



SCHOOL OF
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**Shifting from Voluntary to Mandatory
Mechanisms to scale up Sustainable Public
Procurement**

**The Integration of Voluntary Sustainability Standards into Public
Procurement and Trade Policies**

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Abstract

The Green and Sustainable Public Procurement is widely recognized as the strategic lever to promote innovation, sustainability, and the strategic tool on environmental and social protections. The extension of sustainability beyond environmental aspects, especially the integration of social and economic aspects is becoming common grounds in most jurisdictions. Meanwhile, this generates a considerable number of legal uncertainties about the legal status of sustainability laws, policies, and their relations with public procurement.

The purpose of this thesis is to analyze legal uncertainties in the continuously evolving concepts of sustainability and to define the *status quo* of CSR and its relationship with Sustainable Public Procurement. This has been achieved by analyzing two sets of legal provisions developed under the WTO and the EU jurisprudence.

At the international level, the WTO has been criticized for prioritizing global trade over environmental concerns. Only in recent decades, the WTO regulatory bodies have shown the possibilities of expanding the scope of environmental and social measures within international trade policies and government procurements. The revised GPA 2012 has created the legal possibilities of inclusion of secondary policy objectives in government procurements.

Finally, the challenges and reforms under the WTO jurisprudence have influenced the EU law, and the GPP and SPP have become common and widespread practices throughout Europe. The CJEU has made great contributions to these challenges by legitimizing the use of public procurement rules in support of social and environmental objectives in the form of strategic public procurement in a number of landmark cases.

Abbreviations

DSB	Dispute Settlement Body
CJEU	Court of Justice of the European Union
CSR	Corporate Social Responsibility
EU	European Union
FDI	Foreign Direct Investment
ILO	International Labor Organization
GATT	General Agreement on Tariffs and Trade
GATS	General Agreements on Trade in Services
GDP	Gross Domestic Product
GPP	Green Public Procurement
GPA	Government Procurement Agreement
MEAT	Most Economically Advantageous Tender
OECD	Organizations for Economic Co-operation and Development
SPP	Sustainable Public Procurement
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNEP	United Nations Environmental Program
UNGP	UN Guiding Principles on Business and Human Rights
WTO	World Trade Organization

1. Introduction

1.1 Background

Over the last decades, sustainable public procurement is widely recognized as a strategic lever to promote innovation and to improve the performance of both public and private sectors in sustainability initiatives.¹ The extension of sustainability beyond environmental aspects, especially by integration of social and economic aspects has become the common grounds in most jurisdictions.

Public procurement wields huge purchasing power, according to the World Bank, governments around the world spending estimated nearly 9.5 trillion US dollars in public procurement every year which amounts to approximately 15 to 22 percent of gross domestic products (GDP), and it can go up to 30 percent in most of the developing countries.² Leveraging this power to purchase more sustainable goods, services and works will help to push markets towards sustainability, reduce the organization's negative impacts, and also to produce positive environmental and social benefits.³ Before moving into discussions, let's clarify the terms used throughout this thesis.

Generally, *public procurement* is understood as a process where government authorities and other bodies governed by public law purchase public works, goods, and services from private companies.⁴

Green Public Procurement (GPP) refers to the process that includes environmental criteria in public procurements; therefore, the term is narrower than the frequently used term “sustainable public procurement”. The European Commission introduced a commonly accepted definition of GPP as such:

¹ UN Environment Program (UNEP), *Global Review of Sustainable Public Procurement 2017*, page ix.

² The World Bank, *Procurement for Development*, (April 2020).

³ Ibid, UNEP, page 1.

⁴ EU Commission, *Public Procurement for a Circular Economy- Good practice and Guidance* (2017), page 4.

“GPP is a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise be procured.”⁵

It has been emphasized that in all public contracts, environmental specifications, selection, and award criteria, as well as contract clauses need to be formulated in a way that in full compliance with specified requirements.⁶

In contrast, *Sustainable Public Procurement* (SPP) is a more complex and sophisticated process whereby organizations meet their needs for goods, services, works, and utilities in a way that achieves value for money on a lifetime basis for the benefits not only to the organization itself but also to the economy and society at large while minimizing environmental footprints.⁷ The key aspects of SPP defined by the United Nations (UN) High-Level Committee on Management Procurement Network; it has been stated that SPP integrates requirements, specifications, and criteria that are compatible with and in favor of the protection of the environment, social progress, and in support of economic development, specifically by seeking resource efficiency, improving the quality of products and services and ultimately optimizing costs.⁸

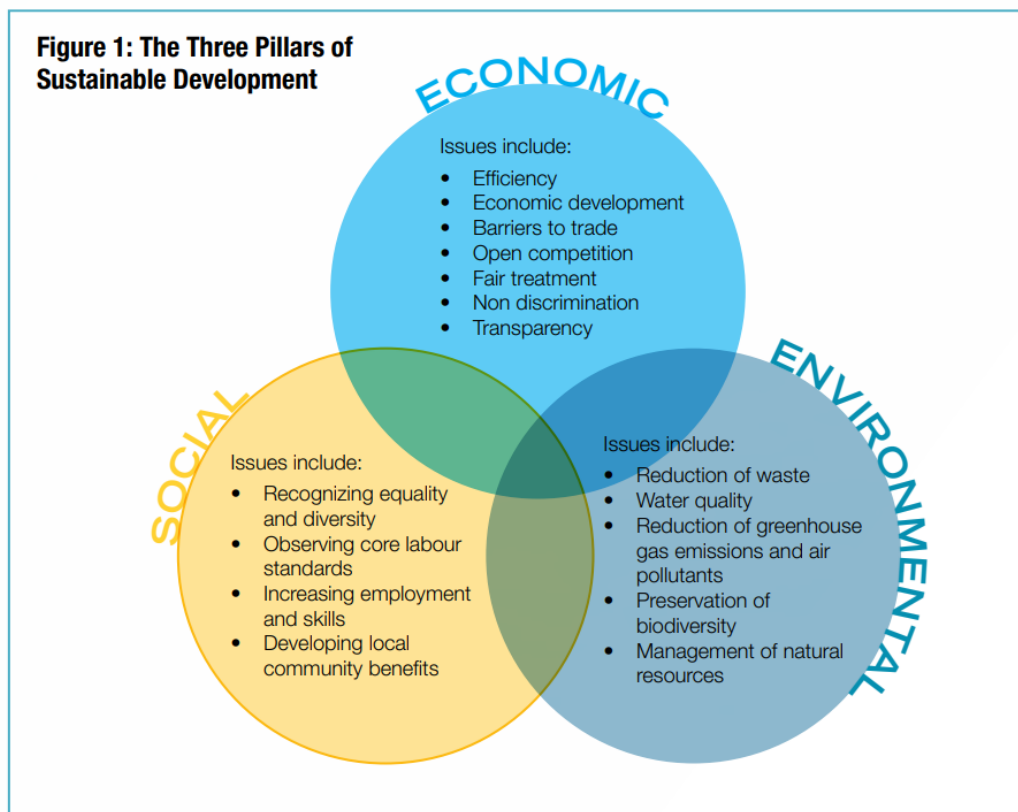
These aspects are commonly known as the *three pillars* of Sustainable Development, indicated in Figure 1, source: UNEP 2011.

⁵ EU Commission, COM (2008) 400 final, Brussels 2008, page 4.

⁶ Ibid, page 5.

⁷ The original definition adopted by the UK Sustainable Procurement Task Force Report, 2006. page 10. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69417/pb11710-procuring-the-future-060607.pdf (Accessed on 27 March 2021).

⁸ Definition adopted by the UN High Level Committee on Management Procurement Network.



The importance of these aspects in this thesis is that they trigger many public authorities to review their procurement practices in the light of global critical changes in the Corporate Social Responsibilities (CSR) debates.⁹ While public authorities play a significant role in encouraging the private sector's participation in CSR initiatives. In the private sector, the concept of CSR is more frequently used than sustainability.¹⁰ Generally, the concept of CSR is understood as conducting business in such a manner that social and environmental interests are protected without undermining the economic prosperity of an entity.¹¹

The research conducted by Kasey McCall Smith and Andreas Ruhmkorf revealed that the global supply chain is a prominent source of problems including the gross violation of human rights, in this regard, they considered that the violation of CSR as synonymous with the breach of sustainability in business operations.¹²

⁹ Peter L.Thomsen and N.Costa, *Sustainable Public Procurement in the United Nations*. (Greenleaf Publishing 2011), page 56.

¹⁰Andrecka M., *CSR and Sustainability in Danish Procurement*, (EPPPL 2017), page 335.

¹¹ Freeman, Ina, and Amir Hasnaoui. "The Meaning of Corporate Social Responsibility: The Vision of Four Nations." *Journal of Business Ethics* 100, no. 3 (2011), pages419-420.

¹² McCall-Smith, K. and Ruhmkorf, A. *Reconciling Human Rights and Supply Chain Management Through Corporate Social Responsibility*. (SSRN Electronic Journal 2016), pages 1-2.

Notwithstanding that the novelty of the concept and interest in the developing economies, authorities are now turning their attention inwards, questioning whether and how they are adhering not only an economic but also to respect environmental and social responsibility principles in their purchases.¹³ Moreover, the three pillars of sustainability can be part of such expectations that are affecting both what is being purchased and from whom the goods or services are being obtained. In these regards, procurement authorities can send a signal to the whole economy by requiring more sustainable goods, services, and works from those who can fulfill these demands.¹⁴ Furthermore, sustainable procurement entails paying greater attention to social responsibilities, such as sustainable supply chain, labor conditions, minimum wages, and forced labor, including child labor, occupational health, and safety, as well as compliance with regulations and internationally recognized standards.¹⁵ Ultimately, that increases the incentives for voluntary and non-binding instruments on CSR to be incorporated into public procurement as sustainability criteria that lie in the center of this thesis. Thus, that eventually becomes a substantial part of mandatory regulatory standards in international public procurement.

1.2 Aim and research question

In many jurisdictions around the world, the legal status of *sustainability* / *SPP* laws, policies, and their relations with public procurement generate a considerable amount of legal uncertainties. These include the uncertainty as regards the lawfulness of including the secondary policy objectives in the procurement procedures. In the present context, it concerns the incorporation of environmental protection and social responsibility oriented technical specifications and award criteria. The overarching question is if these criteria are in compliance or in conflict with the general principles of law, in particular, the principles of non-discrimination, equal treatment, transparency, and proportionality. In addition, technical specifications may also conflict with other norms that eventually may

See additional discussion on this at: Gammage, C & Novitz, The concept of sustainability and its application in international trade, investment and finance. *Sustainable Trade, Investment and Finance: Toward responsible and coherent regulatory frameworks*. Edward Elgar Publishing 2019, pages 17-18.

¹³ Ibid.

¹⁴ See note 1, UNEP, p 1.

¹⁵ Francesco Decarolis and Marco Frey, *Public Procurement's Place in the World – the Charge Towards Sustainability and Innovation*, (Palgrave Macmillan 2014), page 3.

amount to a barrier to trade in the trans-border context. This results in a challenging situation for all market participants involved in the procurement process.¹⁶ It begins with critical decisions by procurement authorities about defining the technical specifications of public goods and services they wish to purchase, from whom to purchase, and it continues with private bidders to design their tendering offers according to that specific requirements.¹⁷

This thesis aims to analyze legal uncertainties in the continuously developing concepts of sustainability and to define the *status quo* of CSR and its relationship with Sustainable Public Procurement. This will be achieved by analyzing two sets of legal provisions developed under the World Trade Organization (WTO) and the European Union (EU) jurisprudence in combination with internationally recognized CSR instruments.

This aim will be guided by research questions; the answer provided for each question will serve as the driving force to reach the intended goal of the thesis. In this context, the present study investigates the following research questions:

- *What are the linkages between Corporate Social Responsibilities and Sustainability?*
- *Under what circumstances can the generally recognized Corporate Social Responsibilities principles be incorporated in combination with the Sustainability criteria as conditions in a Public Procurement Procedure?*

In consideration of the fact that there have not yet been many court decisions regarding sustainability in combination with CSR in public procurement, many cases often raise issues of more general characters in this area, and they are not focused on or linked to CSR and sustainability issues in public procurements.¹⁸ Therefore, the research questions will be examined and answered based on rather limited sources, and according to hypotheses and presumptions developed by legal scholars that are active in this field of study.

¹⁶ Rolf Weber and Valérie Menoud, *Development Promotion as a Secondary Policy in Public Procurement? An Answer in the Light of the Digital Solidarity Clause*, Public Procurement Law Review, (December 2009), page 185.

¹⁷ Ibid, Rolf Weber.

¹⁸ Marta Andrecka, *CSR and Sustainability in Danish Procurement*, (EPPPL 2017), page 339.

1.3 Scope and constraints

Across the globe, public procurement is continuously evolving both conceptually and organizationally. Traditionally, all public entities and procurement authorities have been struggling with the idea of “do more with less” in times of economic constraints, increased public demands for transparency, fair competition, and equality as well as greater concerns about efficiency in government purchases.¹⁹ But today, public procurement has become much more complex and sophisticated than ever before. Public Procurement law does not only aim to achieve the *best value for money* in government purchases but also becomes a *policy tool* to achieve other objectives.

Nowadays, governments must deal with a broad range of issues on constantly changing concerns on the environment, society, technological advancement, product choice, and most importantly the complexities of international and regional instruments, as well as trading agreements.²⁰

Taking into account the complexity of the procurement system, Khi V. Thai narrowed down all the objectives pursued by public procurement law and divided them into two groups: *procurement* and *non-procurement* objectives. The procurement objectives include maximizing competition, transparency, equality, and minimizing financial, legal, and technical risks, as well as maintain integrity. The non-procurement objectives include but not limited to economic objectives (choosing domestic or local providers over foreign providers), environmental protection (green or sustainable procurement), social objectives (human rights, equality between men and women, minimum wage, and working conditions), and international relations (trade agreements and policies).²¹

Furthermore, this study analyzes the institutional drivers (e.g., laws, regulations, and norms) of CSR through sustainability criteria in public procurement procedures, and to see how it affects the behavior of the company that engages in public procurement. Several scholarly literatures reveal that when a

¹⁹ Gian L.Albano, Keith F.Snider and Khi V.Tai, *Charting a Course in Public Procurement Innovation and Knowledge Sharing*. PrAcademics Press 2013, page 1.

²⁰ Ibid.

²¹ Khi V.Tai, *Global Public Procurement Theories and Practices*, *Charting a Course in Public Procurement Innovation and Knowledge Sharing*. PrAcademics Press 2013, Chapter 1, page 3.

company enters into contact with the government for the provision of goods and services, it has greater exposure to governmental influences in two different ways. The first way is under the buyer and seller relationship, and the second way is under a regulatory regime that the government as a contracting authority (or as a buyer) regulates that relationship.²² In other words, if the government is undoubtedly a driver of CSR with its policies, its effects should be more obvious in those companies' behavior on social responsibilities from which it purchases than the other companies that have less extensive relations with public authorities.

Regarding this relationship, several scholars and writers have analyzed the role and influence of governments on CSR; for instance, Fox, Ward, and Howard have classified government engagement in CSR into four different roles,²³ these are as follows.

- 1) *Mandating role*, establishing minimum standards for businesses within a legal framework.
- 2) *Facilitating role*, government authorities enable or incentivize company's participation in CSR agenda, or to drive environmental and social improvements.
- 3) *Partnership role*, strategic partnership between the public and private sector to solve complex societal problems.
- 4) *Endorsing*, provides acknowledgment and appreciation of efforts on CSR.²⁴

This thesis does not intend to cover all the issues and concerns mentioned above. Primarily, its scope is limited to one aspect of development in the public procurement system over the period. That is the inclusion of sustainability criteria in public tenders in many jurisdictions. In addition to this, emerging changes on the *status quo* of CSR instruments from voluntary/non-binding to mandatory and binding instruments. Finally, the goal is to identify the ways and circumstances

²² Keith F. Snider, Barton H. Halpern, Rene G. Rendon, Max V. Kidalov, *Corporate social responsibility and public procurement: How supplying government affects managerial orientations*, Journal of Purchasing and Supply Management, Volume 19, Issue 2, (Elsevier Ltd. 2013), pages 63-64.

²³ Tom Fox, Halina Ward, and Bruce Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study*, (The World Bank 2002), pages 3-6.

²⁴ Ibid.

which combine them as a set of complete legal bases to scale up Sustainable Public Procurement.

1.4 Materials and method

The traditional legal research method is being used throughout this thesis (legal dogmatic method). It is influenced by the fact that both European Union sources and WTO sources are analyzed and pays attention to the special nature of these sources. The approach taken in this study will more particularly be a combination of analysis of the concept of sustainability in order to define the current status of CSR and its relationship with contemporary Sustainable Public Procurement in world trade. Therefore, this analysis will include legal sources developed under the jurisprudence of the WTO and the EU together with internationally recognized CSR instruments. As a part of this analysis the academic publications, scholarly discussions and comments, critiques of the provisions, case law, and legal literature will be used to provide insights into this study.

The legal provisions referred to in this thesis are the relevant Multilateral WTO Agreements that affect GPP. There are assumptions that the most important WTO agreements namely, the General Agreement on Tariffs and Trade (GATT)²⁵ and the General Agreements on Trade in Services (GATS)²⁶ are excluded government procurement from their scopes, therefore they are not relevant to government procurement, in particular to GPP. However, these might be misleading assumptions that will be illustrated in the proceeding section of this thesis. In addition to this, the most recent revised WTO agreement on the Government Procurement Agreement (GPA)²⁷ of 2012 which was entered into force in 2014 will be discussed in more detail in comparison with the relevant EU legislation.

²⁵ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Available at: https://www.wto.org/english/docs_e/legal_e/legal_e.htm (accessed on 06 April 2021).

²⁶ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994). Available at: https://www.wto.org/english/docs_e/legal_e/26-gats.pdf (accessed on 06 April 2021).

²⁷ GPA: Revised Agreement on Government Procurement, Mar. 30, 2012, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 1915 U.N.T.S. 103 (2012). Available at: https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm (accessed on 06 April 2021).

From the EU law perspectives, mostly secondary and partly primary EU legislation (e.g., Treaty on the Functioning of the European Union TFEU), numerous widespread policies including renewed EU Procurement Directives, as well as some of the case law from the Court of Justice of the European Union (CJEU) those are applicable in the European SPP field.

Furthermore, there are *codes of conduct* or CSR instruments that have been developed by international organizations in the form of guidelines and recommendations of the international community for transnational corporations. The most internationally recognized instruments developed by the United Nations (UN), the Organizations for Economic Co-operation and Development (OECD), and the International Labor Organization (ILO). In this thesis, all the codes of conduct will be referred to as the main tools and instruments of CSR.

Finally, it has been emphasized that this subject is dynamic and under constant development. Therefore, the discussions involved in this study are relatively new, or at least the author tried to obtain the latest available literature on the internet and some of the other reliable sources obtained from the library databases of Lund and other partner Universities.

1.5 Structure

For the purpose of analysis, the thesis is divided into four major sections. The second section examines the various challenges of the Green Public Procurement under WTO jurisprudence. It starts with the subsection focusing on the linkages between corporate social responsibilities and sustainability. Then it continues with a brief discussion about the relevance of multilateral WTO agreements. In the next subsection, the government procurement agreement (GPA 2012) will be analyzed in detail to demonstrate new reforms and their importance to our study. The technical specifications, design of tenders, and hypothesis of the inclusion of CSR as sustainability criteria in government procurements will be covered in the proceeding subsection. After that, the final part will attempt to leverage by balancing non-discrimination provisions with sustainability criteria in public procurements. Finally, the second section will be concluded with a summary and conclusion of the whole section.

The third section will follow the same pattern that has been drawn in the previous section with slight differences. Primarily, this part of the thesis will be devoted to Sustainable Public Procurement under EU law. The first two subsections will be analyzing the legal foundations in general and in particular the secondary EU legislation and the implementation of SPP by the EU Member States. The third subsection will provide an overview of the environmental policy measures and their relations with the SPP. The next subsections will cover CSR and sustainability criteria in public procurements. These will be explained in light of examples of case law from the CJEU, and lastly, the balancing approach of the Court will be assessed and discussed. In the end, all the findings and their concluding remarks will be presented in the conclusion of the third section.

Ultimately, the fourth section summarizes the whole discussion from the previous sections by answering all the research questions stated in the first introductory section and presents the author's claim and personal remarks in the overall conclusion.

2. Green Public Procurement under WTO Law

2.1 Linkages between CSR and Sustainability

Currently, we are living in a world that is facing a wide range of problems such as climate change, economic crisis, poverty, violations of human rights, and the emergence of new diseases. To develop or to construct a sustainable society, we need both the public and private sectors in this world to be socially responsible in their activities. The idea of having responsibility is not only to make a profit out of every activity they engage in, but also to solve other problems which are social and environmental that are known under the term of Corporate Social Responsibility

(CSR).²⁸ The concept of CSR is widely debated for years by researchers and legal practitioners not only due to the lack of a clear definition but also because of different viewpoints regarding regulations and their implementations. Many researchers have emphasized that wrongly implemented CSR policy will lead to insufficiency and unviable use of scarce resources in any given economy.²⁹ In contrast, implementing CSR in the right way found to be not only company leverage (in the private sector), but also a supportive tool for attaining sustainability.³⁰

There is no unique definition of CSR; however, the definition developed by the European Commission is commonly cited in most legal literature, it has been defined as “*a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis*”. The CSR also integrates all the three pillars of sustainability that have been mentioned in the previous section (Figure 1), which are the economic, social, and environmental interests are combined based upon mutual benefits.³¹ Social responsibility entails going beyond legal requirements by investing more resources into human capital and the development of environmentally friendly technologies that eventually increase a company’s competitive advantage in the market.

The wide meaning of the concept of CSR makes it difficult for companies to establish a well-structured policy and to identify what practices should exactly be included in CSR. In general, most of the literature reveals that CSR is considered as a set of practices, programs, or policies adopted for societal well-being and integrated into business strategies of corporations; the related issues to codes of conduct, business ethics, investment in human capital, workplace, human right issues, and other environmental concerns needs to be taken in to account in the

²⁸ Liliana, N., The relationship between corporate social responsibility (CSR) and sustainable development (SD). *Internal Auditing and Risk Management* (2015), pages 179-180.

²⁹ Porter, M.E., and Kramer, M.R., *Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility*. Harvard Business Review 2006, vol. 84, no.12, pages 78-92.

³⁰ Ibid.

³¹ European Commission, *Promoting a European Framework for Corporate Social Responsibility, Green Paper*, Luxembourg 2001, page 7.

whole process. Therefore, many companies choose certain social activities which are they feel them right to be included in their CSR policies.³²

Considering a large amount of money spent on public procurement, surprisingly there not much attention has paid to its role and influence on social responsibilities. However, with a notable exception, Christopher McCrudden published his research in 2006 and he claimed that CSR may be influenced by public procurement, more specifically with public procurement laws.³³ Besides, he argues that CSR and public procurement adhere to two types of policies that are common for both. This was illustrated with the example of an increased role of public procurement in addressing environmental issues and social conditions. Also, other issues including fair trade, reducing the abuse of human rights, elimination of child labor, and sustainable developments are becoming part of the public procurement system in many jurisdictions. Therefore, professor McCrudden strongly believes that there is a strong association between the concepts of CSR and sustainable development, and this association leads to the development of the concept of a sustainable procurement system.³⁴

In contrast, sustainability also seeks to address the major challenges facing societies around the world which are economic, social, and environmental challenges. The most generally accepted definition of sustainability was created by Bruntland in 1987 in his work “*Our Common Future*”, which is commonly known as the Bruntland report. It was suggested that sustainable development refers “to meet the needs of the present without compromising the ability of future generations to meet their own needs”.³⁵ Therefore, in consideration of the fact that many scholars claiming the development of these two concepts CSR and Sustainability must be considered as a part of global and institutional challenges that must be addressed accordingly by public and private sectors.³⁶

³² See note 28, Liliana, page 182.

³³ McCrudden, C., *Corporate Social Responsibility and Public Procurement*. Working Paper no. 9/2006. University of Oxford Faculty of Law Legal Studies Research Paper Series (2006), pp 4-5. Available at: [\(PDF\) Corporate Social Responsibility and Public Procurement \(researchgate.net\)](#) (accessed on 12 April 2021).

³⁴ Ibid.

³⁵ Bruntland, G. H. *Our common future: report of the 1987 World Commission on Environment and Development*. Oxford University Press, Oxford, UK, 1987, page 43.

³⁶ See note 28, Liliana, page 180.

2.2 Applications of the Multilateral Agreements

The World Trade Organization (hereinafter, WTO) has emerged from multilateral trade negotiations initiated by contracting parties to the GATT 1947 (General Agreement on Tariffs and Trade 1947, which set forth the legal framework for governing multilateral trade amongst parties). The ministers of the contracting parties meet for negotiation in Uruguay in 1986, this negotiation commonly referred to as the Uruguay Round. Later, on the 15th of April 1994, the ministerial meeting in Marrakesh concluded the Uruguay Round³⁷ negotiations, and the results annexed to the Marrakesh Final Act, which consisted of the Marrakesh Agreement Establishing the WTO. This final act opened the WTO Agreement for acceptance to all contracting parties to the GATT 1947 and the European Union (previously, the European Communities). Eventually, the WTO Agreement entered into force on the 1st of January 1995,³⁸ this agreement established a new International Organization as we know it today as the WTO.

The institutional operations of WTO are governed by WTO Agreement. It contains four Annexes; annexes 1, 2, and 3 include agreements and associated legal instruments these are referred as to the *Multilateral Trade Agreements*.³⁹ These are binding upon all WTO member states. And the agreements included in annex 4 are the *Plurilateral Trade Agreements* which are binding upon those that have accepted them. This does not create either rights or obligations for the members who have not accepted them. All these four annexes form the integral parts of the WTO Agreement.⁴⁰

The WTO and its predecessor GATT have been criticized for prioritizing global trade over the global environmental concerns, and its contribution to the socio-economic deregulation of the “race to the bottom”. In the strict sense, that means governments trying to underbid each other with low environmental or sustainability standards for the sake of attracting foreign direct investments (FDI), and in contrast the governments with high stringent environmental standards

³⁷Marrakesh Ministerial Declaration of 15 April 1994.

³⁸ The WTO and its treaty instruments, 2021 edition, page 7. Available at: https://www.wto.org/english/res_e/booksp_e/sli_e/3TheWTOanditstreatyinstruments.pdf (accessed on 14 April 2021).

³⁹ WTO Agreement, article II: 2. The Multilateral Trade Agreements are listed in Annex I of this agreement.

⁴⁰ Ibid, article II: 3.

heading towards the risk of suffering from carbon leakage.⁴¹ These controversial issues in the area of “trade liberalization and environment protection” under WTO have been described succinctly by Professor Satoru Taira⁴², he summarizes as such:

“On the one hand, environmentalists argue that the value of free trade conflicts with the values of the environment. According to them, trade liberalization creates new market opportunities and enhances economic activity. Trade also generates wealth, which allows consumers to acquire higher economic outputs. But freer trade and economic growth, if they go without fair payments of the costs ‘internalization’⁴³, that results in the unsustainable consumption of natural resources and waste production and leads to increased pollution and other environmental harm. Trade agreements contain market access provisions that can be used to override domestic environmental regulations.... Countries with lax environmental standards have a competitive advantage in the global marketplace and put pressure on countries with high environmental standards to reduce their environmental requirements. Trade-Related Environmental Measures (TREMS) make it possible for those countries to avoid such pressure On the other hand, free traders mainly argue as follows: environmental values and trade are complementary and the later serves the former. If consumption of a country’s environmental resources is correctly priced, liberal trade improves a country’s overall welfare and leads to more efficient use of natural resources.”⁴⁴

The controversies surrounding international trade and environmental protection leave many open questions that are needed to be addressed accordingly. For instance, what about the legal perspectives that concern whether and to what extent TREMS or Sustainability can be used to protect the environment? In these regards, Rika Koch also stressed out that the WTO has been slow in the provision

⁴¹ Christine Kaufmann and Rolf H. Weber. *Carbon-related border tax adjustment: mitigating climate change or restricting international trade?* World Trade Review 2010, 10, page 498.

⁴² Satoru Taira, Professor of Graduate School of Law Osaka City University.

⁴³ ‘Internalization’ means inclusion of pollution-related damages into a product’s price. As to the ‘Polluter Pay Principle’, the Principle 16 of the Rio Declaration says as follows:

National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

The Rio Declaration on Environment and Development, June 14, 1992.

⁴⁴ Taira, S., Live with a Quiet but Uneasy Status Quo? -An Evolutionary Role the Appellate Body Can Play in Resolution of ‘Trade and Environment’ Dispute. RIETI Discussion Paper Series 05-E-016, pages 2-3.

of solutions to environmental problems, only in the recent decades; the WTO regulatory bodies have shown the possibilities of expanding the scope of environmental measures within international trade policies.⁴⁵ Besides, little efforts have been undertaken on the institutional level to provide a forum for the discussion on environmental issues in trade and to find viable solutions. In so far, these efforts have not taken precise shape under the WTO jurisprudence.⁴⁶

A brief history of initial efforts at the international level indicates that for a long time the protection of the environment and ecosystem was persuaded as a national or even private concern rather than an international or regional one. As a result, there was no international platform to solve problems of climate change mitigations and the protection of the environment at the international level. However, as we understand today, climate change is a global problem, and therefore global solutions are necessary.⁴⁷ Initially, in the aftermath of World War II, the UN and GATT have emerged as international fora that united world nations. Their primary focus was to maintain international peace and security, as well as the reconstruction of the world economy, and to fostering trans-national trade. Only in 1985, the greenhouse emission (GHG) become an international matter with the discovery of the *ozone holes* around Earth's atmosphere. This triggered international efforts by the UN and later the WTO also included sustainable development as one of the fundamental objectives.⁴⁸

Apart from the environmental concerns, the WTO was criticized for being unprogressive in the area of government procurements. For instance, some of the leading scholars including Arrowsmith and Anderson have noted that in contrast with many other areas of works under WTO, there has been little progress on government procurement at the multilateral level. The government procurements remain outside the scope of the main founding multilateral trade agreements (e.g.,

⁴⁵ Koch R., GPP and International Trade Regulation. In: Green Public Procurement under WTO Law. European Yearbook of International Economic Law, vol 9. Springer, Cham. (2020), pages 39-40.

⁴⁶ Ibid.

⁴⁷ Ibid, page 39.

⁴⁸ See, Preamble of the Agreement Establishing WTO.

GATT and GATS) and the efforts to extant existing agreements or to develop new ones are moving slowly.⁴⁹

Regarding the applications of multilateral agreements to government procurement in general, both GATT and GATS contain general provisions that impose obligations on *national treatment* and *most favored nation* (MFN), especially *non-discrimination principles* lie at the very heart of the most important multilateral agreements.⁵⁰The non-discrimination principles constitute the most important instruments of international trade law and one of the main pillars of WTO law.⁵¹That has been stipulated in the basic WTO agreements all of which contain general and specific provisions; such as the GATT, GATS, TRIPS, and special agreements like the Technical Barriers to Trade (TBT), as well as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) or the Agreement on Subsidies and Countervailing Measures (ASCM). Besides, non-discrimination also serves as the guiding principle in the Plurilateral Agreements, including the Government Procurement Agreement (GPA). However, there is a lack of jurisprudence to clarify this principle in the area of the GPA, to understand the methodologies in the interpretation of non-discrimination principles under WTO law is just and an extremely important indication to make legitimate assumptions on how the adjudicatory bodies of WTO would interpret the GPA.⁵²

Besides, the non-discrimination principles have two components as we have mentioned above which are the *most favored nation treatment MFN principle* specified in Article I of GATT and Article II of GATS, and the *national treatment principles* in article III of GATT and Article XVII GATS. These principles allow WTO to check the compliance of domestic law of Member States with the WTO law. In essence, the prohibition of less favorable treatment means the prohibition of discrimination based on origin or nationality. The WTO adjudicatory body interpreted this as the obligation of member states to grant equal conditions, fair competition, and equal treatment for both local and foreign products and producers,

⁴⁹Arrowsmith S. and Anderson R.D., *The WTO Regime on Government Procurement: Challenge and Reform*, World Trade Organization, Cambridge University Press 2011, pages 4-5.

⁵⁰ Ibid.

⁵¹ Diebold Nicolas F., *Non-Discrimination in International Trade in Services, 'Likeness' in WTO/ GATS*, (Cambridge 2010), page 17.

⁵² See note 45, Koch R., pages 53-54.

service, and service providers.⁵³ This principle focuses on the real and potential harm to competition and includes direct (*de lege*) and indirect (*de facto*) discrimination.⁵⁴

With respect to GPP, the literature reveals that it is difficult to determine the factual discrimination in the area of GPA. Even though it is clear that the obligation of Member States on non-discrimination principles constitutes the boundaries of GPP, however, it is not clear where that line needs to be drawn. In this regard, Rika Koch poses several questions to clarify.

“What happens when a GPP clause is origin-neutral and does not distinguish between domestic and foreign products/service, but *de facto* benefits local suppliers?

When does GPP fall into the legitimate policy scope of a country to contribute to environmental protection and when does it overstep the boundaries of the non-discrimination obligation as imposed by WTO law?”⁵⁵

In response, she stresses out that the answer to these questions requires a balancing act respectively on a case-by-case basis. That will be discussed in more detail later in section 2.5.

Another important aspect to mention is that GATT and GATS contain *derogation* or *carve-out* clauses that exclude public procurement from their scope. As a result, measures and policies enacted in the field of public procurement are exempted from the national treatment and the MFN treatment, including all the other obligations. This derogation clause can be found in Article III, 8 (a) of GATT (National Treatment on Internal Taxation and Regulation). The paragraph states that:

8. (a) The provisions of this Article shall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to

⁵³ See, US – Gasoline, para. 6.10.

⁵⁴ See note 51, Diebold, page 37.

⁵⁵ See note 45, Koch R., page 54.

commercial resale or with a view to use in the production of goods for commercial sale.

In GATS, the derogation clause can be found in Article XIII: 1, on the (Government Procurement).

1. Articles II (MFN), XVI (Market Access), and XVII (National Treatment) shall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

Moreover, the GATS contains a negotiation clause in Article XVIII (Additional Commitments), but not GATT. This article requires the Member States to further negotiate on the commitments concerning measures affecting trade in services in government procurements, which includes qualifications, standards, and licensing matters.

All in all, obligations for Green and Sustainable Public Procurement not only arise from the plurilateral agreement such as the GPA but also the multilateral agreement of WTO law. Primarily, the agreement establishing the WTO recognizes all the elements in the preamble (e.g., rising standard of living, ensuring full employment, optimal use of world's resources under the objectives of sustainable development, and the protection and preservation of the environment), this increases the incentives for CSR and Sustainability to be incorporated into the legal frameworks of WTO, more specifically into the government procurements. In addition to this, GATT and GATs are equally relevant in this regard and also the special legislations on TBT and ASCM. The TBT may be violated through GPP measures, when the technical specifications and technical regulations have the same effects, if it happens then non-discrimination principles in public procurement must be taken into consideration. The relevance of ASCM is that GPP may be affected when a member state provides environmental incentives enacting procurement laws or practices, public authorities need to be careful with granting subsidies that are prohibited under ASCM.

2.3 Government Procurement Agreement (GPA)

As we have discussed above, for political and practical reasons the public procurements have not been regulated internationally for many decades, and it has been excluded from the scope of many WTO multilateral and international agreements. The efforts on procurement market liberalization at the international level started by the GATT Contracting Parties with the negotiations on the market access on a plurilateral level. This has been achieved during the 7th GATT Round in Tokyo with the conclusion of the Tokyo Code of 1979. The draft of the agreement identified the parameters, the logic, and results of fifteen years of reflections and negotiations within OECD and in the context of the European Economic Community (EEC). Most of that text was embodied in the Tokyo Round Agreement on Government Procurement.⁵⁶ Consequently, the first agreement so-called “Tokyo Round Code on Government Procurement” was signed and entered into force in 1981. Later, it was amended in 1987 and entered into force a year after. Contracting parties decided to extend the scope and coverage of the agreement and negotiated in parallel with Uruguay Round. Eventually, the reformulated GPA (GPA 1994) was signed at the same time as the Agreement Establishing the WTO in Marrakesh in 1994, and it was entered into force on January 1, 1996.⁵⁷

The major challenges of GPA1994 were that the coverage broadened from federal to local authorities, state-owned enterprises, and public utilities. Previously, its scope was limited only to goods, later it was extended to services, supplies, and constructions. Besides, it introduced a new procedure that assures fair hearing for unfairly treated tenderers on a domestic level according to Article XX (under the Challenge Procedure) and empowered the WTO Dispute Settlement Body (DSB) to make binding recommendations under Article XXII (Consultations and Dispute Settlement).⁵⁸ This became the only legally binding instrument that regulates government procurement under the WTO. As being a plurilateral agreement, the accession is voluntary, and the agreement is binding only to those members that

⁵⁶ Blank, Annet, Marceau, Gabrielle Zoe. A history of multilateral negotiations on procurement: from ITO to WTO. In: Hoekman, Bernard M; Mavroidis, Petros C. Law and policy in public purchasing: the WTO agreement on government procurement. Ann Arbor: University of Michigan Press, 1997. p. 31–55, pages 40–41.

⁵⁷WTO | Government procurement - The plurilateral Agreement on Government Procurement (GPA). Available at: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed on April 22, 2021).

⁵⁸ Koch R., GPP and International Trade Regulation. In: Green Public Procurement under WTO Law. European Yearbook of International Economic Law, vol 9. Springer, Cham. (2020), page 65.

have signed it. The EU and its Member States, and several other developing countries are the signatories for whom it constitutes the supranational legal framework on government procurements.⁵⁹

After long negotiations, the most recent revision of GPA 2012 concluded and entered into force in 2014. Currently, this agreement consists of 21 parties that include 48 WTO Member States, the European Union counts as one party that covers 27 of its Member States. There are another 35 WTO members, and 4 international organizations participate as observers in the Committee of Government Procurement.⁶⁰The revision of GPA 2012 brought about significant changes; it has been transformed from a market access tool to a comprehensive legal instrument that covering a wide range of issues.

In general, the open-ended text of GPA has created the possibilities for a broad range of interpretations about the legality of the inclusion of secondary policy objectives in government procurements.⁶¹ Since the GPA has given rise to case law in this area, legal scholars have played a critical role in these discussions. The discussions divided commentators into two groups according to their viewpoints.

On the one hand, some scholars including McCrudden argue that GPA is characterized by “purity principles”, which means the agreement would aim to establish a system of law that reduces as far as possible the inclusion of non-economic criteria into the public procurement process. In addition to this, the interpretation of its provisions should not be exchanged with negotiations to obtain specific advantages and exceptions.⁶²On the other hand, it has been claimed that since the GPA does not prohibit explicitly the inclusion of secondary policy objectives in government procurements, the promotion of sustainability through public spending is not affected by this agreement. In support of sustainable procurement, Tosoni also argued that “the GPA provisions leave significant scope

⁵⁹ Tosoni L., *The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective*. European Procurement & Public Private Partnership Law Review (January 2013), page 44.

⁶⁰ WTO, Government procurement - The plurilateral Agreement on Government Procurement (GPA). Access at: https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (accessed on April 24, 2021)

⁶¹ See note 59, Tosoni, pp 44-45.

⁶² McCrudden, C., “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 Economic Law* 2/1999, page 30.

for the inclusion of sustainability criteria in the different stages of the procurement process, provided that such criteria are non-discriminatory, sufficiently objective and verifiable.”⁶³

This thesis incline to support the second line of arguments focusing on the provisions that leave room for the inclusion of CSR as a part of sustainability concerns in the main procurement procedures, such as the technical specifications, more specifically gives greater attention to award criteria. Since award criteria are believed to be one of the critical paths that affect the wide spectrum of public spending by awarding the most advantageous offer in public procurement. The GPA2012 introduced the possibilities of addressing environmental concerns through technical specifications and award criteria. Article X of GPA 2012 (Technical Specifications and Tender Documentation), section 6 specifically authorizes procuring entity with a discretion “to adopt or apply technical specification to promote the conservation of natural resources or protect the environment.” Another important incentive to mention is that the indicative list of evaluation criteria specified in Article X (9) includes environmental characteristics. This can be seen as an opportunity of addressing social characteristics since they are not mentioned in the provisions, but this does not mean they are prohibited. The discretion granted to procuring entities creates the possibility of achieving the inclusion of societal characteristics with the combination of other provisions.

Besides, the negotiations to revise the GPA text also resulted in the adoption of a Committee on a package of working groups, including a Working Program to promote sustainable procurement practices inconsistent with the Agreement. The Proposed Decision of the Committee on Government Procurement on a Work Program on Sustainable Procurement (Annex 7) paragraph 2 states the following commitments.

2. The work program shall examine topics that include:

(a) the objectives of sustainable procurement.

⁶³ See note 59, Tosoni, p 45.

- (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.⁶⁴

This Working Program was intended to promote sustainable procurement, to assist in improving the administration and implementation of the agreement on government procurements.⁶⁵ Considering the coverage of GPA under WTO, it governs about EUR 1.3 trillion worth of procurement projects that is only a fraction of global public procurement. But it is still a considerably large sum that parties to the agreement may correspondingly be able to influence by procurement procedures, the terms of trade policies, and corporate conducts in favor of sustainability and social responsibilities across a broad range of public sectors.⁶⁶

The authors Clarie O'Brien and Olga Ortega of a chapter in the book so-called "Discretion in EU Public Procurement Law" perfectly explained this in the light of human rights standards and how this would work in the practices of public authorities throughout the supply chain in public contracts. They explained that in a way this can be done "through their purchase contracts, they might exercise leverage over immediate suppliers and, through supply chain requirements, over second and subsequent tiers of the supply chain. By forgoing the imposition of minimum human rights standards in their supply chains, public actors undermine the achievement, and credibility, of the 'sustainable value chain' standards they promote to businesses and other stakeholders."⁶⁷ Thus, this explanation is highly

⁶⁴ GPA/112, Decision on the Outcomes of the Negotiations under Article XXIV: 7 of the Agreement on Government Procurement", GPA/112, Annex 7 (2).

⁶⁵ WTO / Government procurement - The plurilateral Agreement on Government Procurement (GPA) https://www.wto.org/english/tratop_e/gproc_e/gpa_wk_prog_e.htm (accessed on April 25, 2021).

⁶⁶ O'Brien C. and Ortega O., Discretion, Divergence, Paradox: Public and Private Supply Chain Standards on Human Rights (June 16, 2018) (*in the*) Bogojevic S., Groussot X. and Hettne J. (eds), Discretion in EU Procurement Law, University of Groningen Faculty of Law Research Paper No. 18/2018, Available at Hart Publishing 2019, chap. 9, p. 189-210, page 192.

⁶⁷ Ibid.

relevant in cases of social responsibilities and sustainability standards in government procurements.

2.4 CSR and Sustainability Criteria in Government Procurement

As we have discussed above in Section 2.3, the WTO revised GPA governs public procurement that covers goods, services and construction works. The most serious threat to the purpose and aim of GPA is favoring national producers and suppliers, in other words, “buy national” policies, which constitute barriers to transnational trade, potentially limits the rights of foreign companies to bid on public tenders in another GPA contracting parties.⁶⁸

For the purpose of illustration, the author has chosen the technical specifications and award criteria as the base to identify how and under what conditions the tenderers can meet specific requirements and criteria regardless of their nationality and residence. This section analyses preconditions of the inclusion of CSR and Sustainability criteria as an integral part of technical specification and award criteria in government procurements, what does technical specification mean under GPA 2012?

The list of definitions given in Article I GPA2012, section (u) states that *Technical Specifications means a tendering requirement that:*

- (i.) “lays down the characteristics of goods or services to be procured, including quality, performance, safety, and dimensions, or the processes and methods for their production or provision; or
- (ii.) addresses terminology, symbols, packaging, marking or labeling requirements, as they apply to a good or service.”

This section of the article does not explicitly prohibit all technical specifications that might be accountable for the trade barriers but those that are unnecessary. There is also a certain type of specifications that are considered as an unnecessary barrier to international trade in cases where there is a less restrictive

⁶⁸ Marc Steiner, *The WTO Government Procurement Agreement: Assessing the scope for green procurement* | International Centre for Trade and Sustainable Development (December 2015). Online source available at: <https://ictsd.iisd.org/bridges-news/biores/news/the-wto-government-procurement-agreement-assessing-the-scope-for-green> (accessed on April 29, 2021).

and equivalent alternative available to apply or when there is no valid policy justification for it. Tosoni emphasizes that these alternatives should not have to be purely theoretical and should not place an unproportioned weight on the interest of free trade policies.⁶⁹ In addition to this, earlier Arrowsmith clearly explained that “the objectives that may justify specifications in government contracts are clearly not limited” and “any legitimate government objective, in the sense of one that is not positively prohibited by the GPA, can provide a basis for specification”.⁷⁰

According to interpretations of the provision, the reference to some aspects of CSR and sustainable development provided in the preamble of the Marrakesh Agreement 1994. The preamble of the agreement essentially sets out in broad terms, the objectives of the whole body of agreements. Thus, the main fundamental objectives of the WTO Agreement are:

*“to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development”.*⁷¹

On the one hand, this provision touches upon some aspects of social considerations that can be linked directly to the general principles accompanied to internationally recognized CSR instruments, for instance, the UN Guiding Principles include recommendations for the *State* on the duty to protect human rights and the recommendations for the *companies* on the corporate responsibility to respect human rights.⁷² The OECD Guidelines explain companies about their responsibilities, how they can minimize adverse effects coming from business-

⁶⁹ Tosoni L., *The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective*. European Procurement & Public Private Partnership Law Review (January 2013), page 46.

⁷⁰ Arrowsmith, *Government Procurement in the WTO*, (the Hague 2003), page 326.

⁷¹ WTO, *Agreement establishing the World Trade Organization (WTO) 1994*, preamble.

⁷² UN Guiding principles on business and human rights (UNGPR) – Implementing the United Nations “Protect, Respect and Remedy” Framework. New York and Geneva: United Nations (2011).

related activities, and encourage positive contributions to economic, social, and environmental progress.⁷³ ILO International Labor Standards and Conventions promote human rights at work, encourage employment opportunities for both men and women, enhance social protection, and strengthening international dialogue on work-related issues.⁷⁴

In addition to general principles of CSR, States are bound under international human rights treaties to protect, respect, and fulfill their human rights obligations within their jurisdictions. More specifically, the duty to protect and take reasonable steps to preclude harmful human right actions and societal issues by third parties, that include both legal and natural persons. Thus, a state is responsible for acts or omissions that are negatively attributing to the above-mentioned concerns.⁷⁵

On the other hand, technical specifications are not only limited to characteristics of goods or services being procured but also can include secondary policy objectives as discussed in the previous sections. For example, Article I, section (u) of GPA 2012 includes important environmental aspects that are worth mentioning. The labeling requirements increase precautions about giving greater attention to procurement planning procedures. As Corvaglia pointed out that employing labeling and certification schemes as a part of technical specifications has dramatically increased as a mechanism of verification for environmental or sustainability criteria.⁷⁶ The reference is given in Article I, (u) GPA suggests that to design technical specifications that require certain labeling (e.g., eco-label, or recyclable) are generally permissible under Article X (6) of GPA 2012 (Technical Specifications and Tender Documentation). Moreover, considering the discretion provided in this article, the public procurement authorities have all the possibilities for promoting and enforcing secondary policy objectives in their procurement

⁷³ Organization for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000, available at: <https://www.refworld.org/docid/425bd34c4.html> [accessed 29 April 2021].

⁷⁴ International Labor Office, *International labor standards- A global approach* (2002), available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087692.pdf (accessed April 29, 2021).

⁷⁵ See note 66, page 193.

⁷⁶ Corvaglia Maria Anna, "Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement", in: *Journal of International Economic Law* 19(3), 2016, page 607.

procedures as an integral part of technical specifications, within the limits in mind that there are enough justifications to do so.

Another important piece of discussion in this section is award criteria. Generally, award criteria are used by procurement authorities to compare the offers of different bidders and to identify the most advantageous tender based on aspects of the tender submission no other than just price.⁷⁷ For example, from the EU perspective, there are MEAT award criteria that were introduced by the European Parliament in January 2014, MEAT assessment identifies the most economically advantageous tender, and this is the ground for awarding a contract to the specific bidder who meets all the criteria. That includes quality, price or cost-effectiveness, technical merits, functionality, accessibility, social and environmental characteristics (this is the point of opportunity for public authorities to promote CSR and sustainability in their purchases), the list continues with innovative characteristics, technical assistance after purchase, and finally delivery conditions (e.g., date, process and period)⁷⁸. However, award a contract under GPA 2012 is not detailed as in Article 67 (contract award criteria) of the EU Directive 2014/24/EU. Despite that in Article XV (5) of GPA states two criteria that are the basis for awarding a contract, these are (a) the most advantageous tender; or (b) where the price is the sole criterion, the lowest price.

Thus, this provision leaves open room for national authorities and legislatures to interpret the law within the limits of freedom permitted by law. As we have seen from the EU perspectives (as being a contracting party to GPA 2012), paragraph (a) the most advantageous tender was interpreted and extended into the broad spectrum that allows the Member States and their procuring authorities to promote and enforce secondary policy objectives including CSR and sustainability. Furthermore, all the concerns discussed in this section are dependent on the subject matter of the contract, sometimes “buy national” policy is irrelevant due to the subject matter. For instance, in the case where the specific public good is being purchased is not available in national territory that opens the market for the foreign supplier, anyone

⁷⁷ See note 69, Tosoni, page 46.

⁷⁸ Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement, article 67.

who can satisfy the public needs in the procuring country will be awarded a contract regardless of nationality.

2.5 Balancing non-discrimination provisions with sustainability criteria

As we have briefly discussed above (in Section 2.2), *non-discrimination principles* lie at the very heart of the most important WTO multilateral agreements, both GATT and GATS contain general provisions that impose obligations on member states to comply with (and to respect) the *National Treatment* and *Most Favored Nation* principles.⁷⁹ Correspondingly, under GPA the general non-discrimination principles set out in Article IV (General Principles)⁸⁰, prohibits Parties (including all the national procurement authorities) from the less favorable treatment to the goods and services offered by the supplier from other GPA Parties. The wording of the article as follows: *Non-Discrimination*.

1. “With respect to any measure regarding covered procurement, each Party, including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party and to the suppliers of any other Party offering the goods or services of any Party, treatment no less favorable than the treatment the Party, including its procuring entities, accords to:
 - a) domestic goods, services, and suppliers; and
 - b) goods, services, and suppliers of any other party.”

The obligation of equal treatment also extended to the situations where domestic suppliers that include locally established foreign companies offer goods and services originating in the territory of another Party (paragraph 2 of this Article). Accordingly, this non-discrimination principle applies to technical specifications (that covers the inclusion of green, sustainable, and CSR criteria), therefore, public procurement authorities are required to design technical specifications in a way that is not discriminating or less favoring certain tenderers from other Party to the GPA.

⁷⁹ *The Most Favored Nation treatment MFN principle* specified in Article I of GATT and Article II of GATS, and the *National Treatment principles* in article III of GATT and Article XVII GATS.

⁸⁰ Wto.org. 2012. *WTO | legal texts - Revised Agreement on Government Procurement GPA*, Article IV [online] Available at: <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleIV> (Accessed 2 May 2021).

Furthermore, in Article IV the general principles do not provide the procurement authorities with clear guidance on how to design a technical specification that includes sustainability or any other secondary policy objectives, therefore, Article X (Technical Specifications and Tender Documentation) of GPA provides the set of detailed guidelines for procuring entities.

Sometimes, the incorporation of secondary policy measures in technical specifications and award criteria may also raise issues concerning legitimacy and transparency, which could eventually result in possible violations of non-discrimination principles. In these regards, Corvanlia noted that “the use of private regulatory initiatives has been frequently criticized due to the lack of transparency in their formulation: environmental and social private standards have often been defined as disguised forms of discrimination, favoring national products and providers that comply with nationally established private codes of conduct, for example, and against goods and services from developing countries.”⁸¹ Thus, if that policy measure violates the WTO law and its obligation under International law, the good news is that it can be justified under certain conditions.

Generally, under WTO jurisprudence, the violation of legal obligations by the Member States through their national measures can be justified under certain conditions, for instance, if persuaded policy measure is necessary to protect public interest such as social, political, or cultural objectives. The exception clauses can be found at the multilateral level in Article XX of GATT and Article XIV of GATS, respectively.

Article XX of GATT (General Exceptions) exempts policy measures from violating WTO law, if those measures are aimed at (a) protection of public morals, (b) protection of human, animal or plant life or health, ... (g) conservation of exhaustible natural resources, etc. and contains the *chapeau* that clause requires those measures should not be abused or used to restrict trade in an unjustifiable manner. Many literatures reveal that above mentioned justifiable reasons according to Article XX of GATT have been main issues in most of the dispute settlement

⁸¹ Corvaglia A. Maria, Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement, *Journal of International Economic Law*, Oxford University Press 2016, 19, 607–627, page 616.

procedures under WTO.⁸² This clause applies to all parts of the GATT with the function of examining from the viewpoint of to what extent (whether or not) measures of concern at stake can reasonably be explained by that introduced policy objectives or are there any more desirable measures that exist.⁸³ Similar or almost identical wording of provision can be found in Article XIV of GATS (Security and Exceptions) that also follows the same pattern described in Article XX of GATT.

At the plurilateral level, the GPA also contains the exception catalog listed in Article III (Security and General Exceptions), the list of justifications reflects the same justifications reasons provided in both GATT and GATS with almost equal wordings. The scope of GPA exceptions on the GPP, SPP, and CSR (hypothetically, due to the lack of case law on CSR under the jurisprudence of GPA) are analyzed based on accumulated insights from jurisprudence in the context of GATT in Article XX.⁸⁴

In order to policy measures regarding green (aimed at the protection of the environment) and sustainability (the protection of environment, social and economic interests that accompany CSR principles) to be justified under Article III GPA and Article XX GATT respectively, at first, parties need to identify whether the policy measure is justified under one of the exceptions listed in the respective articles. Secondly, the party needs to prove that that measure was necessary to fulfill the above-identified objective. Thirdly, that policy objective at issue must comply with the requirements established under the chapeau.⁸⁵

Finally, the secondary policy objectives analyzed throughout this thesis (GPP, SPP, CSR) could be justified or in other words, could be balanced under two paragraphs of Article III of GPA 2012, the first, the paragraph (b) that justifies measures “necessary to protect human, animal or plant life”, and the second, under the paragraph (a) that exemptions are “necessary to protect public morals, order or safety”. Moreover, the above-mentioned requirements need to be fulfilled to invoke

⁸² Ministry of Economy, Trade and Industry (METI) of Japan, Press release- Chapter 4: Justifiable Reasons, page 327. Available at: https://www.meti.go.jp/english/report/data/2019WTO/pdf/02_04.pdf (accessed on May 1, 2021).

⁸³ Ibid.

⁸⁴ Koch R., GPP and International Trade Regulation. In: Green Public Procurement under WTO Law. European Yearbook of International Economic Law, vol 9. Springer, Cham. (2020), page 99.

⁸⁵ Ibid.

these Articles, as established previously in the Judge-made law (case law), will be analyzed in turn. Generally, under WTO legal system the burden of proof to establish meeting requirements lies upon the responding party, in order to invoke the exception clause provision.⁸⁶

2.6 Summary

Today we live in a society that is facing a lot of problems (e.g., social, environmental, and economic), to create a sustainable society we need to push both public and private sectors towards being socially responsible in their operations. The idea of having a social responsibility entails going beyond legal requirements voluntarily to improve the quality of life of human beings by investing in human capital and developing environmentally friendly technologies that eventually decrease the detrimental effect of humans on the environment. Therefore, to address those problems the concept of CSR and Sustainability must be considered as a part of global and institutional challenges and must be incorporated into the international public procurement legal system.

At the international level, the WTO criticized for prioritizing global trade over environmental concerns, and its contribution to the socio-economic deregulation of the “race to the bottom”. Many scholars argued that WTO has been unprogressive in the development of a legal basis for environmental and social protection within the context of government procurements, besides, the most important instrument GPA has been left outside the scope of the multilateral trade agreement. Only in recent decades, the WTO regulatory bodies have shown the possibilities of expanding the scope of environmental measures within international trade policies and government procurements.

New revised GPA 2012 brought about significant challenges that have created the possibilities for a broad range of interpretations about the legality of the inclusion of secondary policy objectives in government procurements. Article X of GPA authorized procuring entities with the discretion to adopt environmental policies and to apply them through technical specifications and award criteria. The inclusion of social and human rights standards in government procurements can be

⁸⁶ Ibid.

done through their purchase contracts by imposing the minimum human rights standards in their supply chains that eventually create the concept of a “sustainable value chain”.

In some cases, the promotion of secondary policy objectives through government procurements may raise general questions and concerns regarding the principles of non-discrimination. However, these policies can be justified or balanced with primary policy objectives, provided that it is “necessary to protect human, animal or plant life” and “necessary to protect public morals, order or safety”. Thus, that policy objective at issue must comply with the requirements established under *chapeau* exceptions.

3. Sustainable Public Procurement under EU Law

3.1 Legal Foundations

The EU legislation on public procurement is multilayered with a set of regulations at different levels of the hierarchy of norms. This means, on the one hand, public authorities of EU Member States are governed by their domestic law on public procurement. On the other hand, these domestic laws emerge from the implementation of the EU legislative framework that was transposed from the international laws, in our case, it is the Government Procurement Agreement (GPA) of the WTO.⁸⁷ This section will briefly discuss various EU legal norms that are relevant to public procurement in general, which includes primary and secondary EU law sources, in particular, Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

Public procurement law under EU jurisprudence is based on certain general principles that are derived from the primary law sources which are the Treaty on the Functioning of the European Union (hereinafter, TFEU) and general principles of law, which is aimed at ensuring equal opportunities and equal access for all tenderers into the EU procurement market, as well as ensures fair competition for all market participants.⁸⁸ Despite the relevance of primary law principles, domestic procurement laws are given significant flexibility in the implementation of the EU public procurement legislative framework. This flexibility is crucial in the promotion and enforcement of non-economic objectives (e.g., concentrations on green, sustainability, and social characters) within the field of public procurements. This becomes apparent in cases where public procurement contracts are below the threshold values established by EU law, this gives freedom for the EU Member

⁸⁷ Koch R., GPP and International Trade Regulation. In: Green Public Procurement under WTO Law. European Yearbook of International Economic Law, vol 9. Springer, Cham. (2020), pages 117-118.

⁸⁸ Burrows, E. and McNeill, E., 2021. *Public Procurement 2021 | EU Public Procurement Rules* | ICLG. [online] International Comparative Legal Guides International Business Reports. Available at: <<https://iclg.com/practice-areas/public-procurement-laws-and-regulations/1-eu-public-procurement-rules>> [Accessed 3 May 2021].

States to adopt their domestic legislation as long as they do not conflict with the EU primary law principles. This has been stated in the Directive 2014/24/EU, (recital, 1) that expressively refers to the TFEU.

“... authorities *have to comply with the principles of the TFEU*, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.”

Although public procurement is governed by detailed secondary EU legislation (Directives), still the EU primary law sources apply in parallel.⁸⁹ This concern to the public contracts that are under the EU threshold value. However, the contract over the certain threshold values, the procurement authority must apply to EU directives on public procurement, in addition to this, the treaties including TFEU, the Charter of Fundamental Rights of the European Union (CFR)⁹⁰, and others applicable to all public contracts, regardless of their values.⁹¹

In this regard, the number of literature in combination with the statistics reveals that approximately 80 percent of all public procurement contracts concluded within the territories of the EU fall outside of the scope of procurement directives, which means they are bound by the primary EU law rules.⁹² Public procurement directives usually excluded some public contracts from their scope, because of the threshold values or the nature of the contracts.⁹³ This is as a result of the applications of *de minimis* principles that the values are considered to be of minor importance in the EU internal market, therefore, EU Directive on public procurement covers only above certain established thresholds. This is due to a general exclusion and that

⁸⁹ Ibid, Burrows.

⁹⁰ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <https://www.refworld.org/docid/3ae6b3b70.html> [accessed 4 May 2021]

Article 6(1) of the Treaty on European Union (TEU) states that “the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, ... which shall have the same legal value as the Treaties”.

⁹¹ See note 87, Koch, page 118.

⁹² Dragos, Dacian C. “Sub-Dimensional Public Procurement in the European Union.” *Research Handbook on EU Public Procurement Law 2016* (OAD): 176–212, Pages 176.

⁹³ Caranta R. and Drogos C., *The Borders of EU Public Procurement Law*, in *Outside the EU Procurement Directives – Inside the Treaties?* (Djoef Publishing 2012).

contracts are regulated by domestic procurement laws of Member States.⁹⁴ Thus, the importance of primary EU law within the context of public procurement has been acknowledged on various occasions by the Commission and the CJEU.⁹⁵

In support of primary EU legislation, the secondary law sources are complementing treaties with more detailed regulations and directives; in particular, public procurement directives. They are aimed at “achieving smart, sustainable and inclusive growth while ensuring the most efficient use of public funds” (Directive 2014/24/EU, recital 2). The current directives that are in force were adopted in 2014 and they must be implemented into domestic legislation of EU Member States by 2016. There are three directives that are regulating public procurement across the EU. 1) Directive 2014/24/EU (Public Procurement Directive).⁹⁶ 2) Directive 2014/25/EU (Utilities Directive).⁹⁷ 3) Directive 2014/23/EU (Concessions Directive).⁹⁸ The directive we are focused on is the Directive 2014/24/EU that is considered as the *lex generalis*, it covers public procurement in general, two other directives are *lex specialis*, they regulate other specific sub-areas. Moreover, all these three directives are complemented by the Remedies Directive (2007/66/EC)⁹⁹ that coordinates the national review system through common standards aimed at ensuring rapid and effective means of remedy for tenderers who are treated differently, or the contract has been awarded unfairly. Thus, the following sections will be focusing more on the secondary EU legislation on public procurement, non-economic objectives, and environmental policy measures.

⁹⁴ See note 92, Drogos, page 184.

⁹⁵ COM/2006/C 179/02, para. 1.3.

⁹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

⁹⁷ Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors.

⁹⁸ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

⁹⁹ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

3.2 Secondary EU legislation and implementation of Sustainable Public Procurement

The regulatory framework for sustainable public procurement in the EU jurisprudence has considerably increased over the last 30 years.¹⁰⁰ The CJEU has made significant contributions to the evolution in a number of landmark cases (that will be discussed in the later sections) and has played an important role in the interpretation of the EU procurement provisions, the most importantly legitimized the use of public procurement rules in support of green and sustainable development policies.¹⁰¹ It has been emphasized repeatedly, public procurement plays a significant role in the EU internal market, the EU public authorities are considered as major players and consumers. Using their huge purchasing power to promote by choosing environmentally friendly goods and services, they can make another important contribution to sustainability (sustainable consumption and production) and green procurement or “Buying Green” policies.¹⁰²

The legal bases for the EU public procurement are the directives that were mentioned in the previous section. Generally, directives are divided into two paradigms in terms of harmonization. The first one is the *minimum harmonization* where the directives may create minimum standards that allow the Member States to create domestic stricter standards that include various secondary policy objectives (including, social, environmental, sustainability, etc.). Although in some contexts if the Member States exceed the minimum standards, still all the Treaty provisions remain applicable. The second paradigm is related to *total harmonization*, a directive may create a standard (harmonized) that is common across the EU internal market and it does not allow for any divergence. For instance, for the purpose of creating *a level playing field* for companies operating across EU territory,¹⁰³ thus, the EU harmonized public procurement law sets out detailed

¹⁰⁰ McCrudden, Christopher, *Buying Social Justice: Equality, Government Procurement & Legal Change*. BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT & LEGAL CHANGE, Oxford University Press, 2007, Oxford Legal Studies Research Paper No. 18/2007, p 64.

¹⁰¹ Tosoni L., *The Impact of the Revised WTO Government Procurement Agreement on the EU Procurement Rules from a Sustainability Perspective*. *European Procurement & Public Private Partnership Law Review* (January 2013), page 42.

¹⁰² European Commission. *Green Public Procurement - Environment - European Commission* 2021. [online] Available at: <https://ec.europa.eu/environment/gpp/index_en.htm> [Accessed 5 May 2021].

¹⁰³ Czarnecki J., *Green Public Procurement. Legal Instruments for Promoting Environmental Interests in the United States and European Union*. Uppsala: Uppsala University 2019. ISBN 978-91-506-2789-3, page 51.

procedures on how the public goods, services, and works should be purchased by procurement authorities.

In addition to total harmonization, professor Hettne has argued that it creates two obligations for the Member States. “First, they must allow free movement of goods that meet the requirements stipulated by the harmonized rules. Second, they must not allow trade with products which do not satisfy these requirements.”¹⁰⁴ He explained that in practice that means, the scope of domestic regulations of Member States becomes preoccupied with totally harmonized EU legislations. In this case, it is not possible to diverge from these rules, only if they included a safeguard clause.¹⁰⁵ Eventually, public procurement may conflict with or limit some of the free movement of four fundamental freedoms and principles established by the TFEU, this may happen if the restrictions pursue public interests at the same time meeting other certain conditions.¹⁰⁶

The Public Procurement Directive 2014 was adopted with the intention of creating possibilities for public authorities to use procurement as a tool to further common societal goals that include sustainability (sustainability covers all three pillars of CSR) while increasing the efficiency of public purchases.¹⁰⁷ This directive explicitly refers to sustainable development in its both provisions and recitals.¹⁰⁸ As an example, Article 18 (2) of this directive requires the EU Member States:

“to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions.”¹⁰⁹

¹⁰⁴ Hettne, J. (2013). Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law: Bilaga 12 till SOU 2013:12. In *Goda affärer – en strategi för hållbar offentlig upphandling* (12 ed., Vol. 2013, pp. 1-45). Statens Offentliga Utredningar, pp 24–25.

¹⁰⁵ *Ibid.*

¹⁰⁶ O'Brien C. and Ortega O., *Discretion, Divergence, Paradox: Public and Private Supply Chain Standards on Human Rights* (June 16, 2018) (*in the*) Bogojevic S., Groussot X. and Hettne J. (eds), *Discretion in EU Procurement Law*, University of Groningen Faculty of Law Research Paper No. 18/2018, Available at Hart Publishing 2019, chap. 9, p. 189-210, page 200.

¹⁰⁷ *Ibid.*, page 201.

¹⁰⁸ Directive 2014/24/EU, recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts 2(22), 18(2), 42(3)(a), 43, 62, 68, 70.

¹⁰⁹ Directive 2014/24/EU, article 18 (2).

These requirements are not only for public authorities to promote to align their procurement decisions with the policies on green and sustainability. This also concerns private actors (bidders) are, in principle, do the same to meet the specific requirements of established policy measures.¹¹⁰

The one important aspect of this Directive to our study is that it supports the *strategies use of public procurement* that encourages EU horizontal policies in the areas of creating a more innovative, sustainable, green, and more socially inclusive economy. Strategic procurement focuses more on additional aspects (environmental, social, innovation) of purchased goods, services, and works, and those aspects generate added value to the bids; thus, it provides another channel for action that leads to substantial effects. The final report on the assessment and implementation of Directive 2014/24 cited the DG GROW report, it urges to use of public procurement *to pursue strategic policy goals beyond economic advantage*. The report acknowledged three forms of strategic public procurement:

- Green Public Procurement (GPP) - where public authorities seek to procure goods, services and works with less environmental impact throughout their life cycle.
- Socially Responsible Public Procurement (SRPP) – includes social aspects in the purchasing decision.
- Public Procurement of Innovation (PPI) –procuring innovative goods and services, not yet commercially available on a largescale basis.¹¹¹

The opportunities created by the Directives of 2014 on public procurement will never be materialized without actual transposition and implementation into domestic laws of Member States. Therefore, EU Member States had an important role in ensuring proper transposition of EU Directives into their national laws and then required an effective implementation. As it was supposed, the Member States had to transpose all the three Directives of 2014 on public procurement and concessions by April 18, 2016. However. most of the EU counties failed to

¹¹⁰ Andrecka M., *CSR and Sustainability in Danish Procurement*, (EPPPPL 2017), page 335.

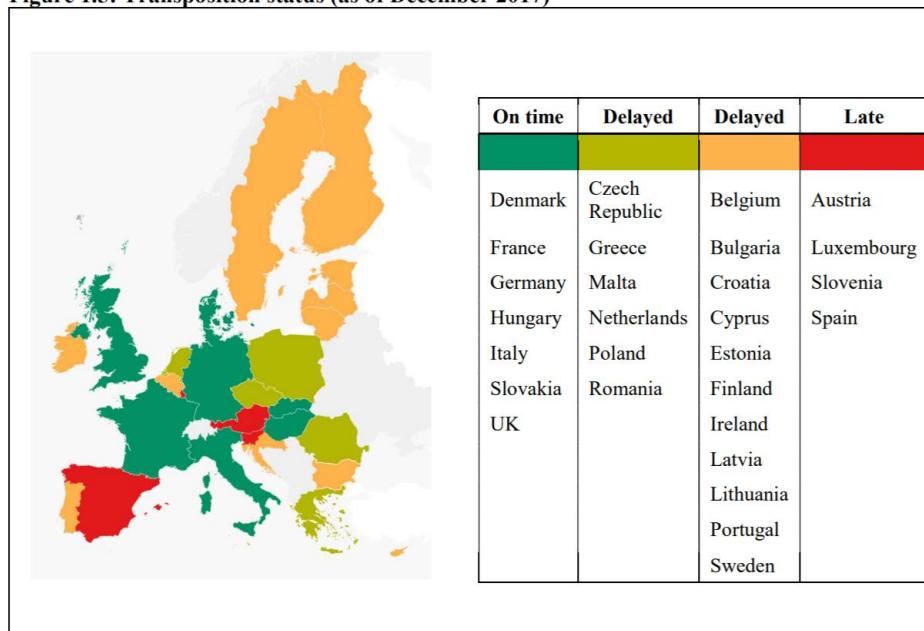
¹¹¹ Valenza, A. and Alessandrini, M., and others. 2019. *Assessing the implementation of the 2014 directives on public procurement*. 1st ed. (online report): European Committee of the Regions, page 8. Available at: <https://cor.europa.eu/en/engage/studies/Documents/Public-Procurement.pdf> (accessed on May 6, 2021).

implement promptly and did not meet the deadline, except Denmark, Germany, France, Hungary, the UK, Italy, and Slovakia.

The main reasons for being delayed are explained in the Eversheds guide on EU Procurement Reforms, it has been stated that the main reason is the complexity of national procurement systems of EU Member States. For instance: “in many countries, public procurement law takes the form of many different acts of law that are issued by various bodies. Moreover, given the value of public tenders and their significance for the national economies, the Member States carefully introduce such significant changes into the law and the practice.”¹¹²

As of June 2016, there only 13 Member States had transposed into national or were on the transposition process. The European Commission has referred four Member States (Spain, Austria, Luxembourg, and Slovenia) to the CJEU over the failure to notify the Commission on the complete transposition and concessions in December 2017. As of July 2018, 26 EU Member States had been transposed and implemented the 2014 Directives into their national public procurement laws.¹¹³

Figure 1.5: Transposition status (as of December 2017)



Source: t33 elaboration.

*retrieved from¹¹⁴

¹¹² Eversheds (2016), page 3.

¹¹³ See note 111, Valenza, page 18.

¹¹⁴ Ibid, page 20.

Finally, as we have seen that CSR already found its way into the EU public procurement system through strategic public procurement. It has been recognized as one of the forms of strategic public procurement, the Socially Responsible Public Procurement (SRPP) – which includes social aspects in the purchasing decision. Besides, the CJEU has legitimized the use of public procurement rules in support of green and sustainable development policies. For the EU Member States, it has become a legal obligation to respect and promote the secondary policy objectives in their purchases. They are obliged to take all appropriate measures to ensure that the performers of public contracts comply with all applicable national and international laws on environmental, social, and labor laws. Europe has a great potential to make a global challenge in the improvement of social, economic, and environmental conditions. Thus, the EU and its Member States are moving progressively towards green and sustainable development. As we have mentioned above, already 26 of the Member States transposed and implemented all three Directive of 2014 into their national public procurement legal system.

3.3 GPP as an Effective Environmental Policy Measure

European environmental policies are built on the “*polluter pays*” principle, which includes “precaution, prevention and rectifying pollution at source.”¹¹⁵ This should be implemented in line with the principles of sustainable development. In practical terms, the polluter pays principle means that any company causing damages to the environment to be held financially liable for the damages, and a company must take all the necessary steps to prevent or remedy that damages and must cover all the related costs.¹¹⁶ This principle was implemented by the Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damages. The primary aim of this principle is to prevent or otherwise remedy damages caused to the environment in order to protect species and their natural habitats as well as water and soil.¹¹⁷ In these regards, the precautionary principle serves as a risk management tool that can be applied in

¹¹⁵ Kurrer C., 2020. *Environment policy: general principles and basic framework / Fact Sheets on the European Union / European Parliament*. [online] [Europarl.europa.eu](https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework). Available at: <<https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework>> [Accessed 6 May 2021].

¹¹⁶ Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, recital 2.

¹¹⁷ See note 115, Kurrer.

cases where a suspected risk (scientifically uncertain) to humans, the planet, or to the environment emerging from certain policy measures or actions.¹¹⁸

Generally, policymakers can adopt different policy instruments to address environmental issues. The public procurement rule that promotes green and sustainable procurement has been highlighted as an effective policy instrument by politicians and lawmakers.¹¹⁹ Early in 1968, Mundell suggested three general guiding principles that are beneficial in designing effective environmental policies. He pointed out the following policy principles: “1) the policy instruments must be effective, 2) the number of policy instruments must equal the number of environmental objectives, and 3) multiple objectives and multiple policy instruments must be mutually independent.”¹²⁰

In addition to this, Lundberg and Marklund claimed that policy instruments should be designed in such a way that can be applied as close as possible to the source of the environmental problem. They explained in the example of *carbon dioxide*, to impose a tax on the substances that causes damages (including carbon and gasoline) can be an effective environmental policy measure,¹²¹ so, the measures must have the needed level of environmental impacts. They analyzed Mundell’s guiding principles in the example of the Swedish GPP policy measure that was aimed at increasing domestic organic food production in the country and contribute to national environmental quality measures. This measure was supported with the national food strategy of 2017¹²² and established a goal stating that by the end of 2030, 30 percent of agricultural lands and 60 percent of public food consumption to be certified as organic. Furthermore, they posed a question: “*does GPP constitute a consistent policy system*”, the findings of this research are highly relevant in this study.

¹¹⁸ Ibid.

¹¹⁹ Lundberg S. and Marklund P., Green public procurement and multiple environmental objectives, *Econ Polit Ind* (2018) 45:37–53, p 38.

¹²⁰ Mundell, R. A. The nature of policy choices. In Mundell R. A. (Eds.), *International Economics*, London, MacMillan (1968), chapter 14.

¹²¹ See note 119, Lundberg, page 44.

¹²² Ibid, cited by Lundberg at page 45, Swedish Government (2017). *Regeringens handlingsplan: En livsmedelsstrategi för Sverige – fler jobb och hållbar tillväxt i hela landet*, Prop. 2016/17:104. Stockholm.

The analysis indicated that GPP has failed to satisfy all three of Mundell's principles, to be an effective environmental policy measure. 1) in the example of Swedish policy to use public procurement to promote organic foods and organic agriculture, they claimed that the policy objectives targeted indirectly, therefore, could be less effective. Instead, the direct subsidies for farmers to move towards organic food production could be more effective. But still, this policy has a positive impact on the protection and promotion of environmentally friendly consumption and production. Principle 3) also failed, "the multiple objectives and multiple instruments must be mutually independent of each other. In turn, this means that GPP should be regarded as a single policy instrument. The only way to satisfy principle (2) is then to have just one objective with public procurement, i.e., to procure the necessary good, service, or public work with the sole aim of running the operations."¹²³ Thus, the research results revealed that GPP as an environmental policy measure is neither a cost-effective nor effective environmental policy measure by an object. Furthermore, when a public contract includes environmental concerns as a part of award and contract performance, the public authorities should be transparent in the tendering procedure and need to take into account the link between the green/sustainability criteria and intended environmental objectives.

3.4 CSR and Sustainability Criteria in Public Procurement

To encourage sustainability and social responsibilities in public procurement, social and environmental policies have been implemented in many jurisdictions around the world.¹²⁴ Procurement authorities are fostered to incorporate both social and environmental criteria in the tendering procedures to ensure sustainability on the contract performance and the lifetime basis of purchased goods or services, ensuring respect for the societal needs while developing sustainable practices aimed at minimizing negative environmental impacts.¹²⁵

As we have already mentioned above the linkages between CSR and Sustainability, it has been concluded that these two concepts deal with similar issues

¹²³ Ibid, Lundberg, pp 50-51.

¹²⁴ Andrecka M., Corporate social responsibility and sustainability in Danish public procurement Eur. Procure. Public Priv. Partnersh. Law Rev., 12 (2017), pp. 333-345.

¹²⁵ Testa F., Annunziata E., Iraldo E., Frey M. Drawbacks, and opportunities of green public procurement: an effective tool for sustainable production J. Clean. Prod., 112 (2016), pp. 1893-1900, page 1893.

(almost identical), including human rights protection, issues related to labor standards, environmental protection, and ethics or code of conducts. Therefore, in this section, we use both concepts interchangeably because CSR and its connections to public procurement have not been much researched.

In general, CSR, sustainability, or any other secondary policy objectives or requirements are specified in the technical specifications and to be published in the official tender notice, and values are added at the contract award stage of the procedures. Therefore, in these regards, the technical specifications in public tenders play a significant role in the promotion of SPP measures. They set out the specific mandatory environmental and societal requirements for the goods, services, and works are being procured. For example, technical specifications regarding mandatory environmental (or sustainability) requirements may include a special requirement to use recyclable and ecofriendly materials, it can also specify a maximum level of greenhouse emission or request proof of compliance with environmental standards set forth by law.¹²⁶ However, the national technical specifications in the context of cross-border public procurement may conflict with other norms that eventually may amount to a barrier to trade.¹²⁷

The statistical data indicates that almost 70 percent of all public contracts contain technical specifications concerning environmental criteria and only 45 percent in the award criteria.¹²⁸ This percentage increases the importance of technical specifications and their application in the promotion of SPP. Usually, public procurement in the EU is governed by basic principles which are open competition, equal treatment, and transparency. In the tender process, the contracting authority published an official tender notice (a prior information notice) about an expected project that will be purchased in a specified time. The tender notice includes a detailed technical specification, estimated value of project, scope, and nature of the public tender, bidding procedure and *award criteria*, terms, and conditions for participation in the tender. Award criteria is another important

¹²⁶ Arrowsmith S., *Government procurement in the WTO*, London (2003), page 303.

¹²⁷ Harvey G., Rammer Sh., Arrowsmith S., "The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO", in: Arrowsmith /Davies (eds.), *Public Procurement: Global Revolution*, (London 1998), page 28.

¹²⁸ Koch R., *GPP and International Trade Regulation*. In: *Green Public Procurement under WTO Law*. European Yearbook of International Economic Law, vol 9. Springer, Cham. (2020), page 139.

component of tender, it identifies which tenderer is eligible and capable of delivering the best value for money, that takes into account the price, quality, and the means of production (as specified in the technical specifications).¹²⁹ Concerning award criteria, the CJEU ruled in favor of inclusion of secondary policy considerations in several cases including *Concordia Bus Finland*¹³⁰ (this will be discussed in detail in the following section): In another case *Max Havellaar*¹³¹, the Court held that award criteria may include the production process and its aspects that do not materially change the final product, in addition, the requirements on the *fair trade label* can be a part of elements of contract performance procedure under public contracts.

In relation to social considerations (or CSR), the Public Procurement Directive 2014, already established a legal basis that enables public authorities to use procurement to foster societal goals in support of sustainability, while increasing efficiency in public procurements. Besides, this directive recognizes all the international labor standards, that were listed in Annex X and explicitly refers to ILO Labor Standards as reflected in the ILO Declaration on Fundamental Principles and Rights at Work.¹³² Thus, Article 57 of this Directive contains the list of *Exclusion Grounds*, that allows a contracting authority to exclude an economic operator who was convicted of the following crimes. That includes participation in a criminal organization, corruption, terrorism, money laundering, child labor, human rights, or any other forms of human trafficking.¹³³ Finally, it can be concluded that under the EU jurisprudence in the context of public procurement, there are enough legal instruments, and policy measures to be enforced to improve social and environmental conditions throughout or even beyond European territories. This requires strong political willpower from each EU Member State to do so.

¹²⁹ Czarnecki J., *Green Public Procurement. Legal Instruments for Promoting Environmental Interests in the United States and European Union*. Uppsala: Uppsala University 2019. ISBN 978-91-506-2789-3, pp 55-56.

¹³⁰ Case C-513/99 *Concordia Bus Finland v Helsingin kaupunki & HKL-Bussiliikenne* [2002] ECR I-7213.

¹³¹ Case C-368/10 *Max Havellaar*, EU:C:2012:284.

¹³² International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988, available at: <https://www.refworld.org/docid/425bbdf72.html> [accessed 8 May 2021].

¹³³ Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement, Article 57.

3.5 Balancing in Practice: The Concordia Bus Finland and Beentjes Cases

As we have seen throughout this study, the European Union and its Member States are doing a fairly good job in balancing their environmental (secondary, that include societal) and economic (primary) objectives in the field of public procurements. This balance already has been expressly stipulated at the highest level of EU law, Article 3 (3) of the TEU states that “the Union shall establish an internal market. It shall work for the sustainable development of Europe based on *balanced economic growth* and price stability, a highly competitive social market economy, aiming at *full employment and social progress*, and a high level of protection and improvement of the quality of the *environment*.”¹³⁴ Another important reference provided in Article 37 of the EU’s Charter of Fundamental Rights (EUCFR) emphasizes that “a high level of environmental protection and the improvement of *the quality of the environment must be integrated into the policies* of the Union and ensured in accordance with *the principle of sustainable development*.”¹³⁵ These require a strong consistency among different norms at different levels. In this context, the role of CJEU in balancing primary and secondary policy objectives is thrown into sharp relief.¹³⁶ The Court demonstrated itself to be a leader in governing environmental disputes within the EU, and same as its acknowledgment of general principles in respect to fundamental human rights.¹³⁷ Besides, the Court has shown its willingness to support the integration of social and environmental criteria in public procurements as long as they are linked to the subject matter of the contract and do not conflict with general principles of EU law.¹³⁸ This section analyzes the CJEU judgments in the examples of leading cases in this area of public procurement that are highly relevant to the outcome of this study.

¹³⁴ Treaty on European Union (TEU), article 3.

¹³⁵ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02. Article 37.

¹³⁶ Kingston S., The uneasy relationship between EU environmental and economic policies. The role of the Court of Justice, University of Florida (2017), page 33.

¹³⁷ Ibid, p 34.

¹³⁸ Hettne, J. (2013). Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law: Bilaga 12 till SOU 2013:12. In Goda affärer – en strategi för hållbar offentlig upphandling (12 ed., Vol. 2013, pp. 1-45). Statens Offentliga Utredningar, page 33.

The judgments in *Concordia Bus Finland*,¹³⁹ the national court of Finland referred questions to the CJEU for a preliminary ruling under Article 234 TEU. The question regarding public procurement in the transport sector, under which conditions the procurement authority may integrate environmental criteria into tendering procedure when establishing the most economically advantageous tender (MEAT) under EU law. The Court referred to previous cases *Beentjes*¹⁴⁰, and *Evans Medical v. Macfarlan Smith*¹⁴¹, in these cases Court ruled that contracting authorities are *free to choose the criteria* that they want to use in selecting MEAT and awarding the public contract, provided that such criteria do not discriminate between alternative offers. In response to the preliminary ruling, the CJEU specified four requirements that must be fulfilled: the criteria 1) must be objective, 2) apply to all the tenders, 3) must be strictly linked to the subject matter of the contract, 4) must have a direct economic advantage to the contracting authority.¹⁴²

The Court expressly stated that such environmental criteria must comply with the fundamental principles of EU law (e.g., principles of non-discrimination, the rights of establishment, and the freedom to provide services)¹⁴³. They must be linked to the subject matter of the contract in question, they do not confer an unrestricted freedom of choice on the procurement authority as well as they must be expressly mentioned in the official tender notice. Concerning the factual context of the case, Helsinki City could supply with busses powered by gas to meet the MEAT, however, they chose electric-powered busses. Furthermore, the Court concluded that the criteria adopted to identify MAET could only be satisfied by a limited number of suppliers, but this does not constitute a breach of the principles of equal treatment.¹⁴⁴

Another important judgment to our study is the *Beentjes*¹⁴⁵ case, it concerns the inclusion of social policy consideration as a part of award criteria in public contracts, especially aimed at combatting long-term unemployment. The Court

¹³⁹ *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and Hkl-Bussiliikenne* [2002] ECR I-7123.

¹⁴⁰ Case 31/87, *Beentjes* [1988] ECR 4635.

¹⁴¹ C-324/93 - *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith* [1995].

¹⁴² See note 139, para 52.

¹⁴³ *Ibid*, para. 63-64.

¹⁴⁴ *Ibid*, para 85.

¹⁴⁵ Case 31/87, *Beentjes* [1988] ECR 4635.

accepted that despite being not exhaustively defined in the relevant Directives, and the discretion is conferred to public authorities to define what would be the most advantageous offer for them. However, the inclusion of social considerations in the section criteria is prohibited, provided that it may disqualify offers due to not meeting the relevant requirements. The selection process must be based on the listed technical and financial requirements stipulated in the Directives,¹⁴⁶ otherwise, this would be considered illegal. The Court held that inclusion of social considerations as a condition of contract performance concerning persons who have been long term unemployed is compatible with the Directive on public procurement as long as there is no discriminatory effect. In addition, such societal conditions must be mentioned in the official tender notice.¹⁴⁷ Thus, the measures related to employment may be utilized as an additional feature of award criteria, ensuring that they are not contrary to the principles of EU law.

In these and all the other related cases, the Court has explicitly accepted that in the process of awarding the contract, contracting authorities may consider social or environmental criteria, provided that the specified criteria are linked to the subject matter of the contract. They must be expressly mentioned in the tender notice and most importantly, they must comply with all the fundamental principles of EU law, especially the principles of non-discrimination.¹⁴⁸

3.6 Balancing as a General Solution

As already pointed out under WTO law (in section 2.5 Balancing non-discrimination provisions with sustainability criteria), the principles of *non-discrimination* lie at the very heart of the most important WTO multilateral agreements. Similarly, under EU law the motives for justifications to non-discrimination are almost the same as WTO law, the exceptions for non-discrimination obligations are provided in both primary and secondary EU legislation. Both legal systems recognize *de jura* and *de facto* discrimination of direct and indirect restrictions.¹⁴⁹

¹⁴⁶ Ibid, para.17.

¹⁴⁷ Ibid, para. 32.

¹⁴⁸ See note 138, Hettne, page 35.

¹⁴⁹ Cottier T. and Oesch M., *Direct and Indirect discrimination in WTO law and EU law*, Working paper No 2011/16, NCCR Trade Regulation (2011), page 23.

The EU Public Procurement Directives provide some explicit exceptions from the prohibition of discrimination, for instance, Article 20 (1) (Reserved Contracts) of the Public Sector Directive states that:

“Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programs, provided that at least 30 % of the employees of those workshops, economic operators or programs are disabled or disadvantaged workers.”

Under the EU law, the non-discrimination principle does not only apply to the economic dimensions of trade, but also highly concerns human and civil rights, investment issues, taxation, or all the fundamental rights stipulated in the treaties. In addition, non-discrimination principles also serve as the guiding principles of public procurement law. For instance, Article 18 Directive 2014/14/EU, Article 3 Directive 2014/23/EU, and Article 36 Directive 2014/25/EU respectively contain a provision on the main principles of public procurement. All the Articles emphasize that: “Contracting authorities shall treat economic operators *equally* and *without discrimination* and shall act in a *transparent* and *proportionate manner*.” This indicates that both GPA (WTO) and the EU Directives on public procurement follow the same principles.

The TFEU also contains Article 18 on the general prohibition of discrimination, it prohibits *any discrimination on grounds of nationality*. This reflects Article IV of GPA; it prohibits *less favorable* treatment of foreign tenderers. The non-discrimination principle is derived from the four fundamental freedoms (free movement of goods, capital, persons, and freedom to establish and provide services) as they form the pillars of the EU law. The free movement of goods, Article 34 of TFEU prohibits all *qualitative restrictions on imports* and all measures having *equivalent effect*. In these regards, GPP, SPP, and CSR policy measures may have an effect equivalent to qualitative restriction, therefore this becomes applicable within the context of public procurement, and it prohibits direct and indirect discrimination in the awarding procedures. The CJEU recognized not only

direct or indirect but also the measures that are capable of having potential effects in *Dassonville* case.¹⁵⁰

Another important provision is Article 25 Directive 2014/24/EU, it directly refers to the GPA and other international agreements by which the Union is bound (this reflects the wording of GATT and GPA). This indicates that WTO non-discrimination standards are also incorporated into EU public procurement law. If a national policy measure raises the question of discrimination or less favorable treatment of certain tenderer, in this case, Article 57 of this Directive prove the list of general exclusions grounds. Besides, recital 41 states that ...

“Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life, the preservation of plant life or other environmental measures, in particular with a view to sustainable development, provided that those measures are in conformity with the TFEU.”

The policy measure regarding GPP, if this would be found contrary to EU law principles, contracting authority could generally invoke the protection of the environment. Thus, the policy or measure needs to be examined according to the proportionality test. This would be possible if a measure under question is highly effective and only a possible way of achieving environmental protection.

3.7 Summary

The scope of Green Public Procurement under EU law has steadily broadened throughout the last decades. The EU has paid greater attention to the recognition of sustainability goals within the public procurement system that has been paralleled with economic objectives concerning increasing efficiency in government purchases. The EU Member States’ legislation on public procurement is multilayered with a set of regulations at different levels of the hierarchy of norm that includes the WTO GPA and the EU Directives on public procurement.

The EU public procurement law is built on certain general principles derived from the primary law sources (Treaties) and general principles of law which include the principles of non-discrimination, equal treatment, fair competition,

¹⁵⁰ Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, EU :C :1974:82, para. 5.

transparency, and all the other fundamental principles stipulated on the treaties. That means both primary and secondary EU legal sources are equally applicable to public procurement (defined by under or above certain thresholds). Nowadays, GPP and SPP are common and widespread practices throughout Europe and are commonly referred to as the secondary goal or policy measure.

Finally, the role of CJEU is significant, it has made great contributions to the evolvement of GPP and SPP (CSR) by supporting the incorporation of secondary policy objectives in public procurements. Most importantly, legitimized the use of public procurement rules in support of those objectives in the form of strategic procurement in the number of leading cases. Moreover, this created an opportunity not only for environmental but also for societal (CSR) concerns to be incorporated into the EU Public Procurement procedures.

4. Summary and conclusions

This study indicated that the concept of CSR and Sustainability address similar issues in general, both cover the issues related to the environment, society, and economy. In the context of public procurement, the SPP and CSR entail paying greater attention not only to the environmental aspects of procurement but also to social responsibilities, in particular, sustainable supply chain, labor conditions, minimum wages, forced labor that includes child labor, occupational health and safety, code of conduct, business ethics, as well as compliance with human rights laws, regulations and internationally recognized standards. This outcome has been supported by legal researches, literatures, and a broad range of scholarly discussions. Increased attention on these concepts fostered the incentives for voluntary and non-binding CSR instruments to be incorporated into the public procurement system. Thus, CSR eventually found its legitimate way into the EU public procurement system through strategic public procurement and becoming a substantial part of mandatory regulatory standards and secondary policy objectives.

As we have discussed the GPP and the inclusion of other secondary policy objectives within the context of WTO government procurements, and its criticism on prioritizing international trade over the environmental concerns. It has been emphasized that WTO has been unprogressive in the development of legal provisions regarding the environmental protection and human rights issues (CSR) within the fields of international trade policies and government procurements. For the last decades, the WTO regulatory bodies have raised their attention to the possibilities of inclusion of the environmental and social measures into the international trade policies. Especially, the challenges and reforms of 2012 resulted in the adoption of a new revised WTO GPA. The GPA 2012 introduced the legitimate possibilities of dealing with environmental and social concerns as an integral part of technical specifications and award criteria. Article X of GPA specifically authorized procuring entities with the discretion *to adopt technical specifications intended to promote the conservation of natural resources or protect the environment*. This can be seen as an opportunity of addressing social

characteristics since they are not mentioned in this article, but this does not mean that they are prohibited. The discretion granted to contracting authorities creates the possibility of achieving the inclusion of societal characteristics in combination with other provisions (for example, sustainability and sustainable development goals).

Section 3 of this thesis indicated that the EU and its Member States are doing a fairly good job in balancing their primary policy objectives with the secondary policy measures or non-economic objectives within the context of public procurements. The reforms of 2012 in the WTO GPA, brought significant challenges to the European procurement system and in 2014, the EU adopted more sophisticated and detailed three Directives on public procurement. Moreover, the Directive 2014/24/EU on public procurement has established a legal basis that enables public authorities to use public procurement to foster societal goals in support of sustainability, while increasing efficiency in public purchases. Besides, this Directive recognizes all the international labor standards, that were listed in Annex X and explicitly refers to ILO Labor Standards. Thus, the CJEU has shown its willingness to support secondary policy objectives in its interpretations and judgments.

In conclusion, I strongly believe in the optimistic results of this study. It shows that there are a multitude of legal possibilities for the non-binding voluntary CSR principles to be incorporated into the public procurement legislation in combination with sustainability criteria and other secondary policy measures within the context of WTO and EU law. In general, public procurement laws demonstrate possible ways of fostering innovation, improving and protecting the environment, social conditions and public health. However, it must be admitted that it is not highly efficient or simple. Therefore, sustainability or SPP seems to be complementary instruments to other primary policy objectives. Everything really depends on the political willpower of the governments and their contracting authorities and whether they chose to apply or not to apply to the complementary instruments in attaining efficiency in government purchases. Despite having all the necessary legal provisions, there are still legal uncertainties regarding the lawfulness of including secondary (non economic) policy measures, in particular whether they comply or not with the general (economic) principles of law. Undoubtedly, legal uncertainties in the system create unforeseeable legal consequences that are one of the

fundamental reasons that lead many public authorities to refrain from imposing additional sustainability criteria into the procurement procedures.

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