or more levels of governance. All three institutions or settings regulate in the area of procurement law. Here, all of them face the challenge of drawing a line between environmental criteria which can be used within the procurement process and those that are not allowed due to their trade-distortive effects.

This paper compares the European and the U.S. procurement regime in order to draw lessons to address diagonal conflicts at the WTO-level. The European and the U.S. procurement market are of a similar size. In Europe, every year nearly 20 % of the GDP is spent by procuring authorities.³⁴ In the U.S. governmental authorities spent 12 % of the GDP, however the GDP is higher, so the size of the actual procurement market is similar. Both regimes follow a different federal path to deal with diagonal conflicts. With regard to the two mayor strands of political federalism, dual and cooperative federalism, the U.S. follows the former and Europe the latter. However, as will be shown below, the main governance structure in which diagonal conflicts are addressed or solved in both regimes is cooperation between different governance agencies and experts.

4.2 Dual and cooperative federalism in the U.S. and the European Procurement Regime

In the real world different types of federalism can be found. However, in the comparative federalism literature two ideal-type models are distinguished: dual and cooperative federalism.³⁵ Both are distinct in the division of legislative power, the procedures to enact legislation and their administrative capabilities. Dual federalism operates with the idea of separated spheres between the state and the individual states. There is no overlap between federal and state regulation.³⁶ Authority is divided in a zero-sum fashion either at the federal or the state level. In addition, the central government can enact laws without the consent of the state. Furthermore, the central

³³ Sartori, Giovanni. 1991. "Comparing and Miscomparing." *Journal of Theoretical Politics* 3(3):243-57.

³⁴ Public Procurement Indicators 2010, http://ec.europa.eu/internal_market/publicprocurement/docs/indicators2010_en.pdf

³⁵ Schütze, Robert. 2009. *From Dual to Cooperative Federalism – The Changing Structure of European Law*. Oxford: Oxford University Press.

³⁶ Ibid.

government can rely on its own administrative infrastructure to implement its laws.³⁷ The U.S. was seen as a dual federal system up until the 1950s. Cooperative federalism on the other hand pictures an overlap of authority. Power is shared between the federal and the state level. The federal legislative procedure is modelled in such a way that the individual states can participate. The implementation of federal regulatory regimes is mostly carried out by the states. The term *cooperative federalism* was introduced to the American federalism literature as the opposite to the dual federalism paradigm.³⁸ In the German literature the U.S. is generally seen as a dual federal model in contrast to the German model of cooperative federalism.³⁹

The distinction between the two ideal types of federal arrangements can differ with regard to the area or function approached by them. In the following section the different procurement regimes are classified with regard to their dual or cooperative nature. Of interest here are differences in the legislative powers and procedures, the approach of the judiciary towards the separation of the legal spheres and the administrative capabilities and procedures. The main question is whether different federal approaches produce different outcomes to address diagonal conflicts.

³⁷ Scharpf, F. 1988. "The Joint Decision Trap: Lessons from German Federalism and European Integration." *Public Administration* 66(3):239-78.

³⁸ Corwin, Edward S. 1950. "The Passing of Dual Federalism." *Virginia Law Review* 36(1):1-24, Zimmerman, Joseph F. 2001. "National-State Relations: Cooperative Federalism in the Twentieth Century." *Publius: The Journal of Federalism* 32(2):15-30.

³⁹ See for example Scharpf, F. 1988. "The Joint Decision Trap: Lessons from German Federalism and European Integration." *Public Administration* 66(3):239-78.

4.2.1 U.S. Procurement Regime

The term used for “buying green” in the U.S. is “environmentally preferable purchasing” (EPP). The federal efforts in the U.S. to pursue environmental protection through EPP really started in the 90s with the Clinton administration.⁴⁰ Those federal efforts were accompanied by state efforts; some of them even started before the 90s and were used as models for the federal strategies.⁴¹ President Obama followed the Clinton lead and issued two executive orders 13514 and 13423. They both require federal agencies to purchase environment-friendly. Diagonal conflicts were not addressed openly, even so companies have complained about differences in environment-friendly purchasing policies between the states. This lack of debate is mainly due to a clear separation of powers between the federal and the state levels. However, as will be shown even within a dual model, some potential for diagonal conflicts exists.

The U.S. follows the model of dual federalism in procurement law. For spending federal money, the U.S. constitution requires an act of congress.⁴² Article 1 Section 9 clause 7 of the U.S. constitution states:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Furthermore the congress has the power to enact laws that govern federal procurement.⁴³ In addition presidential authority can be used to promote social and environmental goals in federal procurement law. This is usually accomplished through an executive order by the president.⁴⁴ The procurement procedures differ to some extent with regard to the different federal agencies, however, they are mainly laid down in the Federal Acquisition Regulation (FAR). Since 2011 the FAR includes a sustainable acquisition policy, which generally requires federal agencies to

advance sustainable acquisition by ensuring that 95 percent of new contract actions for the supply of products and for the acquisition of services (including construction) require that the products are—

⁴⁰ Cogburn, Jerrel D., and Dianne Rahm. 2005. "Environmentally Preferable Purchasing: Who is doing what in the United States? ." *Journal of Public Procurement* 5(1):23-53.

⁴¹ Ibid. See also, EPA, 'State and Local Government Pioneers – How State and Local Governments are Implementing Environmentally Preferable Purchasing Practices' (2000) accessed 28 December 2011.

⁴² Feldman, Steven W. 2011. *Government Contract Guidebook*: Federal Publications.

⁴³ Ibid.

⁴⁴ Ibid.

- (1) Energy-efficient (ENERGY STAR® or Federal Energy Management Program (FEMP)-designated);
- (2) Water-efficient;
- (3) Biobased;
- (4) Environmentally preferable (e.g., EPEAT-registered, or non-toxic or less toxic alternatives);
- (5) Non-ozone depleting; or
- (6) Made with recovered materials.

The power to enact legislation with regard to state expenditure lies with the states. In the U.S. procurement regime the two spheres of regulating federal or state expenditures are separated and therefore represent the dual federal arrangement. Laws and regulations regarding government procurement have been enacted, independently of one another, at the federal and at the individual state level.⁴⁵ Only a few constitutional restraints constrain the individual states in their choice to prefer environmental products over other products in their procurement law. These restraints are the Dormant Commerce Clause, the due process clause of the Fifth Amendment as well as the equal protection clause of the Fourteenth Amendment. Most applicable, for the inclusion of environmental criteria is the Dormant Commerce Clause. This clause is laid down in Article 1, section 8, clause 3 of the US constitution and provides:

The congress shall have Power... to regulate Commerce with foreign Nations, and among the several States...

This clause gives the federal government the power to legislate. However, the Supreme Court has also used this clause to restrict the states' legislative power when it comes to regulate issues that affect interstate commerce. In short, states are not allowed to regulate in a discriminatory manner.⁴⁶ However, in the area of government procurement the Supreme Court has developed the "market participant" exception to the Dormant Commerce Clause. This doctrine states that the Dormant Commerce Clause does not

⁴⁵ For examples for state and local government pioneers in the U.S. see, EPA, 'State and Local Government Pioneers – How State and Local Governments are Implementing Environmentally Preferable Purchasing Practices' (2000) <http://permanent.access.gpo.gov/websites/epagov/www.epa.gov/opptintr/epp/pubs/statenlocal.pdf> accessed 28 December 2011.

⁴⁶ Barnard, Catherine. 2009. "Restricting Restrictions: Lessons for the EU from the US?" Pp. 575–606 in *Cambridge Law Journal*.

prohibit the states from participating in the market. It basically allows discrimination between state residents and non-residents as long as the state is acting as a market participant but not a market regulator.⁴⁷ This shows that even the judiciary tries to develop separate spheres of power for the various states and the federal level. In addition, the judiciary gives a huge policy space to the states and tries to avoid diagonal conflicts or tries to manage them in favour of the lower state level. However, to draw a line between the state acting as a market participant or a regulator has turned out to be challenging.⁴⁸

Although both spheres - the individual state and the federal state - are mainly separated, some attempts at the federal level to foster EPP at the federal and the State level can be observed. Since 1993 the U.S. Environmental Protection Agency (EPA) has been maintaining an Environmentally Preferable Purchasing Program.⁴⁹ The EPA has developed guidelines, granted reports, including the "Environmental Purchasing Starter Kit: A Guide to Greening Government through Powerful Purchasing Decisions for local governments" and conducted different studies. Those guidelines are not restricted to the federal level. They can also be used and implemented by the States.

The Environmentally Preferable Purchasing Program's audience is not limited to the Federal government, however. Businesses, non-profit organizations, and state and local government agencies have also found the program to be of interest and value.⁵⁰

Another way to foster environmental preferable purchasing is the General Service Administration (GSA) Schedules. Those schedules are pre-negotiated contracts. They resemble the concept of framework agreements in the EU.⁵¹ In special areas like IT

⁴⁷ Osei, Kingsley S. 2011. "The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts." *Public Contract Law Journal* 40:715-39.

⁴⁸ Williams, Norman R. 2008. "Taking Care of Ourselves: State Citizenship, the Market, and the State." *Ohio State Law Journal* 69(Ohio State Law Journal):469-524.

⁴⁹ EPA, 'Program History' <<http://www.epa.gov/epp/pubs/about/history.htm>> accessed 29 November 2011.

⁵⁰ EPA, 'Frequent Questions' <<http://www.epa.gov/epp/pubs/about/faq.htm>> accessed 29 November 2011.

⁵¹ Article 1 V directive 2004/18 EC states: A 'framework agreement' is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

procurement, law enforcement and fire-fighter equipment the States can buy through the federal negotiated GSA schedules. This type of purchasing is called cooperative purchasing. However, the States are not obliged to avail themselves of this opportunity and the opportunity is limited to those described areas. The GSA is an independent agency of the U.S. government and has committed itself towards environmental friendly purchasing.⁵² Therefore it can be assumed that the products available through the GSA schedules are environmentally preferable. The GSA schedules are a cooperative instrument between the federal and the state level.

The different attempts at the federal level to foster EPP are not conducted separately. Instead, an interagency working group for sustainable procurement was set up consisting of the EPA, the GSA, the Department of Defense and other federal agencies, led by the GSA. The different departments worked together in a cooperative manner and exchanged their expertise in different procurement areas. Therefore, the procurement expertise of the GSA and the Department of Defense was enhanced by the EPA's environmental expertise.

In summing up, the U.S. procurement regime is mainly guided by the principle of dual federalism and with this it avoids the occurrence of diagonal conflicts in the legal realm. There is no strong linkage between the federal attempt to foster EPP and the attempts of the states. At second glance, some aspects of cooperative federalism occur. However, there is no federal policy to harmonize different green procurement criteria in the states. There is not the view that this is at all necessary. It seems that the question whether interstate commerce could be hindered through different environmental friendly purchasing policies in different states is not at all on the political agenda. The states have a great range of discretion. The only way of addressing diagonal conflicts is through persuasion. This persuasion is done by administrative agencies in a cooperative manner with the states. It is only done from the point of view of making EPP easier and learning from different best practices but not with the view of achieving harmonization or prevent potential interstate commerce distortion.

⁵² GSA, 'Sustainable Acquisition 2.2.8' <http://www.gsa.gov/portal/content/187317> accessed 16 March 2012.

4.2.2 European Procurement Law

The European term for environmentally preferable purchasing is green public procurement (GPP). The discussion to use procurement to enhance environmental protection began in the EU nearly at the same time as in the U.S.. The Europeans however were much more reluctant towards green procurement in the beginning. In the 90s, environmental criteria were discussed with an undertone of disapproval as “secondary” policies. When the European Commission started looking into green procurement, their approach was not to foster environmental procurement but to prevent trade distortion. The first document dealing with green procurement was the 1996 green paper on public procurement: exploring the way forward.⁵³ With regard to environmental criteria the title might be misleading. At several occasions in the green paper, the Commission highlights that negative implication for the internal market, e.g. through different environmental standards being used or different performance conditions, should be avoided. Potential diagonal conflicts should not be addressed but instead trumped by the internal market.

This more negative attitude towards green procurement has changed rapidly in Europe. Today, procurement is seen as one instrument to reach environmental goals.⁵⁴ Michael Barnier, the Internal Market and Services Commissioner stated in 2011:

My ambition is also to make sure that public procurement can help job creation, innovation, and protection of the environment.⁵⁵

Procurement regulation in the EU is part of regulating the internal market, so the power to regulate procurement is laid down in Article 114 TFEU. According to Article 4 II lit a TFEU this is a shared competence. The Member State sphere and the European sphere in the European procurement regime are not separated but instead shared between the two levels of governance. With regard to legislative power the EU therefore follows the

⁵³ European Commission, Green Paper, Public Procurement in the European Union: Exploring the way forward, COM (96) 583.

⁵⁴ For the development in Europe see Krämer, Rike U. 2013. *Die Koordinierung zwischen Umweltschutz und Freihandel im Mehrebenenrechtsverbund am Beispiel des Vergaberechts*. Tübingen: Mohr Siebeck.

⁵⁵ European Commission, Press Release, European Commission consults on the modernisation of the European Public Procurement Market, 27 January 2011, IP/11/88 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/88&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 16 March 2011.

cooperative federal model. This is also the case for the legislative procedure. Procurement directives are enacted in the ordinary legislative procedure (Article 294 TFEU). This procedure gives the Council and the European Parliament co-equal status in the legislative process. The Council represents the executive of the Member States and the European Parliament is directly elected by the European citizens. In addition, the EU is lacking the administrative capacity to implement European procurement law. The law is implemented by the Member States administration. Even in the implementation, the EU follows the cooperative federal model.

Despite this huge cooperative style, the ECJ's approach towards green procurement resembles the market-participant doctrine in the U.S. and is therefore more dual in nature. The first case addressing diagonal conflicts was the *Concordia Bus* case.⁵⁶ 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 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. In this procedure, three questions were raised before the ECJ. Here, only the second question is of importance. The second question was whether environmental criteria are eligible for consideration within the economically most advantageous tender. In the end, to put it plainly, the ECJ states that the Member States can include any kind of environmental criterion, as long as this criterion is linked to the subject matter of the contract.⁵⁷ This requirement “linked to the subject matter” has been further clarified by the ECJ in the case *Wienstrom*.⁵⁸

The link to the subject matter is similar to the market-participant doctrine. It separates the different policy spaces of the Member States. It requires that the

⁵⁶ *Concordia Bus Finland Oy Ab v Helsinginkaupunki, HKL-Bussiliikenne* [2002] **ECR** 2002 I-07213.

⁵⁷ *Concordia Bus Finland Oy Ab v Helsinginkaupunki, HKL-Bussiliikenne* [2002] **ECR** 2002 I-07213, para 59.

⁵⁸ *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR 2003 I-14527.

environmental criterion has to be linked to the content of the contract. In the *Wienstrom* case the contracting authority required that the tender should disclose how much energy from renewable sources they have produced in the past. The subject of the contract was renewable energy. However, the criterion did not correspond to the actual expected annual consumption of renewable energy in the contract. Producers with a large production of renewable energy were given undue preference to producers with only a small production of renewable energy. 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.⁵⁹ This requirement basically states that Member States can use procurement law to pursue different goals as long as those goals are linked to the subject matter. To pursue broader or more general goals, e.g. the sole production of renewable energy in one country, the Member State does not act as market participant anymore but as a regulator. In this case, procurement law is not the right regulatory instrument. Here, the Member State has to use the instrument of regulation. The link to the subject-matter therefore separates the policy space for using European procurement law to pursue environmental protection and the policy space for national regulation. This separation does not solve factual diagonal issues but it is a way of keeping them out of the legal arena. It gives a wide discretion to the Member States.

Besides the link to the subject matter, the discretion of the Member States towards green procurement is restraint by the European procurement regulation, mainly laid down in the two directives 2004/18/EC and 2004/17/EC. Those directives are applied whenever certain thresholds are reached. Below those thresholds the Member States are only bound by the general principles laid down in primary EC law, like the principle of non-discrimination. The implementation of those directives is carried out by the Member States. Below the threshold the European system can be compared to the dual system of the U.S., however, explicit discrimination is, unlike in the U.S., not allowed in Europe.

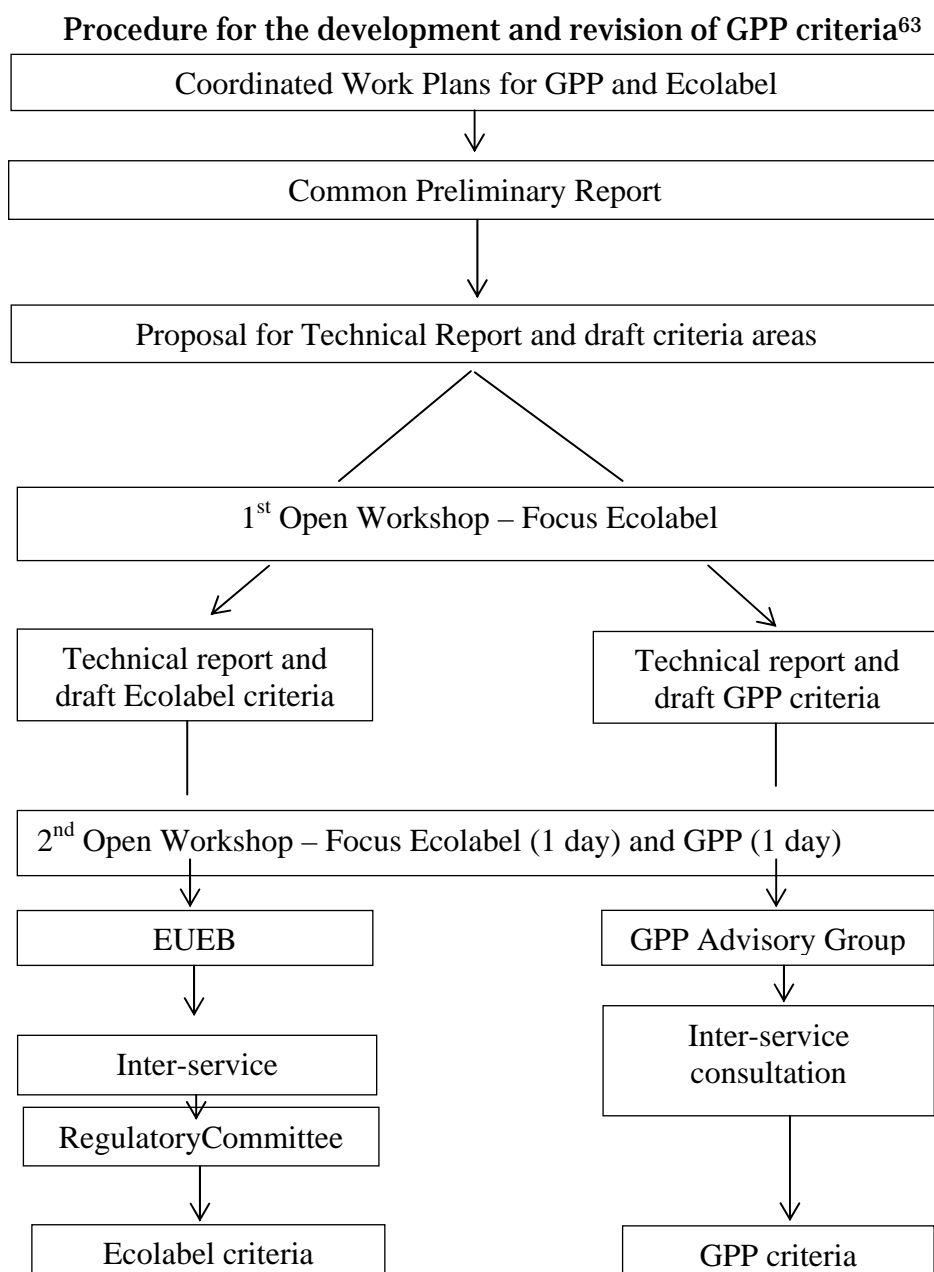
⁵⁹ *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR 2003 I-14527, para 68.

The two directives 2004/18/EC and 2004/17/EC allow the use of green procurement criteria in different stages of the procurement process.⁶⁰ The "environment" therefore is mentioned in different Articles of the directives; however, a *"number of problems are still on the table and are being addressed through soft law by the Commission."*⁶¹ Due to the vagueness in the directives, diagonal conflicts can still occur. To address this issue and to find common solutions to minimise trade distortion, the European Commission released a handbook "Buying green, A handbook on green public procurement"⁶² and established a process for developing Green Public Procurement (GPP) criteria. The first set of those criteria, which should foster GPP, was developed by an external consultant without any Member State involvement. The Member States complained about this, they demanded to be involved. Some of them claimed their own criteria could act as templates for European ones. Since 2010, a more formal procedure has been in place. Since then, GPP criteria have been developed with Member State and stakeholder involvement in coordination with the EU Ecolabel development process.

⁶⁰ Arrowsmith, Sue. 2009. "The Application of the EC Treaty and Directives to Horizontal Policies: A Critical Review." Pp. 147-248 in *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, edited by Sue Arrowsmith and Peter Kunzlik. Cambridge u.a.: Cambridge University Press.

⁶¹ Caranta, Roberto. 2010. "Sustainable Public Procurement in the EU." Pp. 15-51 in *The Law of Green and Social Procurement in Europe*, edited by Roberto Caranta and Martin Trybus. Copenhagen: DJØF Publishing Copenhagen.

⁶² This handbook was first published 2004 and is already available in a second edition <<http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>>



The open workshops are open to all interested parties in the process and the GPP Advisory Group consists of Member State representatives and stakeholder representatives and is led by Environment Directorate-General (DG). Thus now, the DG Environment cooperates with the Member States to harmonize and develop GPP criteria. Like in the U.S., the governance mode here is mainly persuasion and cooperation, learning from each other and the exchange of best practices.

⁶³ http://ec.europa.eu/environment/gpp/gpp_criteria_procedure.htm

In summary, the European procurement regime follows the cooperative federalism paradigm. Through the link to the subject matter requirement, the ECJ tries to establish separate dual spheres and so hinders the occurrence of diagonal conflict in the legal arena. Neither the court nor the legislator have addressed diagonal conflicts excessively but instead left room to manoeuvre to the Member State. The issue of diagonal conflicts and the filling in of this room to manoeuvre is mainly addressed within the GPP procedure, in a cooperative and inclusive manner.

4.2.3 Summary of the comparison

The comparison shows that even different paths of federalism produce similar outcomes. In both systems, the courts give a wide discretion to the Member States or the States. In addition, the occurrence of diagonal conflicts is avoided by the creation of separate spheres either through the market participant doctrine (U.S.) or the link to the subject matter requirement (ECJ). Due to the separated spheres in the U.S., the federal legislator cannot address diagonal conflict through legislation. This possibility exists in Europe but also here the legislative requirements for the inclusion of environmental criteria in the procurement process are rather vague and unclear. Therefore administrative procedures and guidelines are the main tools to deal with diagonal conflicts. The mode of governance is persuasion, learning from each other and the exchange of best practices. The procedures are inclusive, different stakeholders can participate.

4.3 The developments at the WTO-level

The procurement regime at the WTO-level is laid down in the General Procurement Agreement (GPA). The GPA is not a multilateral agreement but a plurilateral one. It is therefore only legally binding for the Parties of the WTO who also signed the GPA. Current Parties are for example the U.S., the EU, Japan, Canada and Switzerland. The GPA follows a different kind of dual approach, like the European procurement regime; it does only apply above certain thresholds. However, a real dual federal approach is not possible: above the thresholds national law and GPA law interact and need to be coordinated. The GPA just establishes certain minimum requirements but it does not

establish an implementable regime; it needs to be combined with and integrated in a national procurement regime.

Questions about the consideration of environmental criteria emerged in the GPA slightly after the controversial discussion in the EU and in the U.S, in 2005. Since 1997, the Members of the GPA were trying to revise the agreement, in 2005, environmental consideration are mentioned for the first time in the official documents of the revision process.⁶⁴In this document, the chairmen highlighted the need for further flexibility. One of the areas where he tried to convince the parties to be even more flexible was “the final wording of the provision relating to use of technical specifications to promote the conservation of natural resources and to protect the environment”.⁶⁵The outcome of this revision, the GPA_rev, includes similar to the EU directive 2004/18/EC environmental consideration explicitly⁶⁶ and was adopted in March 2012.

Altogether, those new developments are sending a positive signal towards the inclusion of environmental criteria. The boundaries what to include and what environmental criteria would or could constitute discrimination, especially with regard to production methods, are still unclear.⁶⁷ Still, there is potential for diagonal conflicts to occur. Like in the EU, the new GPA only establishes a vague framework. Specification and clarification of the new term “environment” are still missing. As has been described for the EU and the U.S., administrative cooperation offers a solution to fill in this gap. Therefore, one of the work programmes, adopted together with the revised GPA, is the work programme on sustainable procurement.

⁶⁴ Committee on Government Procurement, Minutes 21. November 2005, WTO-Doc. GPA/M/28.

⁶⁵ Ibid.

⁶⁶ Art. X (6) and (9) of the Revision of the Agreement on Government Procurement, GPA/W/297, 11 December 2006.

⁶⁷ Arrowsmith, Sue. 2011. "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions." Pp. 285-336 in *The WTO Regime on Government Procurement: Challenge and Reform*, edited by Sue Arrowsmith and Robert D. Anderson. Cambridge: Oxford University Press.

It establishes that the Committee on Government Procurement (CGP) should examine

- (a) the objectives of sustainable procurement;
- (b) the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies;
- (c) the ways in which sustainable procurement can be practiced in a manner consistent with the principle of "best value for money"; and
- (d) the ways in which sustainable procurement can be practiced in a manner consistent with Parties' international trade obligations.

In the end, the CGP shall identify measures and policies that it considers to be sustainable procurement practiced in a manner consistent with the principle of "best value for money" and with Parties' international trade obligations and prepare a report that lists the best practices of the measures and policies.

The question, however, is whether the WTO can provide the institutional capacities required to address diagonal conflicts in a real cooperative manner. Research suggests that the committees "*could become the laboratory for developing new forms of international governance*"⁶⁸. Scott and Lang point towards the capabilities of the "administrative hinterland" at the WTO.⁶⁹ For the conflict between trade and environment the Committee on Trade and Environment (CTE) has been praised as a capable actor. However, in the meetings of the CTE the U.S. emphasized that the CTE was not the right place to discuss government procurement, due to a mismatch between the Members of the GPA and the Members of the CTE, i.e. all the WTO Members.⁷⁰

The capability of the CGP itself to discuss and develop those details seems somehow narrow. Who is going to be involved in such a process? In the U.S. as well as in the EU, guidelines or handbooks are developed in an integrative cooperative approach. Different agencies work together: EPA and GSA, DG Environment and DG Trade. Administrative bodies with environmental protection expertise are included in the process. Different stakeholders are included as well. The goal of these persuasive governance processes is to foster GPP or EPP. The CGP approach instead seems to copy

⁶⁸ von Bogdandy, Armin. 2001. "Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship." Pp. 609-74 in *Max Planck Yearbook of United Nations Law*.

⁶⁹ Lang, Andrew, and Joanne Scott. 2009. "The Hidden World of WTO Governance." Pp. 575-614 in *European Journal of International Law*.

⁷⁰ Committee on Trade and Environment, Minutes 25 June 1997, WT/CTE/M/14.

the restrictive European approach from the green paper in the 1996. Despite the possibility to foster environmental protection via procurement, only the potential trade distortive effect of different green procurement criteria is highlighted. The main goal of the work programme seems to be to avoid the violation of international trade obligations via sustainable procurement at all costs.

5. Conclusion

Through a federalist prism, the paper has provided a different view to address the conflict between trade and environment in multi-level-governance settings. It has been shown that even different paths of federalism produce similar outcomes. In both systems, the courts give a wide discretion to the Member States or the states to choose their own balance between the two goals trade and environment, thereby avoiding the occurrence of diagonal conflicts in the legal arena. The legislator does not address diagonal conflicts at all or only very cautiously, leaving a lot of the issues unsolved. The main tools in both federal settings to address and deal with diagonal conflicts are administrative procedures and guidelines. The mode of governance is persuasion. The possibility to learn from each other and the exchange of best practices are highly valued. The procedures are inclusive, different stakeholders can participate.

With regard to environmental criteria, the WTO is looking towards Brussels. In the Trade Policy Report for the EU, provided by the WTO Secretariat, it is stated that the policy changes in the EU regarding environmental and social criteria

are to be considered not only in the context of the EU's own Procurement Guidelines but also in the Future Work Programmes of the Agreement on Government Procurement (after the revised GPA text comes into force), in which the EU will play a significant role. This is an important context in which the EU will be able to provide input of its own experience with green and social and "other" objectives in the procurement process.⁷¹

But, as described above, the development of environmental criteria in Europe as well as in the U.S. is done in an inclusive manner by more people and interest being involved than only the trade experts. Especially in Europe, where the cooperation between the

⁷¹ WTO Secretariat, Trade Policy Review, WT/TPR/S/248, para 210.

different levels in developing GPP criteria is much more formalised, those criteria gain their legitimacy through the involvement of all stakeholders affected. Whether such a process would be possible or feasible at the WTO seems questionable. The administrative capacities and procedures in place are crucial to fulfil this integrative task. Besides a difficult relationship between "law and politics",⁷² maybe it is also worth to further study the capacity and the legitimate role of the administration at the WTO level.

More broadly, one of the main findings is that diagonal conflicts between trade and environment in multi-level-governance settings are mainly coordinated through administrative coordination. This highlights that a systematic integration of international environmental law into international trade law is not sufficient. To address diagonal conflicts in a more conclusive way, administrative procedures and the law guiding those procedures are important as well. In the future, the trade and environment debate should broaden itself, compare international settings with federal settings facing similar problems and see whether the solutions developed in those settings could or should be transferred into the international arena.

⁷² E.g. von Bogdandy, Armin. 2001. "Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship." Pp. 609-74 in *Max Planck Yearbook of United Nations Law*.

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