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TRANSPLANTING AND CUSTOMIZING LEGAL SYSTEMS: LESSONS FROM NAMIBIAN LEGAL HISTORY

*By: Dr. Martin Cai Lockert**

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This article draws on the author's doctoral thesis "*Entwicklung und Kontinuität des namibischen Rechtssystems von der deutschen Kolonialzeit bis zur Unabhängigkeit Namibias am Beispiel des Bergrechts*", due to be published in 2014. It cannot substitute for a thorough introduction to Namibian history or a complete overview of the Namibian legal system as whole. Accordingly, descriptions are limited to providing the appropriate framework for the scope of this article. References for further reading are provided.

I. INTRODUCTION

The key aim of this article is to provide an addition to the list of practical examples of legal transplants by examining the legal history of Namibia's *mixed jurisdiction*.¹ As Walker and Pekmezovic argue, the literature on legal transplants, while rich in theory, generally lists few case studies or examples of the transplant process.²

The legal history of Namibia shows multiple challenges pertaining to the amalgamation of laws originating from different legal traditions. Apart from the customary law of indigenous tribes, the origins of which can be traced back thousands of years, the area of south-western Africa that comprises the territory of modern-day Namibia³ has been subjected to the influence of three distinct legal families in the last 130 years. The era of Imperial German colonialism started in 1884 and came to an end in 1915 when the Union of South Africa successfully invaded Southwest-Africa.⁴ The highly controversial period of South African occupation ended in 1990 when the Republic of Namibia declared its independence.⁵ As a result, German civil law, English common law, and South African Roman-Dutch law have all left their traces in Namibian legal history.

Because Southwest-Africa was neither fully integrated into the German Empire nor annexed by the Union or Republic of South Africa, but has remained a distinct legal entity, different legal influences provide rich material for studying the practical aspects of moving laws from one jurisdiction to another. In addition, studying the provisions of the Namibian Constitution may give insight into the extent to which the founding fathers of the newly independent nation-state approved of or changed the results of earlier influences.

After a brief overview of the notion of legal transplanting, this article examines the introduction of German and South African laws to Southwest-Africa and the provisions of the Namibian Constitution pertaining to their continuing validity. Following a historical overview

¹ See H. J. Erasmus, *Roman Law and Common Law in Southern Africa: Past and Future*, in *ROMAN LAW AT THE CROSSROADS* 44 (Manfred O. Hinz et al. eds., 2000) (defining the term *mixed jurisdiction*).

² Gordon Walker & Alma Pekmezovic, *Legal Transplanting: International Financial Institutions and Secured Transactions Law Reform in South Pacific Island Nations*, 25 N.Z. U. L. REV. 560, 564 (2013).

³ Notwithstanding the respective political situation, this area will simply be referred to as *Southwest-Africa* in this article.

⁴ *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 32 (John Dugard ed., University of California Press, 1973).

⁵ William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. INT'L L. 683, 689 (2006).

of each period, this article analyzes and evaluates the respective sources of law to determine if the law in force at the time constitutes a legal transplant that contains an element of customization. Special regard is given to the question of whether and to what extent the succeeding powers have reverted back to the legal system and the laws established by their respective predecessors.

Based on these analyses, the author examines the practical conflicts caused by the implementation of the German, South African, and Namibian legal systems and laws. A concluding section attempts to distill lessons learned and caveats for possible consideration in future processes of legal transplanting.

II. LEGAL TRANSPLANTING

The phenomenon of legal transplants has been extensively researched and is said to occur “where law travels from one jurisdiction to another by way of transposition, imposition, reception or intended borrowing.”⁶ As Alan Watson points out, moving a system or a rule of law from one country or people to another has been common since the earliest recorded history.⁷

The desire to promote the rule of law in developing countries through law reform projects,⁸ often fostered by international financial institutions, has rekindled academic interest in the transplantation of laws as a means of legal development. Following Walker and Pekmezovic’s classification,⁹ the legal transplant literature can be divided into three strands:

Heralded by Watson, the first strand deems it possible to successfully transplant both legal rules and structures into other jurisdictions without having to consider the political structure of the donor system or the political, social, or economic context of the transplant law in the process.¹⁰ While not being a prerequisite for the success of the process itself, such knowledge is merely presumed to facilitate a more efficient execution of the transplant.¹¹

⁶ Chen Lei, *Contextualizing Legal Transplant: China and Hong Kong*, in *METHODS OF COMPARATIVE LAW* 192 (2012).

⁷ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (2d ed. 1993).

⁸ See Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 7 (Thomas Carothers ed. 2006) (classifying the different kinds of law reform projects).

⁹ Walker & Pekmezovic, *supra* note 2, at 563-64.

¹⁰ ALAN WATSON, *LEGAL ORIGINS AND LEGAL CHANGE* 293 (1991); see Walker & Pekmezovic, *supra* note 2, at 563.

¹¹ WATSON, *supra* note 10.

A second strand emphasizes the non-transferable nature of law, attributing shortcomings of transplantation attempts—the so-called “transplant effect”—to the foreign source of transplanted laws.¹² Its advocates argue against the universality of laws and highlight the superior functionality of indigenous legal institutions and laws.¹³

The third strand, favored by Walker and Pekmezovic, presumes that law is connected to politics, economics, and culture and—even though socio-economic, historic, or linguistic barriers may arise—may be successfully transplanted if adequately customized or adapted to the legal culture of the host jurisdiction.¹⁴ In order to ascertain the required degree of such customization and the probability of a transplant taking root, this view requires that the sociological, geographic, and political differences between donor and host jurisdiction be considered.¹⁵

In this article, the author does not argue for any one of these three strands. Instead, by looking at transplants that occurred in Namibian legal history and “reverse-engineering” the processes used for implementing such new rules of law, the author attempts to expose and define the conflicts and difficulties encountered therein, while considering possible problems raised by all three strands.

The results of the analysis should not be overly generalized. As Randall Peerenboom points out, the prescription of a common set of “best-practices” for all countries or the establishment of “one-size-fits-all, off-the-shelf blueprints” is prone to produce only meager and lackluster results.¹⁶ By looking at and evaluating the “craftsmanship” of the transplantation processes in Namibian legal history, the author seeks to assist in the creation of a workable methodology for law reform through legal transplants—a major task far beyond the scope of this article.

¹² Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect* 47 EUR. ECON. REV. 163, 167 (2003); see Walker & Pekmezovic, *supra* note 2, at 563.

¹³ DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE: THE POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS 3-35, 83-104 (1990); Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 99-140 (2004); see Walker & Pekmezovic, *supra* note 2, at 563-64.

¹⁴ Walker & Pekmezovic, *supra* note 2, at 564; Pierre Legrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES 55 (David Nelkin & Johannes Feest eds., 2003); Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 1-27 (1974).

¹⁵ Kahn-Freund, *supra* note 14, at 12-13.

¹⁶ Randall Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 CHINESE J. COMP. L. 4, 4 (2013).

III. LEGAL SYSTEMS IN NAMIBIA

This section of the article describes the formation and development of the Namibian legal system on a macro level. For each of the three major regimes—Imperial German colonialism, South African occupancy, and Namibian independence—a historical overview is followed by an examination of the origins of the legal systems constituted for Southwest-Africa by the relevant powers. For each period, an evaluation as to if and to what extent customized legal transplants have been used for this purpose is provided. Where applicable, this article gives special regard to the question of whether and to what extent the regime in power drew on the legal system put in place by its predecessor. After a closer look at the processes of customization or lack thereof, this section analyzes the conflicts and shortcomings resulting from the methods used by each regime.

A. *Imperial German Colonial Period*

1. Historical Overview

To be sure, the legal history of Southwest-Africa did not start with Imperial German colonization. The origins of the indigenous hunter-gatherer tribe of the *San* can be traced back to 5000 B.C., while the present tribes of the *Nama*, *Damara*, *Ovambo*, and *Herero* migrated to Southwest-Africa around the 14th century.¹⁷ Each of these tribes had their own rules of law; mainly focusing on family law, the right of succession, damages, and liabilities.¹⁸ Though different in content, all these rules had one commonality: they were not recorded in writing. Instead the native peoples passed on these rules via oral tradition.¹⁹

Excluding two landings by the Portuguese sailors Diogo Cao and Bartolomeu Dias in 1485 and 1487, the first advances of European and South African missionaries and merchants can be dated to the early 19th century.²⁰ None of these endeavors, however, had a lasting legal impact on Southwest-Africa.

The Imperial German colonial period began on April 24, 1884, when Imperial Chancellor Bismarck instructed the German Consul in

¹⁷ WOLFGANG MÜLLER, *VERFASSUNG VON NAMIBIA: ETHNISCHE VIELFALT UND ELEMENTE EINES MINDERHEITENSCHUTZES* 58-70 (1992); JOHN H. WELLINGTON, *SOUTH WEST AFRICA AND ITS HUMAN ISSUES* 129-57 (1967).

¹⁸ See OSKAR HINZ, *CUSTOMARY LAW IN NAMIBIA: DEVELOPMENT AND PERSPECTIVE* (8th ed. 2003).

¹⁹ SAM AMOO, *AN INTRODUCTION TO NAMIBIAN LAW* 102-03 (2008).

²⁰ J. H. ESTERHUYSE, *SOUTH WEST AFRICA, 1880-1894: THE ESTABLISHMENT OF GERMAN AUTHORITY IN SOUTH WEST AFRICA* 8-10 (1968); UDO KAULICH, *DIE GESCHICHTE DER EHEMALIGEN KOLONIE DEUTSCH-SÜDWESTAFRIKA (1884-1914)*, at 40-41 (2000).

Cape Town via telegraph to officially declare to British officials that the land on the coast of Southwest Africa, which the German merchant Adolf Lüderitz had bought from indigenous chieftains in the years before, was now under protection of the German Empire.²¹ It ended on July 9, 1915, when Imperial Governor Theodor Seitz surrendered at Khorab in front of Louis Botha, the commander of the victorious expeditionary force sent to conquer the colony by the Union of South Africa.²² The thirty-one years of Imperial German rule can be roughly split up into three phases. During the first phase, lasting from 1884 until 1890, the German Empire strove to keep its commitment to the new colony to a minimum. Following the example of “Royal Charters” given by the British Empire, all administrative matters were laid in the hands of privately owned and funded “colonial companies,” which were tasked with providing the infrastructure and administration necessary for prolonged settlement in return for freedom in exploiting the resources of the new territories.²³ However, these plans did not come to fruition, as the newly founded companies lacked capital and largely remained inactive.²⁴

The Imperial Government decided in 1890—mainly for reasons of international prestige—to deploy troops, quell the uprisings, and take control of the administration itself when an insurgency of local tribesmen forced the German Empire to either reinforce or abandon the colony.²⁵ Colonial growth was steady, although slow and predominantly contingent on cattle-farming, as the large deposits of natural resources remained undetected.²⁶ The end of this second phase is marked by the uprisings of the *Nama* and *Herero* tribes from 1904 until 1907. German colonial troops brutally repelled these uprisings, changing the relationship between the indigenous inhabitants of Southwest Africa and the German oppressors.²⁷

The defining moment for economic breakthrough marks the beginning of the third phase. In 1908, a railway worker, Zacharias Lewala, found what he called a “*moi klip*” (beautiful stone) near the town of Lüderitzbucht, which his German supervisor August Stauch at

²¹ Martin Cai Lockert, *Entwicklung und Kontinuität des namibischen Rechtssystems von der deutschen Kolonialzeit bis zur Unabhängigkeit Namibias am Beispiel des Bergrechts* 45 (2013) (Ph.D. dissertation, Universität Münster) (Peter Lang Verlag, Frankfurt am Main, 2014); KAULICH, *supra* note 21, at 52-54.

²² Declaration of Khorab, July 9th 1915; see MICHAEL SILAGI, *VON DEUTSCH-SÜDWEST ZU NAMIBIA: WESEN UND WANDLUNGEN DES VÖLKERRECHTLICHEN MANDATS* 142-44 (1977).

²³ KAULICH, *supra* note 20, at 281.

²⁴ Lockert, *supra* note 21, at 47.

²⁵ ESTERHUYSE, *supra* note 20, at 145-47.

²⁶ See Dugard, *supra* note 4.

²⁷ KAULICH, *supra* note 20, at 247-67.

once recognized as a diamond.²⁸ This discovery started a diamond rush of unparalleled proportions. Between 1908 and 1913, 4.7 million carats of diamonds worth 150 million *Reichsmark* were mined in Southwest Africa, equaling one-fifth the mass and one-quarter of the worth of worldwide diamond production.²⁹ The sudden prospect of wealth attracted an influx of new settlers and fostered economic growth. Taxes and royalties payable on diamonds also enabled the administration of the colony to almost fully³⁰ sustain itself financially, greatly heightening its degree of independence from the German Empire.³¹

All ambitions of the colony to further emancipate itself from the German Empire were cut short in January 1915, when the Union of South Africa invaded German Southwest Africa.³² While the Union of South Africa officially did so as a Dominion of the British Empire at the behest of the Crown, other reasons may include the perceived threat to South Africa's territorial integrity and the urge to claim the rich Southwest African diamond fields as spoils of war.³³

2. Introduction of German Law

a) *Sources of German Colonial Law*

(1) *Schutzverträge*

The first trace of German colonial law in Southwest Africa is purely contractual in nature. The so-called *Schutzverträge* (protection contracts), entered into with indigenous chieftains—first by German merchant Adolf Lüderitz, and, later by emissaries of the German Empire—laid the basis for German sovereignty in Southwest Africa.³⁴ Through these contracts—the formal basis for which often was either the conveyance of land or the granting of mining rights—the chieftains surrendered their sovereignty to the German Empire which in turn offered protection and agreed to refrain from trifling with the purely indigenous affairs of the tribes.³⁵ By 1894, almost all the tribes of

²⁸ Lisa Kuntze, *Die große Zeit der Diamantentfunde, in VOM SCHUTZGEBIET BIS NAMIBIA 2000*, at 431-32 (2002).

²⁹ BERND LÄNGIN, *DIE DEUTSCHEN KOLONIEN: SCHAUPLÄTZE UND SCHICKSALE 1884-1918*, at 149 (2005); OSKAR HINTRAGER, *SÜDWESTAFRIKA IN DER DEUTSCHEN ZEIT 177* (1956).

³⁰ With the exemption of the costs for the upkeep of the *Schutztruppe* (colonial military forces).

³¹ KAULICH, *supra* note 20, at 191-97.

³² See Dugard, *supra* note 4.

³³ Lockert, *supra* note 21, at 66-67.

³⁴ *Id.* at 50-52.

³⁵ See *id.* at 51, n.79 (discussing further examples).

Southwest Africa had entered into such contracts with the German Empire.³⁶

(2) *Imperial Constitutional Law*

In the German Imperial Constitution (*Reichsverfassung*) of April 16, 1871,³⁷ the only references relating to colonization are found in Article 4. While Article 4 gave the Imperial Government jurisdiction for all colonial matters, including emigration to “non-German countries,” and provided the legal basis for consular representation abroad, the legal status of German colonies remained shrouded in uncertainty.

It should not come as a surprise that the exact legal nature of German colonies at the time was highly controversial.³⁸ While most jurists held that colonies did not fall under the jurisdiction of the Imperial Constitution, which restricted itself to the area of the German Empire as positively defined in Article 2, they could not agree on the question of whether the colonies could legally be seen as territorial extensions of Germany, or whether instead they had to be compared to sovereign, foreign nations.³⁹ While courts assessed the legal nature of German colonies on a case-by-case basis when necessary, the dispute remained theoretical in nature. Even with different reasoning, none of the various schools of thought denied the Empire its power to rule.⁴⁰

(3) *Protectorates Law*

On April 17, 1886, the Reichstag⁴¹ of the German Empire enacted the *Gesetz, betreffend die Rechtsverhältnisse in den deutschen Schutzgebieten* (law relating to the legal status of the protectorates).⁴² This law, which was subject to numerous amendments and re-enact-

³⁶ ESTERHUYSE, *supra* note 20, at 98-101.

³⁷ VERFASSUNG DES DEUTSCHEN REICHS [Constitution of the German Reich], Apr. 16, 1871, REICHSGESETZBLATT [RGL.] 63 (Ger.).

³⁸ See Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 740 (2004).

³⁹ FRANZ FLORACK, DIE SCHUTZGEBIETE, IHRE ORGANISATION IN VERFASSUNG UND VERWALTUNG 14-16 (1905); ERICH BAUERFELD, VERORDNUNGSGEWALT IN DEN DEUTSCHEN SCHUTZGEBIETEN 26-28 (1917).

⁴⁰ H. EDLER VON HOFFMAN, EINFÜHRUNG IN DAS DEUTSCHE KOLONIALRECHT 7-21 (Goschen'sche Verlagshandlung ed. 1907); see also Lockert, *supra* note 22, at 52.

⁴¹ The legislative body of the German Empire.

⁴² Gesetz, betreffend die Rechtsverhältnisse in den deutschen Schutzgebieten [Law Relating to the Legal Status of the Protectorates], Apr. 17, 1886, REICHSGESETZBLATT [RGL.] at 71 (Ger.).

ments, was subsequently relabeled *Schutzgebietsgesetz* (protectorates law) in 1900.⁴³

Section 1 of the *Schutzgebietsgesetz* transferred the newly coined term *Schutzgewalt* (power to protect) to the German Emperor.⁴⁴ While, in accordance with the original German plans to leave internal administration in the hands of private entities, legal science at first deemed this power to only relate to the repulsion of external threats posed by third countries, at the outbreak of the 1904 uprisings it was unanimously agreed that the *Schutzgewalt* equaled full sovereignty.⁴⁵

(4) *Imperial Ordinances*

The German Emperor (Kaiser) exercised the *Schutzgewalt* through ordinances (*Verordnungen*).⁴⁶ The German Emperor deferred this power in part to the Imperial Chancellor and the Imperial Colonial Administration.⁴⁷ Apart from this derivative power, the different iterations of the *Schutzgebietsgesetz* also provided the Imperial Chancellor with powers to enact ordinances “where necessary for the execution of the law.”⁴⁸ While this provision contradicted the notion of the *Schutzgewalt* of the German Emperor to be all-encompassing in theory, the supreme rule of the Emperor remained unchallenged in practice.⁴⁹

b) *Transferring German Statutory Law*

A two-fold reference introduced German civil and criminal statutory law into the colony. In Section 2,⁵⁰ the *Schutzgebietsgesetz* referred to the provisions of the *Konsulargerichtsbarkeitsgesetz* of July 10, 1879.

This law regulated the use of German statutory law for German expatriates. Its application in a third country was usually depen-

⁴³ See Lockert, *supra* note 21, at 52, n.83-86 (listing all amendments and re-enactments). The last iteration of the law came into effect on July 22nd, 1913. For ease of reading, this article uses the term *Schutzgebietsgesetz* for reference henceforth.

⁴⁴ Schutzgebietsgesetz von 1886 [SchGG] [Reserve Act], Apr. 17, 1886, REICHSGESETZBLATT [RGL.] at 75, § 1, last amended by Schutzgebietsgesetz von 1900 [SchGG], Sept. 10, 1900, RGL. at 812 (Ger.).

⁴⁵ BAUERFELD, *supra* note 39, at 34.

⁴⁶ See Lockert, *supra* note 21, at 55.

⁴⁷ *Id.*

⁴⁸ See *id.* at 54 n.101.

⁴⁹ BAUERFELD, *supra* note 39, at 66.

⁵⁰ Section 3 in the re-enactment of the Schutzgebietsgesetz of September 10th 1900. See Schutzgebietsgesetz von 1900 [SchGG] [Reserve Act], Sept. 10, 1900, RGL. at S. 812 at § 3 (Ger.).

dent on a bi-lateral contract.⁵¹ According to Sections 3 and 4⁵² of the *Konsulargerichtsbarkeitsgesetz*, all German statutes relating to civil law and criminal law were applicable to German citizens and persons declared to be equal by ordinance of the Imperial Chancellor.⁵³ The *Schutzgebietsgesetz* generalized this application insofar as Section 2⁵⁴ declared these provisions applicable to everybody within the colony—with the exception of all indigenous people.⁵⁵

Whereas the criminal law was introduced in full, all other German laws had to be checked as to whether they should be classified as public or civil law. This is because the introduction of the German civil law was not tied to a specific group of statutory laws, but relied solely on the nature of each single regulation or rule of law in the whole body of German statutory law.⁵⁶

3. Evaluation

It is debatable whether the transfer of German civil and criminal law to the newly founded Southwest African colony can be labeled as a legal transplant at all, or whether it just constitutes a “natural” extension of German law into new German territories. From a factual point of view, one might argue that theory, as the executive and legislative powers effectively share nation of origin or the “donor nation” (the German Empire) and the “host nation” (the Southwest African colony). The legal perspective, however, contradicts this assumption: the Imperial Constitution made it clear that colonies did not directly fall under its jurisdiction. Hence, the legal nature of newly founded colonies remained, at best, unclear.

The German Empire was presented with the task of providing a legal system for the colony while facing two major restrictions: the absence of almost all legal or administrative institutions and the necessity for utmost flexibility in reacting to the challenges and changes encountered in the new territory. While the first obstacle could have been circumvented by instrumentalizing the provisions of the *Konsulargerichtsbarkeitsgesetz* alone, which in itself provided a simplified framework for administering German law abroad through an ap-

⁵¹ *Konsulargerichtsbarkeitsgesetz* [Law on Consular], July 10, 1879, REICHSGESETZBLATT [RGL.] at 197-206, § 1, last amended by Gesetz über die Konsulargerichtsbarkeit, Apr. 7, 1900, RGL. at 213-28 (Ger.).

⁵² Sections 2(2), 19 in the re-enactment of the *Konsulargerichtsbarkeitsgesetz* of April 7th 1900. See Gesetz über die Konsulargerichtsbarkeit [Law on Consular Jurisdiction], Apr. 7, 1900, RGL. at §§ 2(2), 19 (Ger.).

⁵³ See *Konsulargerichtsbarkeitsgesetz*, *supra* note 51, at 213-28, § 3-4.

⁵⁴ See *Schutzgebietsgesetz* von 1900, *supra* note 50, §§ 3, 4.

⁵⁵ See *Schutzgebietsgesetz* von 1886, *supra* note 44, § 2.

⁵⁶ HOFFMAN, *supra* note 40, at 107.

pointed consul,⁵⁷ the latter restriction—although mainly a question of public law—required an additional means to tweak and adjust the material civil law where needed. Rather than focusing on alterations of single statutes, the *Schutzgebietsgesetz* provided a framework which altered or added to the German civil law statutes where required and also allowed for on-the-spot adjustments through executive ordinances.

For example, provisions of the *Schutzgebietsgesetz* for *Kolonialgesellschaften* (colonial companies) supplemented German company law⁵⁸ had not been known to German company law before. These companies enjoyed relative freedom from the restrictions otherwise imposed by German company law.⁵⁹ In addition, apart from the German Emperor's all-encompassing *Schutzgewalt*,⁶⁰ the *Schutzgebietsgesetz* also provided the Imperial Chancellor with jurisdiction to amend all laws for colonial use through ordinances.⁶¹

Notwithstanding the classification or definition of the act of transferring the law itself as a transplant or a simple extension, some contend that by filtering the implementation of German civil (and criminal) law through the provisions of the *Schutzgebietsgesetz* and *Konsulargerichtsbarkeitsgesetz*, an attempt at customization or adaptation was made.

4. Conflicts

The potential for conflict was limited insofar as the German Empire transferred civil and criminal law of the German Empire as a whole. The customization through *Schutzgebietsgesetz* and *Konsulargerichtsbarkeitsgesetz* merely added to this coherent system. The *Konsulargerichtsbarkeitsgesetz* made a clear reference to the civil law *in force* in the German Empire.⁶² Thus, all changes made by Imperial German legislation were automatically applicable in the colony unless specific colonial ordinances enacted by the Emperor or Imperial Chancellor stated otherwise.

⁵⁷ Compare sections 4-18 of the *Konsulargerichtsbarkeitsgesetz*. *Konsulargerichtsbarkeitsgesetz*, *supra* note 51, §§ 4-18. Also, under these regulations, the Imperial Chancellor acted as a substitute for every other German government agency. BAUERFELD, *supra* note 39, at 70; *See* Lockert, *supra* note 21, at 55.

⁵⁸ *See* *Schutzgebietsgesetz* von 1900, *supra* note 50, at § 11.

⁵⁹ Especially relating to the mandatory capital base of companies. *See* HOFFMAN, *supra* note 41, at 110-111; Lockert, *supra* note 21, at 63-64.

⁶⁰ *Schutzgebietsgesetz* von 1886, *supra* note 44, § 1.

⁶¹ *See supra* Part III. A. 2. a) (4).

⁶² *Konsulargerichtsbarkeitsgesetz*, *supra* note 51, § 3; *Gesetz über die Konsulargerichtsbarkeit*, *supra* note 52, § 2(2), 19.

However, we can see cause for conflict in the ambiguity of this jurisdiction. The central term *Schutzgewalt* in section 1 of the *Schutzgebietsgesetz* was not positively defined, but was instead open to legal interpretation.⁶³ The letter of the law extended this jurisdiction to both the Emperor as well as the Imperial Chancellor, without providing a binding method for dissolving possible conflicts. Also, as the legal nature of the colonies remained vague, it remained legally unpredictable as to whether the constitutional hierarchies of the German Empire were also applicable in the colony.

Finally, the provisions of *Schutzgebietsgesetz* and *Konsulargerichtsbarkeitsgesetz* did not provide for a resolution where subsequent civil or criminal legislation of the German *Reichstag* contradicted amendments or addendums made by prior colonial ordinances of either the Emperor or the Imperial Chancellor.⁶⁴

5. Summary

In transferring the body of civil and criminal law to the new colony and allowing for a degree of customization, the German Empire set up a framework with the *Schutzgebietsgesetz*. The *Schutzgebietsgesetz*, in turn, drew on the *Konsulargerichtsbarkeitsgesetz* as a system for bringing German law to subjects abroad already in place.

This setup was cohesive, as it kept the transferred bodies of law connected to the legislation of the German Empire as the country of origin. The methods for customization were practical and allowed for quick, functional, and advantageous adaption to the needs of a newly founded colony. At first, the German Empire defined these needs. While the colony was subsequently granted more and more autonomy and rights of self-governance, World War I abruptly cut short the process of emancipation.⁶⁵ Because of this, the political struggle of turning over the tools for customization from the Emperor and Imperial Chancellor to a local administration, which was sparked by Imperial mining legislation and diamond taxation (and in 1914 had just begun being fought), was not essential.⁶⁶

On a jurisprudential level, the framework for customization displayed various shortcomings. While German constitutional law is responsible for the lack of a definition of the legal status of colonies, the overlapping competencies between Emperor, Imperial Chancellor, and the Imperial legislation of the *Reichstag* are manifest in the *Schutzgebietsgesetz*. As all legal ambiguities were always resolved in

⁶³ See *Schutzgebietsgesetz* von 1900, *supra* note 50, § 1.

⁶⁴ See *id.*; *Konsulargerichtsbarkeitsgesetz*, *supra* note 51.

⁶⁵ See Lockert, *supra* note 21, at 57-59.

⁶⁶ See *id.* at 59, 185-93.

favor of the Emperor in practice,⁶⁷ possible conflicts posed by these inaccuracies never surfaced.

B. *South African Mandate and Occupancy*

1. Historical Overview

After the outbreak of World War I, the Union of South Africa fielded an expeditionary force of 50,000 men and invaded German Southwest-Africa, where it faced less than 5,000 German troops.⁶⁸ The Union troops were victorious during hostilities drawn out until May 1915. These hostilities were due to an uprising among the mainly *Boer*⁶⁹ soldiers of the Union army and various tactical retreats of the German defenders.⁷⁰ The Treaty of Khorab of July 9th, 1915, established a South African Military Governorate in the former German colony, which was now officially called the *Protectorate of Southwest-Africa*. While German soldiers were interned and all traces of German administration were disestablished,⁷¹ German civilian life remained largely untouched.⁷² Like German colonial influence, the South African period in Southwest-African history can be roughly split up into three phases. These are discussed in subsequent paragraphs.

When World War I was coming to an end, it was foreseeable that the South African influence in Southwest-Africa would be perpetuated. While South Africa originally strived to annex Southwest-Africa as a fifth province, the proposal of administering the territories of the Axis powers through a newly incorporated League of Nations gained the support of South Africa when presented by United States President Woodrow Wilson in 1917.⁷³ After the Peace Treaty of Versailles established the League of Nations on January 10th, 1920, the League required South Africa to administer the territory of Southwest-

⁶⁷ See BAUERFELD, *supra* note 39, at 66.

⁶⁸ *Germans Surrender Southwest Africa to Union of South Africa*, HISTORY. <http://www.history.com/this-day-in-history/germans-surrender-southwest-africa-to-union-of-south-africa> (last visited Mar. 17, 2014).

⁶⁹ The term refers to the self-proclaimed name of the original Dutch settlers in South Africa. The revolt against the British elite can mainly be attributed to *Boer* sympathies for their German neighbors, who supported the *Boer* population during the *Boer Wars* (1899-1902), which the *Boers* lost to the British. See Lockert, *supra* note 21, at 66-67.

⁷⁰ See *id.* at 65-68.

⁷¹ Exempting the police force. See *id.* at 67.

⁷² For example, attorneys were allowed to continue their practice, with German still being considered an official language in court. See *id.* at 71-72.

⁷³ See MICHAEL SILAGI, *VON DEUTSCH-SÜDWEST ZU NAMIBIA* 22-48 (1977).

Africa⁷⁴ on December 17th, 1920.⁷⁵ Article 2 of this so-called C-Mandate⁷⁶ gave South Africa full administrative and legislative powers.

The economic growth of the Mandate largely relied on diamond mining, which developed into a high-technology industry and a mainstay of the economy, making up between 45% and 60% of the South-west-African export volume from 1920 to 1930.⁷⁷ Though heavily consolidated in the aftermath of the world-wide economic crisis of 1931, which led to a downfall of diamond mining to just 5% of the export volume, the quota stabilized between 10% and 25% in the late 1930s.⁷⁸

The outbreak of World War II heralded a second phase, which refueled the original intentions of South Africa to fully annex South-west-Africa. The Southwest-African *Legislative Assembly*⁷⁹ unanimously voted for integration into the Union of South Africa as a fifth province in 1943, South African Prime Minister Smuts proclaimed that he considered the Mandate of the League of Nations to have come to an end and that Southwest-Africa would be annexed after necessary negotiations with member states of the League of Nations had been held.⁸⁰ This proposed annexation did not take place. Instead, after the founding of the United Nations on October 24th, 1945, South Africa was asked—and expected—to place Southwest-Africa under the administration of the International Trusteeship System created by Chapters XII and XIII of the Charter of the United Nations in 1946.⁸¹ After the United Nations turned down an official request by the Union of South Africa to fully annex Southwest-Africa, South Africa refused to recognize the new Trusteeship System and sought to uphold the status quo and administer Southwest-Africa “in the spirit of the League of Nations-mandate.”⁸²

As a result, the conflict escalated from a political to a legal level, when the International Court of Justice was tasked with deter-

⁷⁴ See The Covenant of the League of Nations, art. 22, para. 5-6.

⁷⁵ See Lockert, *supra* note 21, at 68-71.

⁷⁶ See SILAGI, *supra* note 73, at 148-50.

⁷⁷ Gabi Schneider, *Die Verborgenen Schätze – der Bergbau, in VOM SCHUTZGEBIET BIS NAMIBIA* 253 (Klaus Hess & Klaus Becker eds., Gottingen: Klaus Hess Verlag 2000).

⁷⁸ *Id.* at 254.

⁷⁹ The legislative body of the Territory of Southwest-Africa. See Lockert, *supra* note 21, at 89-90.

⁸⁰ ANDRÉ DU PISANI, *SWA/NAMIBIA: THE POLITICS AND CONTINUITY OF CHANGE* 85 (1986).

⁸¹ See Lockert, *supra* note 21, at 73-75.

⁸² *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS* 89-96, 104-112 (John Dugard, ed., University of California Press, 1973).

mining the legal status of Southwest-Africa in 1949, and held that South Africa could not be forced to place Southwest-Africa under the Trusteeship System itself. They obligated South Africa to fulfill the obligations incurred by the C-Mandate to the United Nations as successor to the League of Nations.⁸³ In 1960, the United Nations backed two former members of the League of Nations, Ethiopia and Liberia, in their lawsuit against the Union of South Africa for violating the provisions of this Mandate through promotion of racial inequality in its administration of Southwest-Africa.⁸⁴

The *Odendaal-Report* provided for the introduction of *Apartheid* into Southwest-Africa—the racial segregation already practiced in South Africa—and this segregation took place in 1964.⁸⁵ This report advocated the administrative reorganization of the territory into ethnically divided areas and henceforth constituted the basis for all political and economic decisions made by South Africa for Southwest-Africa until 1975.⁸⁶

Economically, Southwest-Africa continued to rely on diamond mining as its backbone. Beginning in 1961, new maritime mining techniques, through which diamonds could also be extracted from the shoreline and the seabed on an industrial scale, led to record results.⁸⁷ While the mining of non-precious base minerals stagnated in the late 1960s, the mining of uranium, which was taken up in 1973 in the Rössing-Mine (one of the world's largest opencast pits near Swakopmund), added to the economic importance of the mining sector.⁸⁸

The legal action of the United Nations turned out to be unsuccessful on July 18th, 1966, when the International Court of Justice held in one of its most controversial decisions that both Ethiopia and Liberia lacked the power to sue.⁸⁹ As a reaction to the implementation of the *Apartheid* system and the failure of the lawsuit, the positive outcome of which the United Nations had relied on for their future plans for Southwest-Africa, the General Assembly of the United Nations terminated the South African Mandate through Resolution 2145 (XXI) on October 27th 1966:

The General Assembly, . . .

⁸³ International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11); *See generally* SILAGI, *supra* note 73.

⁸⁴ DU PISANI, *supra* note 80, at 140.

⁸⁵ Dugard, *supra* note 82, at 236.

⁸⁶ DU PISANI, *supra* note 80, at 161-63.

⁸⁷ Schneider, *supra* note 77, at 229-45.

⁸⁸ *See* Lockert, *supra* note 21, at 225-26.

⁸⁹ South West Africa Cases, Advisory Opinion, 1966 I.C.J. 4 (July 18); *see* Dugard, *supra* note 82, at 292-324.

- 1) Reaffirms . . . the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter of the United Nations;
- 2) Reaffirms further that South West Africa is a territory having international status and that it shall maintain this status until it achieves independence;
- 3) Declares that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate;
- 4) Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under direct responsibility of the United Nations.⁹⁰

A third phase began with the armed resistance of the indigenous *South West Africa People's Organization* (SWAPO) on August 26th, 1968.⁹¹ The General Assembly of the United Nations explicitly approved of this struggle.⁹² Also, as a sign of support, the General Assembly officially re-labeled Southwest-Africa "Namibia," a term hitherto exclusively used by SWAPO.⁹³

South Africa, at first, blocked all attempts by the United Nations to politically defuse the situation. South Africa gave up its goal of fully annexing Southwest-Africa and agreed to set foot on a path that would eventually lead to Namibian independence only in the mid-1970s, when the various international sanctions called for by the United Nations Security Council took effect and the guerrilla struggle of SWAPO was backed by communist countries and turned into a Cold War proxy-conflict.⁹⁴ These plans, which were subsequently laid out in United Nations Security Council Resolution 435 of September 29th,

⁹⁰ U.N. GAOR, 21st Sess., 1454th plen. mtg, at 2, U.N. Doc. A/RES/2145(XXI) (Oct. 27, 1966).

⁹¹ See Lockert, *supra* note 21, at 78-79.

⁹² U.N. GAOR 26th Sess., 2028th plen. mtg. at 1, U.N. Doc. A/RES/2871 (Dec. 20, 1971).

⁹³ *Namibia* is an artificial word, based on the *Namib* desert in the west of the country. U.N. GAOR 22nd Sess., 1671st plen. mtg. at 1, U.N. Doc. A/RES/2372 (June 12, 1968).

⁹⁴ See Lockert, *supra* note 21, at 78-81.

1978, called for free elections supervised by an United Nations Transition Assistance Group (UNTAG) and a Special Representative.⁹⁵

In order to prepare Southwest-Africa for these elections, South Africa once again tightened its administrative grip on the territory. The execution of Resolution 435 was put to a halt when, in 1980, the United States government linked their consent to the withdrawal of Cuban troops from Angola. This fully elevated the conflict to the global scale of the Cold War.⁹⁶ Accordingly, a solution was only reached in the course of the Soviet *Perestroika* in the late 1980s, and free elections for the Constituent Assembly of Namibia were held from November 7 until November 11, 1989.⁹⁷

2. Introduction of South African Law

The following part of the article analyses the various sources of law introduced to Southwest-Africa during the period of South African occupancy. This analysis does not take into account their—highly controversial⁹⁸—legal validity according to international law, and is merely focused on the bilateral legal relationships and connections between South Africa and Southwest-Africa.

a) *Constitutional Laws for Southwest-Africa*

(1) *Martial Law*

After the German surrender at Khorab, the Minister of Defence of the Union of South Africa proclaimed a Military Governor on July 11th, 1915, who ruled Southwest-Africa on his behalf under martial law as follows:

. . . do hereby appoint you to be Military Governor provisionally throughout the said territory which shall be known as the South West African Protectorate . . . I do further authorize and empower you as such Military Governor, but subject to any instruction which you may from time to time receive from the Minister of Defence for the said Union, to take all such measures, and by proclamation to make such laws, and enforce the same, as you may deem necessary for the peace, order and good government of the Protectorate.⁹⁹

⁹⁵ The so-called “Namibia-Plan.” See DU PISANI, *supra* note 80, at 335-68.

⁹⁶ *African States Try New Tactics for Namibia Independence*, CHRISTIAN SCI. MONITOR (May, 19, 1983) at 2, <http://www.csmonitor.com/1983/0519/051943.html> (page)/2.

⁹⁷ See Lockert, *supra* note 21, at 83-86.

⁹⁸ See *supra* Part III. B. 1.

⁹⁹ Dugard, *supra* note 82, at 27.

Through proclamation by the Union Minister of Defence, the office of Military Governor was subsequently re-labeled as Administrator, and the term Protectorate was substituted by the term Territory of South West Africa.¹⁰⁰

After the end of World War I, the Parliament of the Union of South Africa—still acting under the provisions of martial law—transferred all legislative and executive powers from the Territory of South West Africa to the Governor-General of South Africa in order to prepare for the execution of the Mandate granted to South Africa by the League of Nations.¹⁰¹ They, in turn, delegated these rights to the Administrator. After the withdrawal of martial law, which was declared on January 2nd, 1921,¹⁰² all executive and legislative powers were once again concentrated in the office of the Administrator, who in turn acted on and was subject to the instructions of the South African Parliament and Governor-General.¹⁰³

(2) *South West Africa Constitution Act 1925*

The South West African Constitution Act laid out a constitutional basis for the administration of the Territory of South West Africa under the C-Mandate of the League of Nations. The South African Parliament passed this act in 1925.¹⁰⁴ This granted the local white population limited rights of participation: legislation was partially put in the hands of an elected Legislative Assembly, while executive powers were shared by the Administrator and members of an Executive Committee, who were nominated by the Legislative Assembly.¹⁰⁵ The South African Parliament and the Governor-General, who at any time could step in and take over administration of the Territory as a whole, could overrule all legislative and executive decisions.¹⁰⁶ Because the Southwest-African population was not represented in the South African Parliament at all, and rights of participation were limited to the white minority only, this Act did not further the goals of Southwest-African autonomy set out by the League of Nations Mandate, but instead tightened the grip of white South African supremacy.¹⁰⁷

¹⁰⁰ *Id.*

¹⁰¹ Treaty of Peace and South West Africa Mandate, Act No. 49 of 1919, Union Gazette of September 19th 1919.

¹⁰² Indemnity and Withdrawal of Martial Law, Proclamation No. 1 of 1921, Union Gazette of January 2nd 1921.

¹⁰³ See Lockert, *supra* note 21, at 88-89.

¹⁰⁴ Dugard, *supra* note 82, at 425.

¹⁰⁵ See Lockert, *supra* note 21, at 89-90.

¹⁰⁶ South West Africa Constitution Act No. 42 of 1925 (Union), section 44.

¹⁰⁷ DU PISANI, *supra* note 80, at 71.

(3) *South West Africa Affairs Amendment Act 1949*

A major amendment of the South West African Constitution Act of 1925 took place in 1949,¹⁰⁸ when, after the downfall of the League of Nations and growing conflicts with the newly founded United Nations, the Union of South Africa shifted its political focus to the outright annexation of Southwest-Africa in the second phase of the occupational period. The amendment granted the white population the right to elect representatives for both Chambers of the South African Parliament.¹⁰⁹ In addition, it extended the jurisdiction of the South-west-African Legislative Assembly and made exclusive for certain areas. While the Governor-General lost his power to overrule Southwest-African legislation in these areas of exclusive jurisdiction, he kept all administrative powers.¹¹⁰ Also, all ordinances by the Legislative Assembly were still subject to suspension by Act of the South African Parliament.¹¹¹

(4) *South West Africa Constitution Act 1968*

The new South West African Constitution Act of 1968 repealed the South West African Constitution Act of 1925 in its amended form in order to implement the recommendations made by the *Odendaal-Plan*. While the provisions regarding the representation of the South-west-African white minority in the Parliament of the Republic of South Africa were carried over, the administrative process itself altered the former rights of self-governance in order to accommodate the incorporation of the ethnically divided *homelands* or *bantustans* envisioned by Odendaal.¹¹² While still having a unique role on paper, the jurisdiction of the Legislative Assembly was further curtailed in favor of the South African Parliament and the State President,¹¹³ thereby effectively placing it on par with the Provincial Councils of the four South African provinces.¹¹⁴ Under the provisions of the South West Africa Constitution Act of 1968, the territory could rightfully be

¹⁰⁸ Dugard, *supra* note 82, at 120.

¹⁰⁹ *Id.*

¹¹⁰ South West Africa Constitution Act 42 of 1925 as amended by South West African Affairs Amendment Act 23 of 1949 § 44 (3)-(4). *See* Lockert, *supra* note 22, at 91.

¹¹¹ South West Africa Constitution Act 42 of 1925 as amended by South West African Affairs Amendment Act 23 of 1949 § 4(4).

¹¹² DU PISANI, *supra* note 80, at 188-89.

¹¹³ As successor to the Governor-General as head of the executive after South Africa proclaimed itself a Republic on May 31st, 1961.

¹¹⁴ Werner Bertelsmann, *Current Legal Developments in South West Africa*, 2 COMP. & INT'L L.J. S.AFR. 3, 338 (1969); *see* Lockert, *supra* note 21, at 93.

claimed to equal a fifth province of South Africa for all administrative matters, even though it had not been officially annexed.¹¹⁵

(5) *South West Africa Constitution Amendment Act 1977*

In the wake of the fundamental change in South African policy during the third phase of the occupancy, the constitutional setup of Southwest-Africa was effectively revoked. In preparation for transitioning the territory to independence, all legislative and executive powers for Southwest-Africa were transferred to the South African State President, thereby disempowering the South West African Parliament.¹¹⁶ The State President delegated these powers in full to the newly established office of the Administrator-General for the Territory of South West Africa.¹¹⁷ The Southwest-African Legislative Assembly and Executive Committee effectively lost jurisdiction and fell back to a purely advisory role.¹¹⁸

From 1985 until 1989, the newly formed *Transitional Government of National Unity* demoted the Administrator-General to a mere advisor to the legislative and executive organs.¹¹⁹ South African supremacy was upheld at all times as this government was established on behalf and by authority of the South African State President. He reserved a right to veto all propositions and exempted key elements such as matters of defense and foreign policy from its jurisdiction.¹²⁰

b) *Acts, Proclamations, and Ordinances*

As shown above, all acts of lawmaking between the German surrender in Southwest-Africa in 1915 and Namibian independence in 1990 can be traced back to South African authority. They were legally based on martial law and the provisions of the C-Mandate of the League of Nations at first. While, during the second and third phase of the occupancy, South African sovereignty over Southwest-Africa was subject to highly controversial international debate, it was undisputed on a practical level.

¹¹⁵ DU PISANI, *supra* note 80, at 189; Bertelsmann, *supra* note 114, at 337-38.

¹¹⁶ South West Africa Constitution Act 39 of 1968, as amended by the South West African Constitution Amendment Act 95 of 1977 § 38 (1).

¹¹⁷ Establishment of Office of Administrator-General for the Territory of South West Africa Proclamation No. 180 of 1977, August 18th 1977; Empowering of the Administrator-General for the Territory of South West Africa to Make Laws Proclamation No. 181 of 1977, August 18th 1977 (Sw. Afr.)

¹¹⁸ DU PISANI, *supra* note 80, at 430-31.

¹¹⁹ South West Africa Legislative and Executive Authority Establishment Proclamation No. R 101 of June 17th, 1985.

¹²⁰ See Lockert, *supra* note 21, at 93-95.

Legislation in and for Southwest-Africa has largely been a combined effort between the South African Parliament and Governor-General, on one side, and the appointed Administrator and Southwest-African Legislative Assembly on the other.¹²¹ The highest and most important sources of law were the Acts passed by both Chambers of the South African Parliament. Up until the appointment of the Administrator-General in 1977, these Acts formed the premiere law of Southwest-Africa, followed by the Proclamations issued by the representatives of the South African executive and their Southwest-African proxies.¹²² The Ordinances issued by the Southwest-African legislature within its limited jurisdiction were subordinate to these sources of law, as they were largely dependent on the approval of the executive and subordinate to the Acts of the South African Parliament.¹²³

c) Introduction of Roman-Dutch Law

After the end of World War I, the South African administration decided to introduce the common law of South Africa to Southwest-Africa as the new law of the land after a prolonged South African engagement in Southwest-Africa became foreseeable while negotiating the Peace Treaty of Versailles and the foundation of the League of Nations.

The Administrator introduced Roman-Dutch Law as practiced in the South African Cape Province through the Administration of Justice Proclamation No. 21 of 1919,¹²⁴ section 1 of which reads as follows:

- (1) The Roman Dutch Law as existing and applied in the Province of the Cape of Good Hope at the date of the coming into effect of this Proclamation shall, from and after the said date, be the Common Law of the Protectorate, and all Laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provisions of this Section, be repealed.
- (2) Notwithstanding the provisions of paragraph (1) of this Section, all Proclamations which have been issued during the Military occupation of the Protectorate and are still in force on the said date shall continue to be in force.
- (3) All rights, privileges, obligations or liabilities acquired, accrued or incurred prior to the said date

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Lockert, *supra* note 21, at 95-96.

¹²⁴ Administration of Justice Proclamation No. 21 of 1919, (GG) (S. Afr).

shall be determined according to the law in force in the Protectorate at the time of acquisition, accrual or incurrence.”¹²⁵

The introduction came into effect on January 1st, 1920.¹²⁶ In order to assess if and to what extent this implementation can be considered a legal transplant and what types of problems and conflicts were posed by its adaptation, a historical overview¹²⁷ of the development of Roman-Dutch Law and its inception in South Africa will be followed by an in-depth look at the range and scope of its introduction to South-west-Africa.

(1) *Historical Overview*¹²⁸

(a) *Reception of Roman Law in Holland*

Academic studies of Roman law in medieval Europe started in the 11th century in Bologna, when scholars—the so-called “glossators”—started to add commentaries and explanations to the *Corpus Iuris Civilis*. After this practice had spread to various universities in northern Italy and southern France in the following centuries, the so-called “postglossators” or “commentators” started to adapt these rules of Roman Law to the contemporary practical needs of the 14th century.¹²⁹ As a result, even without official reception, Roman laws permeated the local laws of large parts of Europe. Such an official reception subsequently took place in 1495, when the Holy Roman Empire, which saw itself as the successor to the Roman Empire, installed the Roman law as adapted by the “glossators” and “commentators” as the subsidiary law of the land in the *Reichskammergericht-sordnung*.¹³⁰ The area of this reception included the seven provinces of the Netherlands, which at the time were part of the Holy Roman Empire.¹³¹ After having been intermixed with the existing Germanic law, this new form of Roman law was called *usus modernus pandectarum*.¹³²

The term Roman-Dutch Law refers to the amalgamation of Roman law as received in medieval Europe and the Germanic common

¹²⁵ *Id.*

¹²⁶ *Id.* § 16.

¹²⁷ See H.R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* (1968); LOURENS MARTHINUS DU PLESSIS, *AN INTRODUCTION TO LAW* 16 (2ND ED. 1995).

¹²⁸ See Lockert, *supra* note 21, at 97-105.

¹²⁹ *Id.*

¹³⁰ HAHLO & KAHN, *supra* note 127, at 503; FRANZ WIEACKER, *VOM RÖMISCHEN RECHT. WIRKLICHKEIT UND ÜBERLIEFERUNG* 222-51.

¹³¹ HAHLO & KAHN, *supra* note 127, at 515-16.

¹³² AMOO, *supra* note 19, at 91; WIEACKER *supra* note 130, at 252-66.

law,¹³³ which was used in the Dutch province of Holland in the 17th and 18th century.¹³⁴ Contemporary sources of law are not only the statutes of the province of Holland (so-called *Placaaten*, *Ordonnantien*, and *Diplomata*), but also collections of decisions (*Observationes*), opinions and expertises (*Consultatien*), which originally got compiled by judges and jurists for unofficial personal use.¹³⁵ By far, the biggest influence on the legal practices in court have (and still is today) been attributed to the books and treatises of contemporary legal scholars, who tried to systematically summarize the law for the sake of practical manageability.¹³⁶

The most influential of these works is the textbook “*Inleiding tot de Hollandsche Rechtsgeleertheyd*” by Hugo Grotius (1583-1645), which was published in 1631 and was first to portray the connection between Roman and Dutch law as a legal system in its own right, rather than depicting the Dutch parts as mere addendums to a Roman code of law.¹³⁷ It still is considered to be the unofficial codification of Roman-Dutch Law and is frequently cited in modern legal practice.¹³⁸ Another such book of continuing legal importance is the “*Commentarius ad pandectas*” by Johannes Voet (1647-1713), published in 1698 (Vol. I) and 1704 (Vol. II.), which contains an extensive commentary on all fifty books of the *Digest*, followed up by a description of contemporary Dutch law.¹³⁹

(b) *Reception of Roman-Dutch Law in South Africa*

On March 20th, 1602, four rival shipping companies banded together and formed the Dutch East India Company (the Vereenigde Oost-Indische Compagnie or “V.O.C.”).¹⁴⁰ The V.O.C. was based in the province of Holland and had been granted far-reaching trade-

¹³³ See J.T.R. GIBSON, WILLE’S PRINCIPLES OF SOUTH AFRICAN LAW 23-24 (1977).

¹³⁴ HAHLO & KAHN, *supra* note 127, at 329.

¹³⁵ *Id.* at 543-48; REINHARD ZIMMERMANN, DAS RÖMISCH-HOLLÄNDISCHE RECHT IN SÜDAFRIKA. EINFÜHRUNG IN DIE GRUNDLAGEN UND USUS HODIERNUS 59 (1983) [hereinafter *Zimmerman 1*]; GIBSON, *supra* note 133, at 25-27.

¹³⁶ HAHLO & KAHN, *supra* note 127, at 548-62; *Zimmermann 1*, *supra* note 135, at 58-62; see REINHARD ZIMMERMANN, RÖMISCH-HOLLÄNDISCHES RECHT - EIN ÜBERBLICK 26-49 (Robert Feenstra & Reinhard Zimmermann eds., 1992) (providing a description of the seven most important authors and their works) [hereinafter *Zimmermann 2*]

¹³⁷ GIBSON, *supra* note 133, at 21; *Zimmermann 2*, *supra* note 136 at 29-30.

¹³⁸ HEIN KÖTZ & KONRAD ZWEIGERT, AN INTRODUCTION TO COMPARATIVE LAW 234 (3rd ed. 1996).

¹³⁹ HAHLO & KAHN, *supra* note 127, at 556-57; GIBSON *supra* note 133, at 28; *Zimmermann 1*, *supra* note 135, at 60.

¹⁴⁰ Vereenigde Nederlandsche Geocroyeerde Oost-Indische Compagnie, abbreviated V.O.C.

rights and even a limited degree of sovereignty by the government of the United Netherlands (the so-called *Staten-Generaal*). This sovereignty allowed the V.O.C. to found and administer new outposts and colonies abroad.¹⁴¹ On April 6th, 1652, Dutch merchant Jan van Riebeeck arrived at the Cape of Good Hope and built an outpost on behalf of the V.O.C. in order to provide supplies to the company's ships en route to India.¹⁴²

As a result of a directive of the Directorate of the V.O.C. dating back to 1621, the Roman-Dutch Law as practiced in the Province of Holland was introduced as the law of the new outpost.¹⁴³ The authorities of the V.O.C. regulated local matters through the use of ordinances (*Placaaten*), which—according to the economic nature of the enterprise—were singularly focused on providing a stable environment for the ongoing trade operations.¹⁴⁴

From a legal point of view, the validity of both the directive of 1621 and the ordinances of local V.O.C. authorities is questionable, as the original rights granted to the V.O.C. by the *Staten-Generaal* in 1602 did include the right to install courts of law, but explicitly excluded legislative powers.¹⁴⁵ However, given the scope of this article, this question can remain unanswered because the introduction of Roman-Dutch Law to Southwest-Africa does have a valid basis in the Administration of Justice Proclamation No. 21 of 1919, issued under martial law.¹⁴⁶

In the 19th century, Roman-Dutch Law was carried from the Cape Colony to the newly founded *Boer*-Republics of Transvaal, Natal, and the Orange Free State by the migrating *Trekboers*.¹⁴⁷

¹⁴¹ OSKAR HINTRAGER, *GESCHICHTE VON SÜDAFRIKA* 27 (1952).

¹⁴² SOUTH AFRICAN HISTORY ONLINE, *The Arrival of Jan Van Riebeeck in the Cape-6 April 1652*, <http://www.sahistory.org.za/topic/arrival-jan-van-riebeeck-cape-6-april-1652>.

¹⁴³ HAHLO & KAHN, *supra* note 127, at 572 (the Province of Holland was chosen for its economic importance and because the V.O.C. was headquartered in Amsterdam).

¹⁴⁴ Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in *SOUTHERN CROSS. CIVIL LAW AND COMMON LAW IN SOUTH AFRICA* 47 (Daniel Visser & Reinhard Zimmermann eds., 1996); *Zimmermann 1*, *supra* note 135, at 3.

¹⁴⁵ *Zimmermann 1*, *supra* note 135, at 4; Fagan, *supra* note 144, at 38-39.

¹⁴⁶ See Administration of Justice Proclamation No. 21 of 1919, (GG) (S. Afr.).

¹⁴⁷ HAHLO & KAHN, *supra* note 127, at 575-76.

(c) *British Influences on South African Roman-Dutch Law*

From 1795 until the formation of the Union of South Africa in 1910, the British Empire ruled the Cape Colony and large parts of southern Africa.¹⁴⁸

After a slow and steady decline, the V.O.C. declared bankruptcy in 1794.¹⁴⁹ In order to withdraw it from the grasp of Napoleon, the government of the Netherlands agreed to allow the British Empire to occupy the Cape Colony from 1795 to 1803. In 1806, the Napoleonic Wars took on a trans-continental dimension and the British Empire once again¹⁵⁰ took control of the Cape Colony as a means of protecting the sea routes along the Cape of Good Hope.¹⁵¹ After the end of the Napoleonic Wars, the British government decided to maintain its presence at the Cape, promote immigration, and transform the Colony into an integral part of the British Empire.¹⁵²

According to contemporary colonial policy,¹⁵³ the British Empire did not substitute the local law in the Cape Colony with its own common law but kept the prevailing Roman-Dutch Law as the law of the land.¹⁵⁴ As a result, Roman-Dutch Law continued to apply in the Cape Colony, even when its country of origin, the Netherlands, abandoned the implementation of the Napoleonic *Code Civil* in 1811.¹⁵⁵ It was only because of these colonial advances of the British Empire, which had legally separated the former Dutch colonies from the Netherlands, that the Roman-Dutch Law did survive as a living legal system—not only in the Cape Colony, but also in Ceylon and Guyana.¹⁵⁶ As a result of the expansion of British hegemony during the course of the 19th century, Roman-Dutch Law as practiced in the Cape Colony spread to other parts of southern Africa.¹⁵⁷

As in other British colonies, the government successfully established itself in South Africa and replaced the equivalent rules of the Roman-Dutch Law. These replacements included methods of adminis-

¹⁴⁸ See M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 304 (1975).

¹⁴⁹ HARALD BILGER, *SÜDAFRIKA IN GESCHICHTE UND GEGENWART* 56 (1976).

¹⁵⁰ See HOOKER, *supra* note 148, at 250 (the Cape Colony had been administered by the Dutch Batavian Republic from 1803 until 1806).

¹⁵¹ BILGER, *supra* note 149, at 63.

¹⁵² *Zimmermann 1*, *supra* note 135 at 8.

¹⁵³ See *Cambell v. Carolina* (1774) 1 Cowp. 204 (209), 98 E.R. 1045 (1047).

¹⁵⁴ HAHLO & KAHN, *supra* note 127, at 575.

¹⁵⁵ *Zimmermann 1*, *supra* note 135, at 7.

¹⁵⁶ KÖTZ & ZWEIGERT, *supra* note 138, at 232; *Zimmermann 1*, *supra* note 135 at 7.

¹⁵⁷ AMOO, *supra* note 19, at 61 (noting the Roman-Dutch Law spread to Rhodesia, Botswana, Lesotho and Swaziland, as well as the future South African provinces of Transvaal, Natal and the Orange Free State); see *Zimmermann 1*, *supra* note 135, at 20-23.

tration, criminal, and civil procedural law, and the corresponding laws of evidence.¹⁵⁸

The ongoing expansion of these British influences, which permeated the laws of procedure but quickly spread to other areas of the law and led to a subtle Anglicization of the Roman-Dutch Law, can for the most part be attributed to the fact that almost all contemporary jurists practicing in South Africa were legally educated in England¹⁵⁹ and the official change of the language of the colony and the courts to English.¹⁶⁰ Through forced translation, many legal concepts of Roman-Dutch Law were substituted by terms of English legal terminology, which often differed in content, eventually replacing the respective rules of Roman-Dutch Law in practical use.¹⁶¹ In difficult cases or when in doubt, a lack of knowledge of the Roman-Dutch Law also often led English jurists to simply substitute an allegedly comparable English rule of law.¹⁶² This effect was especially prevalent in the *Privy Council*, the court of last instance for all appeals against decisions of South African courts, where the intricacies of the Roman-Dutch Law were simply not known.¹⁶³

The legal principle of *stare decisis et non quieta movere*, which was unknown to Roman-Dutch Law before, was introduced into South Africa due to a final court of appeals in England, close political and economic ties, an underdeveloped indigenous legal culture, and the professional habits of English jurists practicing in the Cape Colony.¹⁶⁴ English statutory law explicitly replaced certain aspects of the Roman-Dutch Law, such as the rules pertaining to company law, securities law, and trade law.¹⁶⁵

Despite—or because of—these myriad influences, the South African legal system cannot be classified as positively belonging to either the Roman or the common law legal traditions.¹⁶⁶ This indistinctiveness is a classifying characteristic of the so-called *mixed jurisdictions*,¹⁶⁷ which the South African legal system exemplifies.

¹⁵⁸ HAHLO & KAHN, *supra* note 127, at 503, 576.

¹⁵⁹ Zimmermann 1, *supra* note 135, at 13.

¹⁶⁰ HAHLO & KAHN, *supra* note 127, at 576.

¹⁶¹ Zimmermann 1, *supra* note 135, at 14.

¹⁶² *Id.* at 13.

¹⁶³ *Id.* at 15.

¹⁶⁴ See HAHLO & KAHN, *supra* note 127, at 578; Zimmermann 1, *supra* note 135, at 14-15; Erasmus, *supra* note 1, at 47-48.

¹⁶⁵ KÖTZ & ZWEIGERT, *supra* note 138, at 234; AMOO, *supra* note 20, at 61; Zimmermann 1, *supra* note 135, at 12.

¹⁶⁶ KÖTZ & ZWEIGERT, *supra* note 138, at 235; HAHLO & KAHN, *supra* note 127, at 585.

¹⁶⁷ Erasmus, *supra* note 1, at 44.

(d) Current Legal Practice in South Africa

The cultural clashes between the urban British elite and the rural *Boer* population during the 19th century culminated in the *Boer War* (1899-1902).¹⁶⁸ Following their defeat in the field, the *Boers* were nonetheless able to successfully negotiate their claims of independence and self-determination against the victorious British. The British Parliament consented to the founding of the Union of South Africa¹⁶⁹ in 1910. This unified the former Cape Colony and the conquered *Boer* Republics of Transvaal, Natal, and the Orange Free State under one constitution, which—although the Union continued to be part of the British Empire—granted the *Boer* population equal political rights.¹⁷⁰

The formation of the Union prompted a cultural emancipation of the *Boers*, which quickly came to encompass the concepts and the perception of law. After the legal system in the Union was standardized, the affinity for falling back to English concepts of law continuously became replaced by a new focus on traditional Roman-Dutch rules of law.¹⁷¹ This change can be attributed to a newly found *Boer* sense of national pride, the adoption of *Afrikaans* as an official language of the Union, and the beginning scientific examination of Roman-Dutch Law at the newly founded South African universities.¹⁷²

These developments led to the following rearrangements in the ranking order of South African sources of law which is still in force today: the most important source, statutory law, comprises all legislation enacted for South Africa, ranging from the Acts of the South African Parliament to the ordinances (*Placaaten*) of the *Staten-Generaal* of the Netherlands.¹⁷³ The Roman-Dutch Law as the common law of South Africa is considered to be the second most important source of law, even outranking case law.¹⁷⁴ The decisions of South African superior courts, notwithstanding their major role in legal practice, are considered to only follow in third place.¹⁷⁵

The resurgence of Roman-Dutch Law in the early 20th century also curtailed application of *stare decisis* insofar as prior decisions are considered not to have a binding effect if they violate core principles of

¹⁶⁸ See JÖRG FISCH, *Die Geschichte Südafrikas* 212-17 (1991); BILGER, *supra* note 149, at 332-38.

¹⁶⁹ South Africa Act 152 of 1909.

¹⁷⁰ Erasmus, *supra* note 1, at 212, 217-25.

¹⁷¹ Zimmermann 1, *supra* note 135, at 35-37.

¹⁷² Fagan, *supra* note 144, at 60-64; Zimmermann 1, *supra* note 135, at 233.

¹⁷³ HAHLO & KAHN, *supra* note 127, at 151; GIBSON, *supra* note 133, at 38.

¹⁷⁴ GIBSON, *supra* note 133, at 38.

¹⁷⁵ Zimmermann 1, *supra* note 135, at 52; see also HAHLO & KAHN, *supra* note 127, at 214-82.

Roman-Dutch Law.¹⁷⁶ Because the courts' decisions are not simply based on pure case law, but have to adhere to the rules set out by the Roman-Dutch Law, the works of famous Dutch jurists of the 17th and 18th century, the so-called *Ou Skrywers*, and modern legal scholars are used by the courts for interpreting the law and reaching and explaining their judgments. Through referencing these scholarly writings, contemporary laws of the medieval Netherlands and decisions reached by Dutch courts find their way into South African jurisprudence.¹⁷⁷ Even though there is no uniform rule for the assessment and evaluation of these writings,¹⁷⁸ which are largely dependent on soft factors like the reputation of the author or the accessibility of the relevant sources, the writings of legal scholars are classified as a fourth source of law.¹⁷⁹

(2) *Range and Scope of Introduction to Southwest-Africa*

In determining the range and scope of the introduction of Roman-Dutch Law to Southwest-Africa, the provisions of section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 must be examined. Through this provision, on January 1st, 1920, the Roman-Dutch Law became applicable "as existing and applied" in the Cape Province.¹⁸⁰ It was introduced with specific limitations in respect to the time and place of its application not in an abstract, pure, and all-encompassing form.

d) *Continuing Validity of German Colonial Law*

From July 9, 1915 until January 1, 1920, various German laws were repealed and numerous individual provisions had been enacted under martial law.¹⁸¹ Nonetheless, up until the implementation of Roman-Dutch law, the bulk of the remaining German statutes continued to serve as a legal framework for Southwest-Africa.¹⁸²

According to section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919, on January 1st, 1920 all laws in conflict with the Roman-Dutch Law were—"to the extent of this conflict"—repealed.¹⁸³ The proclamation did not include any other specific provisions as to the continuing validity of German statutory laws. Thus, in

¹⁷⁶ *Zimmermann 1, supra* note 135, at 55; *see Dukes v. Marthinusen 1937 (12) AD at 23.*

¹⁷⁷ *BILGER, supra* note 149, at 40-41.

¹⁷⁸ *Zimmermann 1, supra* note 135, at 61-62.

¹⁷⁹ *GIBSON, supra* note 133, at 39; *HAHLO & KAHN, supra* note 127, at 303.

¹⁸⁰ Administration of Justice Proclamation 21 of 1919 §§ 1 (1), 16 (S.W. Afr.).

¹⁸¹ *See Lockert, supra* note 21, at 60.

¹⁸² *See id.*

¹⁸³ Administration of Justice Proclamation No. 21 of 1919 § 1(1).

order to answer the question of the continuation of a German law or rule of law, such law must be individually compared to the Roman-Dutch Law.

A definite answer can only be given in those cases where the new South African or Southwest-African legislation explicitly repealed German law, which often happened in the area of public law. In Schedule I of the Liquor Licensing Proclamation,¹⁸⁴ the *Verordnung des Kaiserlichen Gouverneurs, betreffend Einfuhr und Handel mit alkoholischen Getränken vom 11. März 1911*—the preceding German equivalent to this proclamation—was repealed in full. As another example, the *Dienstanweisung für die Vermessungsverwaltung vom 12. Juni 1912*¹⁸⁵ was repealed by Schedule I of the Land Survey Proclamation of 1920.¹⁸⁶

Likewise, German statutory law's positive continuation was easily assessable where new laws expressly referred to it. This usually did not occur by mere declaratory statements of law, but rather implicitly through either amending existing German statutes which otherwise continued to be in force—exemplified by the additions to the *Kaiserliche Bergverordnung vom 8. August 1905* as the German mining law¹⁸⁷ or by taking over specific provisions of German statutory law as part of new legislation, such as the transfer of those parts of the German *Handelsgesetzbuch* (trade law) relating to *Kommanditgesellschaften auf Aktien* (limited partnership by shares) into the new Companies Proclamation of 1920.¹⁸⁸

The continuing validity of German colonial law must therefore be assessed on an individual case-by-case basis. While most of the existing German laws had been explicitly repealed in the abovementioned manner even before World War II,¹⁸⁹ the South African administration never issued a provision through which the existing German law for Southwest-Africa was repealed *in complexu*.

3. Evaluation

The above analysis of the Southwest-African constitutional law shows that under martial law as well as during the following times of international mandate and occupancy, custom-made legislation of South African origin set up the underlying legal framework for Southwest-Africa. These measures of constitutional legislation, even though

¹⁸⁴ Proc 6/1920 (S. Afr.).

¹⁸⁵ *Amtsblatt für Deutsch-Südwestafrika* of June 24th 1912.

¹⁸⁶ Proc 7/1920 (S. Afr.).

¹⁸⁷ Proc 12/1920 (S. Afr.).

¹⁸⁸ Proc 35/1920 (S. Afr.).

¹⁸⁹ Laws of South West Africa, Appendix I, Vol. I, 1915-1922 at 879-881 (for a list of the German statutory laws officially still in effect in 1923).

they provided for an interconnection with South African constitutional law of varying depth, can thus not be classified as legal transplants.

However, all South-West Africa Constitution Acts and their various amendments established Southwest-Africa as a stand-alone jurisdiction. From a legal perspective, even though a *de facto* annexation by South Africa might have taken place in the second half of the 20th century,¹⁹⁰ Southwest-Africa remained independent at all times during this period. As a result, the concept of legal transplants continued to be generally applicable under the South African regime, as Southwest-Africa retained its status as a valid “host jurisdiction” for laws transplanted from a “donor jurisdiction.”

The introduction of the Roman-Dutch law¹⁹¹ of South African origin as the new common law of Southwest-Africa constitutes an imposition of law and we can therefore classify it as a legal transplant. Also, as this introduction was limited in range and scope,¹⁹² a degree of customization can be said to have been applied to this transplant.

As to the material laws enacted by the South African and Southwest-African legislation, whether through acts or ordinances,¹⁹³ no generalizations can be made. A legal transplant occurred where either a specific law or a set body of rules was transferred wholly from another jurisdiction. The same holds true where a law customized or tailored to Southwest-African circumstances at least contained a rule or element of law with foreign roots. In order to classify any given legislative measure as a legal transplant, these preconditions must be ascertained on an individual basis.

The retention of German Colonial law, either through express referral in new acts, ordinances, or proclamations or through the general clause in section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919,¹⁹⁴ can also be classified as a legal transplant. Even though in most cases no direct or express act of transfer¹⁹⁵ took place, “intended borrowing” passively transplanted the law of the former German colony. The new South African administration deliberately opted to hold on to the German laws in place to some degree even though the implementation of martial law and the subsequent South African Constitution Acts provided ample opportunity to “clean the slate” from a legislator’s point of view.

¹⁹⁰ See *supra* Part III. B. 2. a) (4).

¹⁹¹ See *supra* Part III. B. 2. c).

¹⁹² See *supra* Part III. B. 2. c) (2).

¹⁹³ See *supra* Part III. B. 2. b).

¹⁹⁴ See *supra* Part III. B. 2. d).

¹⁹⁵ Such as express referral to or use of German provisions in new legislative measures. See *supra* Part III. B. 2. d).

The newly established legal system carried over numerous provisions of German colonial law through the general provisions of the Administration of Justice Proclamation No. 21 of 1919 or declaratory references in more specific statutory law.¹⁹⁶ As shown above, the transplanted law of the former German colony has been customized by either subordinating the law to the rules of the Roman-Dutch Law in general, or by re-packaging or re-integrating certain provisions from German statutory law into new legislative measures, as seen in numerous specific cases.¹⁹⁷

4. Conflicts

At first glance, both the transplantation of Roman-Dutch Law—a rounded-out legal system in itself—and German colonial provisions do not seem to carry any intrinsic cause for conflict. But since the introduction and applicability of the Roman-Dutch Law, and through it the continued validity of German colonial law, were limited in range and scope,¹⁹⁸ a closer look is imperative.

a) Transplanting the Roman-Dutch Law

In view of a lack of authoritative codifications of the Roman-Dutch Law, which could be relied upon as reference for the scope of the Roman-Dutch Law in effect at a certain place at a specific point in time, no easy assessments as to the effects of the limitations of its transfer into Southwest-Africa can be made. The wording of Proclamation No. 21 of 1919 makes explicit reference to the Roman-Dutch Law “as existing and applied” in the Cape Province,¹⁹⁹ but does not answer the question of whether, or to what extent, any influences that the common law or statutory law of English origin may have had on the body of Roman-Dutch Law are to be taken into account.

Since Proclamation No. 21 of 1919 only makes provisions for transferring the common law, but not the statutory law, of the Cape Province, it can be argued that because of its deep intermixture with elements of English law—both common law and statutory—the body of Roman-Dutch Law as referred to in Proclamation No. 21 of 1919 has been full of “gaps” or “cavities.”²⁰⁰ Owing to the primacy of statutory law, such “gaps” or “cavities” tear into the body of Roman-Dutch Law of the Cape Province whenever one of its parts had been “broken off”

¹⁹⁶ See *supra* Part III. B. 2. d).

¹⁹⁷ See Lockert, *supra* note 21, at 145-260 (exemplary and extensive analysis of the continuity of the German Colonial mining law provisions of the *Kaiserliche Bergverordnung vom 8. August 1905*).

¹⁹⁸ Administration of Justice Proclamation Act 21 of 1919 §1(1) (S.W. Afr.).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

and substituted by a statutory rule of law of English origin.²⁰¹ One has to accurately differentiate whether British legislation indeed substituted specific parts or rather simply added to certain underdeveloped aspects or areas of the Roman-Dutch Law, or whether through “subtle reception”²⁰² new rules of law or legal procedures had been introduced without a basis in statutory law. One must also examine whether these new rules classified part of the Roman-Dutch common law by contemporary jurists.²⁰³

Only in this last case did Proclamation No. 21 of 1919 bring about a reception of English rules of law and procedures in Southwest-Africa, provided that these English influences permeated the Roman-Dutch Law before the date of January 1st, 1920 and were indeed accepted in the Cape Province itself. Therefore, the claim²⁰⁴ that all English rules of law in effect in the Cape Province were also transferred to Southwest-Africa by Proclamation No. 21 of 1919 is to be rejected as too broad and imprecise. The provisions of this Proclamation merely introduced a perforated body of the Roman-Dutch Law into Southwest-Africa, the gaps in which could only be closed through the enactment of the specific pieces of legislation responsible for this erosion in (or for) Southwest-Africa.

It hence comes as no surprise that after the introduction of the Roman-Dutch Law in 1920, an abundance of such legislative measures were being realized, which not only dealt with areas of public law not covered by the Roman-Dutch common law, but also entailed changes of or additions to the body of the Roman-Dutch Law. By looking at specific acts, these legislative measures and their relation to and influence on the body of Roman-Dutch Law in Southwest-Africa can be classified and exemplified as follows:

- The regulation of an issue of public law, which as such is not comprised by the Roman-Dutch Law itself, can be exemplified through the aforementioned Southwest-African Administrator’s Liquor Licensing Proclamation.²⁰⁵ This act regulates importing and trading alcoholic beverages. This is an area of public law to which the Roman-Dutch Law does not refer. Accordingly, in Schedule I of the Liquor Licensing Proclamation, the preceding German equivalent to this

²⁰¹ *Id.*

²⁰² *Zimmerman 1, supra* note 135, at 13 (for use of term “subtle reception”).

²⁰³ The abolishment of this practice was one of the main goals of South African jurists when re-focusing on the Roman-Dutch Law in the beginning of the 20th century. See *Zimmerman 1, supra* note 135, at 52; HAHLO & KAHN, *supra* note 127, at 214-82.

²⁰⁴ See AMOO, *supra* note 19, at 60.

²⁰⁵ *Liquor Licensing Proclamation 6 of 1920, in LAWS OF SOUTH WEST AFRICA, Vol. I, 1915-1922, at 163-92.*

proclamation is repealed in full.²⁰⁶ Under section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 this would be unnecessary had this area of law been encompassed by the Roman-Dutch Law.²⁰⁷

- To the contrary, the area of labor law as regulated by the Southwest-African Administrator's Masters and Servants Proclamation No. 34 of 1920²⁰⁸ is covered by the legal figure of *locatio conductio operarum*²⁰⁹ of the Roman-Dutch Law. This figure had not been replaced in full by the Masters and Servants Acts of the Cape Colony in 1856 and 1873,²¹⁰ as their provisions only applied to a certain class of employees,²¹¹ but remained in force alongside the statutory regulations of these Acts.²¹²
- As this prior British legislation thus had not torn away parts of the body of the Roman-Dutch Law, the Masters and Servants Proclamation was obviously meant not to patch, add to, or specify, but rather to effect an outright change to the Roman-Dutch Law in this regard. This proclamation can therefore be seen as an example of legislation intended to replace parts of the Roman-Dutch Law.
- Prime examples for the necessity to patch up cavities left in the body of the Roman-Dutch Law by British or South African statutes through legislation for Southwest-Africa can be found by looking at company law and the law of succession. British statutory law in the 19th century replaced almost all parts of Roman-Dutch Law related to company law.²¹³ The Southwest-African Administrator introduced the company law enacted for the South African Province Transvaal in

²⁰⁶ *Id.*

²⁰⁷ Administrative Proclamation Act 21 of 1919 (Cape).

²⁰⁸ *Masters and Servants Proclamation 34 of 1920*, in LAWS OF SOUTH WEST AFRICA, Vol. I, 1915-1922, at 336-66.

²⁰⁹ See *Zimmermann 1*, *supra* note 135, at 129-31; Eltjo Schrage, *Locatio Conductio*, in DAS RÖMISCH-HOLLÄNDISCHE RECHT. FORTSCHRITTE DES ZIVILRECHTS IM 17. UND 18. JAHRHUNDERT 245, 262-68.

²¹⁰ Masters and Servants Act 15 of 1856 (Cape); Masters and Servants Act 18 of 1873 (Cape).

²¹¹ Barney Jordaan, *Employment Relations*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 389, 397 (Reinhard Zimmerman & D.P. Visser eds., 1996); Rochelle Le Roux, *The Evolution of the Contract of Employment in South Africa*, 39 INDUS. L.J., June 2010, at 139, 143-44.

²¹² Jordaan, *supra* note 211, at 397-415; Le Roux, *supra* note 233, at 145-46.

²¹³ *Zimmermann 1*, *supra* note 135, at 12.

1909²¹⁴ *in toto* to Southwest-Africa in order to fill this gap.²¹⁵

English rules of law substituted from certain fundamental parts of the Roman-Dutch laws of succession. In 1874 the formal Succession Act replaced the rules of the Roman-Dutch Law relating to the legal portion of the share for heirs at law.²¹⁶ The provisions relating to the freedom of the testator to make a will thus were not part of the body of Roman-Dutch law transferred to Southwest-Africa and had to be re-established by Southwest-African statutory law. Accordingly, in 1920 the Administrator declared the Wills Proclamation.²¹⁷

- The difficulty of categorizing the various receptions of English rules of law into the body of the Roman-Dutch Law, and the legal uncertainties caused by its mere fragmentary transfer to Southwest-Africa can be exemplified by the short phrasing of the Bills of Exchange Proclamation.²¹⁸ Without relating to any specific act or proclamation, the Administrator simply introduced all laws on cheques and bills of exchange in force in the Cape Province to Southwest-Africa and declared all other provisions possibly in conflict therewith to be repealed.

The law on cheques and bills of exchange as codified in the Bills of Exchange Act of 1893²¹⁹ is thus considered to be one of the areas of the Roman-Dutch Law which had been influenced and changed the most by English-influenced legislation.²²⁰ The wording of the Bills of Exchange Proclamation of 1920, simply transplanting the relevant law of the Cape Province as a whole, allowed circumventing the complex legal question of the extent of these influences on the body of Roman-Dutch Law at the cost of customization and flexibility.

²¹⁴ Transvaal Companies Act (Act No. 31/1909) (Transvaal).

²¹⁵ *Companies Proclamation No. 35 of 1920*, in LAWS OF SOUTH WEST AFRICA, Vol. I, 1915-1922, 367-70.

²¹⁶ Succession Act §2 (Act No. 23/1874) (Cape).

²¹⁷ *Wills Proclamation 23 of 1920*, in LAWS OF SOUTH WEST AFRICA, Vol. I, 1915-1922, at 269-71.

²¹⁸ Bills of Exchange Proclamation 20 of 1920, in: LAWS OF SOUTH WEST AFRICA, Vol. I, 1915-1922, p. 230.

²¹⁹ Bills of Exchange Act 19 of 1893 (Cape).

²²⁰ Charl Hugo, *Negotiable Instruments*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 481, 485-520 (Reinhard Zimmerman & D.P. Visser eds., 1996).

In summary, the Administration of Justice Proclamation No. 21 of 1919 caused a great degree of legal uncertainty, because it did not provide for a transfer of statutory laws that had taken the place of the Roman-Dutch Law in certain areas. The extent to which the Roman-Dutch Law was transplanted to Southwest-Africa had to be checked in every single case of doubt, as no authoritative codification could be referred to for the *status quo* of the Roman-Dutch Law as practiced in the Cape Province at the time of transfer. While changes in the Cape Province after January 1st, 1920 did not apply to the Roman-Dutch Law transferred to Southwest-Africa, all legislation enacted in and for the Cape Province before this date had to be checked for possible effects on the body of the Roman-Dutch Law.

b) *Transplanting German Colonial Law*

This uncertainty in regard to the scope of the transplant of Roman-Dutch Law also affected the continuing validity of German colonial law. When examining whether a German rule of civil law was repealed under the provisions of section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919, one did not only have to compare the rule in question to the Roman-Dutch Law in a first step, but to further investigate whether a contrary provision of the Roman-Dutch Law had been modified or substituted by English-influenced legislation before having been transplanted to Southwest-Africa. In that case the German rule of law could only be repealed under the Proclamation No. 21 of 1919 if the “gap” caused by this influence in the body of the Roman-Dutch Law had been subsequently closed through corresponding legislation, thus necessitating a third step of confirmation. At least when relying on section 1 (1) of the Administration of Justice Proclamation No. 21 of 1919 to repeal German laws, the legislators were bound to thoroughly investigate the relationship of these laws to the body of Roman-Dutch Law as transplanted to Southwest-Africa.

However, looking at how contemporary legal practice dealt with possible conflicts, it becomes evident that this scientific approach was often neglected in favor of more practical solutions: When the existing *Gesellschaften mit beschränkter Haftung* (companies with limited liabilities) were—instead of being transformed or replaced—simply legally equated with newly founded proprietary limited companies through the Companies Proclamation of 1920,²²¹ the resulting legal question as to whether the rules of the German *Handelsgesetzbuch* (trade law) or the Southwest-African Companies Act of 1920 were to be applied for actions such as an increase in share capital, was circumvented. This was achieved by simply transforming the *Gesellschaften*

²²¹ Companies Proclamation 35 of 1920 § 14 in: *Laws of South West Africa*, Vol. I, 1915-1922, at 367-70.

mit beschränkter Haftung into proprietary limited companies, even though the Companies Act of 1920 did not provide a legal basis for this.²²² Thus, it did not become necessary to scrutinize if and to what extent the rules of the German *Handelsgesetzbuch* had been carried over into the new Southwest-African legal system.

In effect, because of the elusive restrictions imposed on the introduction of the Roman-Dutch legal system, the provisions of the Administration of Justice Act No. 21 of 1919 and thus the transplantation of both the Roman-Dutch Law and the German colonial law were laden with conflict.

5. Summary

After subjugating the former German colony in 1915, South Africa implemented custom-made constitutional legislation in Southwest-Africa. This legislation subsequently tailored and adjusted the changing political goals of the South African administration during the three phases of occupation. While it allowed for small and variable degrees of Southwest-African self-determination, it secured South African supremacy at all times.

Through the Administration of Justice Proclamation No. 21 of 1919, the Roman-Dutch Law “as existing and applied in the Province of the Cape of Good Hope” on January 1st, 1920 was introduced as the new common law of Southwest-Africa.²²³ At the same time, this Proclamation only repealed laws or rules of law in force at the time in conflict with the Roman-Dutch Law. Because of these provisions, German colonial laws were not abolished in their entirety. Instead, German laws not in conflict with this customized form of the Roman-Dutch Law were effectively transplanted into the new jurisdiction, either through “passive” perpetuation or explicit declaratory (re-)enactment.

The Roman-Dutch Law in general was disconnected from future legal developments in South Africa, unlike the prior framework implemented by the German Empire, which kept the underlying foundations of the legal system transplanted to the colony connected to the donor jurisdiction through the *Schutzgebietsgesetz* and *Konsulargerichtsbarkeitsgesetz*.²²⁴ While discrepancies between the fundamentals of the transplanted legal system and subsequent statutory law enacted for or transferred into the host jurisdiction—the legal inconsistencies that threatened the German colony²²⁵—were thus ruled out and were in turn replaced by another grave problem.

²²² See Lorentz & Bone, Windhoek, Case No. D 336/48 of November 28th 1949.

²²³ Proclamation 21 of 1919 (Cape).

²²⁴ See *supra* Part III. A. 5.

²²⁵ See *supra* Part III. A. 4. and 5.

The body of the Roman-Dutch Law was received fragmented and inchoate due to a number of influences—most notably the English common law and conflicting statutory provisions. It had not been transferred to Southwest-Africa in its whole form.²²⁶ As a result of this, the base on which further legislative measures had to be built was fragile and difficult to predict. This most notably became apparent when trying to ascertain the extent to which German colonial laws continued to apply.

It can be questioned whether these conflicts had been considered by contemporary jurists at all, as Southwest-African legal and legislative practice in general did not let itself be perturbed by the possibility of ramifications resulting from these shortcomings. Nonetheless, the “gaps” and “cavities” in the body of the Roman-Dutch Law and the relating uncertainty as to the perpetuation of German colonial law constituted a veritable theoretical obstacle, restraining the diligent lawgiver and lawyer.

C. *Namibian Independence*

1. Historical Overview

The South African occupancy officially ended on March 21st, 1990, the Namibian Day of Independence, when former SWAPO-leader and newly appointed State President Sam Nujoma swore an oath in front of the General Secretary of the United Nations to uphold the Namibian Constitution, which had been developed in less than three months by the Constituent Assembly.²²⁷

The constitution introduced a presidential democracy and a catalogue of basic rights, modeled after the German *Grundgesetz*. A myriad of international experts, legal scholars, and human rights organizations took part in its development, and it claimed to be one of the most modern constitutions of its time.²²⁸

Even though the constitution places much power into the hands of the president, and Namibian political realities often grant the majority party SWAPO—which has continuously been voted into power since the days of independence—an absolute majority in parlia-

²²⁶ See *supra* Part III. B. 4 a); Lockert, *supra* note 22, at 105-11.

²²⁷ Frank Leonhard Watz, *Die Grundrechte in der Verfassung der Republik Namibia vom 21. März 1990 [The Fundamental Rights in the Constitution of the Republic of Namibia of March 21, 1990]* (2003) (published Ph.D. dissertation, Christian-Albrechts-Universität Kiel, Göttingen, Windhoek) at 19-33 (detailing the course of the Constituent Assembly and the general layout of the Namibian Constitution).

²²⁸ *Id.* at 19.

ment, the constitution has stood the test of time. This is due to the well-functioning and largely independent judiciary.²²⁹

In the Namibian national economy, even though the importance of the tertiary sector with a focus on tourism has steadily grown in the years following independence, the natural resources still continue to play a vital role. The primary industries of fishing, farming, and mining formed a quarter of the gross domestic product in 2009.²³⁰ The share of the gross domestic product of mining alone measured 8% in 2012, while the mining sector at the same time accounted for 50% of the export volume of Namibia.²³¹

Diamond mining especially is still the driving force of the Namibian economy and continues to contribute to industrial growth just as it had during German colonial times and the days of South African occupancy. Between 1990 and 2006, diamond mining alone earned an average of 8-10% of the gross domestic product, while the rest of the mining industry averaged a share of 3%.²³² Accordingly, it continues to be highly regulated.²³³ Apart from diamond mining, the rise of corresponding prices on the world-market in the wake of the economic crisis of 2008 also has led to a renewed upsurge in the mining of uranium. In two mines, Namibia supplies 10% of the world's demands of uranium oxide, making Namibia the fourth largest producer in the world.²³⁴

2. Namibian Constitution

The interesting question of whether and to what extent the Namibian Constitution itself draws on other legal systems and incorporates transplants of legal rules cannot be answered in the scope of this analysis.²³⁵ With regard to the questions posed by this article and the results of its prior sections, the following description of the Namibian Constitution therefore limits itself to the examination of provisions relating to the transfer and incorporation of statutory laws as well as the Roman-Dutch Law into the nascent Namibian legal system.

²²⁹ See Lockert, *supra* note 21, at 120-23 (giving a detailed introduction to the Namibian judiciary); *id.* at 132-42.

²³⁰ See *id.* at 36.

²³¹ Central Intelligence Agency, *Namibia*, THE WORLD FACTBOOK, (Jan. 28, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>.

²³² Schneider, *supra* note 77, at 303.

²³³ See Lockert, *supra* note 21, at 180-87, 204-06, 224, 244.

²³⁴ Central Intelligence Agency, *Namibia*, THE WORLD FACTBOOK, (Jan. 28, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/wa.html>.

²³⁵ See Lockert, *supra* note 21, at 116-26 (providing an introductory overview of the Namibian Constitution); Watz, *supra* note 227 (providing a detailed analysis of the Namibian Constitution).

a) *Continuing Validity of Existing Statutory Laws*

In order to prevent the creation of a legal vacuum through the declaration of independence, the Namibian Constitution incorporates an all-out adoption of all laws in effect in Namibia on the date of independence, March 21st, 1990, in its Article 140 section 1:

The Law in Force at the Date of Independence

- (1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.²³⁶

In its Article 25 section 1 lit. (b), the Namibian Constitution makes further provisions for legal protection against laws predating the Constitution and the declaration of such laws as unconstitutional.²³⁷ Article 140 of the Constitution only provides detailed rules for the transfer and the interpretation of statutes of alleged South African origin—i.e. Acts, Proclamations and Ordinances—in its sections 2 to 5.²³⁸ Because of the clear wording of its section 1, which merely contains the broad and all-encompassing term “laws,” in lack of any clear provisions to the contrary, the Constitution’s Article 140 can only be interpreted in a way as to also encompass all German laws or rules of law still in force at the day of independence. Thus, the Namibian Constitution does not provide for a “clean cut” in legislation either, but upholds the basic line of legal continuity that can trace its beginnings back to German colonial times.²³⁹

b) *Continuing Validity of the Roman-Dutch Law*

The question whether the term “laws” of Article 140 section 1 of the Constitution can also be read to encompass the Roman-Dutch Law is made superfluous by Article 66 of the Constitution:

Customary and Common Law

- (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
- (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed

²³⁶ NAMIB. CONST. Art. 140 § 1.

²³⁷ See NAMIB. CONST. Art. 25 § 1 cl. b.

²³⁸ NAMIB. CONST. Art. 140 §§ 2-5.

²³⁹ See Lockert, *supra* note 21 (analyzing this line of continuity).

or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.²⁴⁰

According to the Constitution, both the customary law²⁴¹ and the Roman-Dutch Law as the common law of the land are valid sources of law, which—like all other sources of law—have to adhere to the primacy of the Constitution²⁴² and can be suspended or replaced by statutory legislation. In judicial practice, the constitutionality of all rules of the Roman-Dutch Law employed in court after the day of independence has to be put to a fundamental examination.²⁴³ A specific constitutional court does not exist. While there are no formal rules for this examination, courts must state the considered constitutionality of a rule when relating to a certain rule of the Roman-Dutch Law.²⁴⁴

3. Evaluation

The declaration of independence did not bring sudden cataclysmic changes to the everyday workings of the Namibian legal system. Instead, the newly elected Namibian government aimed for slow and smooth adjustments, fostering change without endangering the *status quo* of legal praxis.

The practice of transferring the Roman-Dutch Law and all statutory laws into the newly established Namibian legal system through the explicit provisions of Articles 66 and 140 of the Constitution can—just like the transfer of German colonial law during the times of South African occupancy²⁴⁵—be classified as a conscientious legal transplantation by means of “intended borrowing.”

While those transplants were not accompanied by acts of customization *per se*, both Roman-Dutch Law and statutory laws preceding independence were subjugated to the supremacy of the Namibian Constitution as the “supreme law of the land.”²⁴⁶ As such, the Constitution provided for means of customizing these transplants either directly through the powers vested in the new Namibian executive and

²⁴⁰ NAMIB. CONST. Art. 66 §§ 1-2.

²⁴¹ See AMOO, *supra* note 19, at 102-06; for a detailed examination of the customary law see HINZ, *supra* note 18.

²⁴² Because its Article 1, section 6 states that the Constitution is the supreme law of the land in Namibia, the provisions of its Article 66, section 1 are merely of a declaratory nature.

²⁴³ Myburgh v. Commercial Bank of Namib., 1994 NR 41 (HC); see AMOO *supra* note 19, at 105.

²⁴⁴ See AMOO, *supra* note 19, at 125 (comparing this to the practice of *obiter dicta*).

²⁴⁵ See *supra* Part III. B. 3.

²⁴⁶ See NAMIB. CONST. Art. 1 § 6.

legislative branches of government,²⁴⁷ or indirectly through review of their constitutionality by the judiciary.²⁴⁸

4. Conflicts

The provisions of Article 66 of the Namibian Constitution ensure a continuity of the application of the Roman-Dutch Law ever since its introduction into Southwest-Africa by the Administration of Justice Proclamation No. 21 of 1919.²⁴⁹ All vagueness and all ambiguities as to the range and scope of its application are evened out by the wording of Article 66 section 1 of the Constitution. This section does not relate to the Roman-Dutch Law as such, but merely to the “common law of Namibia” in force at the day of independence.²⁵⁰ This formulation does not only encompass the Roman-Dutch Law in its original or an amended form, but also all rules of law that have grown to become considered part of the common law of Namibia, whether as additions, supplements or substitutes to rules of the Roman-Dutch Law. In theory, this wording also allows for specific German rules of law to be part of the Namibian common law, provided that these rules had grown to be accepted as parts of the common law before the day of independence.

This provision, however, does not alleviate the effects of the shortcomings of the Administration of Justice Proclamation No. 21 of 1919 itself. The necessary examinations described above²⁵¹ theoretically still must be performed every time a specific rule of the Roman-Dutch Law is employed. While in practice all possible “gaps” or “cavities” in the body of the Roman-Dutch Law might have been filled by almost a century of South African and Namibian legislation, a source of legal uncertainty remains and has to be factored in by the diligent jurist.

Another source of legal uncertainty in praxis is the mandatory constitutional review of every rule of the Roman-Dutch Law, which makes it necessary for careful law-users to keep track of all decisions which have put the constitutionality of certain areas of the Roman-Dutch Law to a test, a task which is complicated by the fact that there is no dedicated constitutional court.

²⁴⁷ See NAMIB. CONST. Chs 5-8; see Lockert, *supra* note 22, at 116-29.

²⁴⁸ See NAMIB. CONST. Ch. 9; see Lockert, *supra* note 22, at 129-40.

²⁴⁹ Nico Horn, *The Independence of the Judiciary in Pre-independent Namibia: Legal challenges under the Pre-independence Bill of Rights (1985–1990)*, in *The Independence of the Judiciary in Namibia* 45, 45 (Nico Horn & Anton Bösl eds., Macmillian Education Namibia 2008).

²⁵⁰ NAMIB. CONST. Art. 66 § 1.

²⁵¹ See *supra* Part III. B. 2. c). (2).

5. Summary

For the first time since the days of German colonialism, Namibian independence enabled the people of Southwest-Africa to determine the course of their country's politics free from any external influence. The declaration of independence on March 21st, 1990 and the resulting sovereignty of the Republic of Namibia marked a political turning point in Southwest-African history.

However, this clear cut theory was not extended *ad hoc* from politics to the legal system. In order to avoid the creation of a legal vacuum, Namibian legislators, just like the South African oppressors before them, favored the slow and consecutive adjustment of the legal system, and opted for the—if only temporary—perpetuation of existing laws.

Through Articles 66 and 140 of the Namibian Constitution, the Roman-Dutch Law and existing statutory laws already applicable before the date of independence were intentionally “borrowed” and thus transplanted into the jurisdiction newly established by the Namibian Constitution. While the transfer itself had been all-encompassing, it did not alleviate the shortcomings of the Administration of Justice Proclamation No. 21 of 1919 of South African origin, namely the fragmentary introduction of the Roman-Dutch Law. In addition, the pre-existing laws were subjected to the supremacy of the Namibian Constitution. While this allowed for ample customization of these laws on the one side, the necessity of constitutional review by the judiciary—naturally—overshadowed the scope of their applicability with legal uncertainty of some extent on the other side.

As a result, parts of the underlying fundament of the Namibian legal system continue to be—at least in theory—weakened as to this day. Before a specific rule of traditional Roman-Dutch Law is put to use in Namibia, law-users not only have to ascertain whether this rule is indeed encompassed by the fragmented and therefore unique iteration of this body of law in force in Namibia, but also have to ensure its constitutionality by referencing it against the provisions of the Namibian Constitution.

IV. CONCLUSIONS

Notwithstanding the indigenous customary law practiced in Southwest-Africa since primeval times, the introduction of systematic, codified law can be traced back to the formation of the *Schutzverträge* with local chieftains by German colonialists. Starting from these humble beginnings, this article outlined the development of the modern Namibian legal system, re-tracing the implementation of German colonial law, the introduction of the Roman-Dutch legal system by South African occupants in the course of the 20th century, and the coming-into-effect of the Namibian Constitution.

Even though the Republic of Namibia only reached full sovereignty through its declaration of independence in 1990, the territory of Southwest-Africa formed a distinct jurisdiction during German and South African hegemony. This article portrayed how and to what extent legal transplants were used to introduce both German colonial legislation and South African laws and subsequently analyzed the resulting problems and conflicts encountered by the respective legislators and their successors.

As outlined in the introduction, these findings are not meant to be generalized, but should rather be seen as stand-alone examples for the execution of legal transplants. The feasibility of applying any *lessons learned* or *caveats* derived from these examples to upcoming undertakings of legal transplantation will have to be assessed on a case-to-case basis in the future.

For the German period, the use of legal transplants is exemplified by the introduction of German civil and criminal law within the set of rules provided by the *Konsulargerichtsbarkeitsgesetz* and the *Schutzgebietsgesetz*. This legal framework kept the transplanted laws connected to corresponding legal proceedings and developments in the “donor jurisdiction”—the German Empire—while also allowing for customization as a means of adapting to local circumstances. It lacked provisions for regulating conflicts between legislative changes originating in the donor jurisdiction and local acts of customization. Due to the political realities—the German Emperor effectively ruled supreme—this never became an issue during the lifespan of the Southwest-African colony. However, in light of the proceeding emancipation of the colonists, such conflicts were not to be ruled out completely. Had the “host jurisdiction” not been as dependent on the “donor jurisdiction” as it was in the given colonial setup, it might have become necessary to face these problems after all.

The South African period most notably stands for the introduction of the Roman-Dutch Law into Southwest-Africa. While the limitation of range and scope of its introduction served to circumvent the conflicts mentioned in the above paragraph, in this particular case it caused other, even more severe problems instead:

The introductory portrayal of the Roman-Dutch Law in this article shows that, after it had been subjected to English legal practice and legislation for more than a century, the body of the Roman-Dutch Law as practiced in the Cape Province on January 1st, 1920 had been full of “gaps” and “cavities.” As the South African statutory law that effectively filled out these “gaps” had not been transplanted into or enacted for Southwest-Africa *in complexu*, the body of Southwest-African Roman-Dutch Law remained incomplete.

This shortfall in turn not only affected the subsequent South African legislation for Southwest-Africa in general and the perpetua-

tion of German colonial law in particular, but continues to be a detriment to the jurisprudential manageability of Namibian common law and pre-independence statutory legislation as to this day. While in practice most of these “gaps” may have been filled out by subsequent statutory enactments, a readily accessible overview of these “patches” does not exist.

Due to lack of explicit provisions in statutory law, both diligent practitioners of law and academic scholars are forced to trace back the history of every single rule of the Roman-Dutch Law well into the 19th century before making a definite assumption about their applicability in Namibia. Likewise, unless ruled out by statutory enactment or an in-depth analysis on a case-to-case basis, the perpetuation of German colonial law into the Namibian jurisdiction remains a possibility.²⁵²

The Namibian example shows that successful legal transplanting not only demands consideration of the cultural, economic, and political backdrop in light of the connection between “host jurisdiction” and “donor jurisdiction” and corresponding customization of the laws in question, but first and foremost: accuracy, adequate care, and due diligence in jurisprudential execution.

²⁵² See Lockert, *supra* note 21 (providing an in-depth analysis of aspects of continuity in the development of the Namibian legal system and the perpetuation of basic rules of Imperial German mining law).

ENDANGERED ELEMENT OF ICSID ARBITRAL PRACTICE: INVESTMENT TREATY ARBITRATION, FOREIGN DIRECT INVESTMENT, AND THE PROMISE OF ECONOMIC DEVELOPMENT IN HOST STATES

*By: Felix O. Okpe**

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Abstract

The omission to define the term “investment” in the ICSID Convention is one of the most critical decisions that has led to inconsistent jurisprudence and the resulting debate regarding the propriety of the ICSID Convention and investment treaty arbitration. The legislative history and the circumstances leading to the birth of the ICSID Convention strongly suggest that its main objective is the protection and promotion of economic development in the host State. Most of the propositions aimed at giving a meaning to the term “investment” in ICSID arbitral practice have focused more on whether the scope of the meaning of “investment” should extend to any plausible “economic activity or asset.” The focus of this approach is flawed. It has relegated the element of “contribution to economic development” of the host State to the back seat of investment treaty arbitration. This article challenges this relegation as historic to the ICSID Convention. The article argues that from the standpoint of the host State, the ICSID Convention is meaningless if the analysis of the relationship between FDI and investment treaty arbitration excludes considerations of economic development in view of the omission in the ICSID Convention. The article hinges this argument on the implication of international development as the main foundation of the ICSID Convention. The article acknowledges the difficulty that may be associated with the determination of an “investment” that contributes to economic development, but contends that relegating the element of “contribution to economic development” to the back seat of investment arbitration is contrary to the main objective of the ICSID Convention in host States.

INTRODUCTION

The jurisdiction of ICSID arbitration is regulated by Article 25(1) of the ICSID Convention.¹ The gateway to ICSID arbitration and

¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, (entered into force October 14, 1966), available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (last visited Feb. 8, 2013) [hereinafter ICSID Convention]. The ICSID Convention established the International Center for Settlement of Investment Disputes (ICSID). The Convention was formulated by the Executive Directors of the International Bank for Reconstruction and Development (the “World Bank”). Article 25 (1) of the ICSID Convention provides:

practice is, more often than not, determined by the meaning that may be ascribed to the term “investment,” pursuant to the ICSID Convention and the applicable investment agreement governing the investment dispute. In other words, the jurisdiction of ICSID arbitration depends on the answer to the question whether or not the foreign investment that led to the investment dispute arbitration is an “investment” in line with the ICSID Convention.² ICSID arbitral practice has recognized and applied certain elements in the determination of an “investment” because the term is undefined in the ICSID Convention. In spite of the considerable consensus on certain elements that have been applied by arbitral practice in the determination of the meaning of “investment,” the jurisprudence of ICSID, which includes scholars, academics, and ICSID arbitral tribunals, are split on the definition of “investment.”³ Part of the debate revolves around the question of whether there should be a separate consideration of “contribution to economic development” of the host State of FDI as an element or characteristic of the meaning of an “investment” as the term is understood in the context of investment treaty arbitration in ICSID arbitral practice.⁴ However, the debate and propositions for a broader meaning of

The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Center by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.

² *ICSID Dispute Settlement Facilities*, THE WORLD BANK, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=Dispute+Settlement+Facilities&pageName=Disp_settl_facilities.

³ See, e.g., David A. R. Williams & Simon Foote, *Recent Developments in the Approach to Identifying an “Investment” Pursuant to Article 25(1) of the ICSID Convention*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 42, 47-48 (Chester Brown et al eds., 2011). (The authors addressed the piecemeal approach to identifying an “investment” pursuant to the ICSID Convention. They observed that “. . . the progressive development of international investment law on the topic of investment has led, perhaps inevitably, to piecemeal and sometimes inconsistent approaches to determining whether there is an investment as the term is used in Article 25(1)”).

⁴ CHRISTOPH H. SCHEUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 133 (2009). See also *Salini Costruttori S.P.A and Italstrade S.P.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (Jul. 29, 2001), 6 ICSID Rep. 400 (2004). The *Salini* ICSID Tribunal espoused what is now commonly known as the “Salini Criteria” in determining what constitutes of an “investment” in the context of the ICSID Convention. The decision of the Tribunal contributed immensely to the intellectual foundation of the debate over the meaning of “invest-

“investment,” without a consideration of whether the investment contributes to the economic development of the host State, forgoes a critical objective of the ICSID Convention.⁵ In this respect, the proponents appear to be more concerned with extending the meaning of “investment” to include any conceivable economic activity in the host State. The analysis in this article is focused on the element of “contribution to economic development” from the standpoint of what may be considered the main objective of the ICSID Convention and the legitimate expectation of host States in ICSID arbitration and international investment law.⁶ In carrying out the tasks in this article, it is pertinent to briefly comment on the concept of law and international development. An analysis of the relationship between law and international development may be utilized in understanding the circumstances and considerations that led to the negotiation and ratification of the ICSID Convention.

It has been argued that the rule of law with reference to development “has become significant not only as a tool of development policy, but as an objective for development policy in its own right.”⁷ This article questions the mechanism of investment treaty arbitration and

ment” in the ICSID Convention. At paragraph 52 the Tribunal held inter alia that “. . . [t]he doctrine generally considers that investment infers: Contributions, certain duration of performance of the contract and participation in the risks of the transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contribution and duration of the performance of the contract. As a result these various criteria should be assessed globally, even if, for the sake of reasoning the Tribunal considers them individually here.” The prescriptions of the *Salini* criteria have been criticized because the criteria espoused by the decision are not supported by the ICSID Convention. Thus it has been argued that applying the *Salini* criteria could lead to challenging the jurisdictional requirements of the ICSID Convention as a matter of law. See A. Martin, *Definition of Investment: Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?*, 11 GLOBAL JURIS. 1, 2 (2011).

⁵ See, e.g., Julian D. Mortenson, *Quiborax SA et al v Plurinational State of Bolivia: The Uneasy Role of Precedent in Defining Investment*, 28 ICSID REV. 254 (2013) (arguing that Article 25 of the ICSID Convention “should properly be understood to reach any plausible economic activity or asset”).

⁶ In the context of investment treaty arbitration, investment disputes may arise from the violations of foreign investment agreements or contracts as a result of the interference or the omission of the host State to act in a manner envisaged by the applicable legal regime or international investment agreements.

⁷ David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1 (David M. Trubek et al eds., 2006).

Foreign Direct Investment (FDI) in the context of the protection and promotion of foreign investment within the framework of the ICSID Convention.⁸ The ICSID Convention is part of an international mechanism for the arbitration of investment disputes negotiated by sovereign States to promote and protect foreign investment for economic development.⁹

It is appropriate to note that economic development is the outcome of a successful relationship between law and economics. For example Clarke, Murrell, and Whiting have argued that China's economic development and transformation success can be traced to the important role and process of law.¹⁰ These commentators find support in Justice Ocran who, writing extra-judicially, posited that the study of law and development should be consciously used to meet the challenges of economic development.¹¹ The process of economic development involves the interplay of law and economics that impact the quality of life and infrastructural development of a sovereign State.¹² Promoting and sustaining the economic development of a State challenges the political and economic activities of all sovereign States.¹³ Indeed, the phenomenon of globalization continues to make economic development a major challenge in developing countries. Developing countries strive to catch up with global economic development through the creation of international wealth for the benefit of its citizens and the international economy.¹⁴ The recent economic downturn in the United States, spreading to Europe and other parts of the world, stands as a testament to the reality of the inter-connectivity of the

⁸ ICSID Convention, *supra* note 1.

⁹ *About ICSID*, THE WORLD BANK, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowH%20ome&pageName=AboutICSID_Home.

¹⁰ Donald Clarke et al., *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 375, 377 (Loren Brandt et al. eds., 2008). See also Mashood A. Baderin, *Law and Development in Africa: Towards a New Approach*, 1 NIALS J. OF L. & DEV. 1, 4 (2011) (discussing the importance of law and development in Africa).

¹¹ TAWIA M. OCRAN, LAW IN AID OF DEVELOPMENT: ISSUES IN LEGAL THEORY, INSTITUTION BUILDING, AND ECONOMIC DEVELOPMENT IN AFRICA 17 (1978).

¹² *Id.*

¹³ Anthony Allot, *The Law of Development and the Development of Law*, in INTERNATIONAL LAW OF DEVELOPMENTAL COMPARATIVE PERSPECTIVES 49, 70 (Francis G. Snyder et al. eds., 1987).

¹⁴ See Robert Pritchard, *The Contemporary Challenges of Economic Development*, in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 1, 3 (Robert Pritchard ed., 1996) (arguing that "[a]ll countries aim to be as 'sovereign' and economically self-sufficient as they can possibly can. They have a need therefore for domestic financial institutions and mechanisms to encourage the highest possible level of domestic savings and to develop efficient domestic capital markets . . .).

global economy. From a legal perspective, the process of economic development makes the relationship between law and development¹⁵ relevant to the challenges of economic development.

The reference to law in the context of this article implies the combination of efficient domestic and international laws including statutes, systems, international norms, and treaties that are designed to promote and sustain economic development. The thesis of Trubek and Santos states that the theory of law and development ought to be examined as “the intersection of current ideas in the spheres of economic theory, legal ideas, and the policies and practices of development institutions.”¹⁶ In spite of the recognition of some scholars of the relationship between law and development, there is still considerable debate on the actual role of law in economic development, particularly with reference to international economic development.¹⁷ In other words, there is no consensus on the precise nature of the relationship between law and development.¹⁸ Pritchard puts the issue this way, “[d]espite the consensus which have emerged on many of these issues [economic development and foreign investment] the development process remains something of an international intrigue . . . many of the cast of this intrigue are very suspicious of each other.”¹⁹

However, this article hypothesizes that the place and role of law cannot be divorced from the process of economic development because law and development are mutually reinforcing factors. According to Morgan, “[t]he relationship between law and development, in the context of an integrated global economy, has moved from a niche area of study to an increasing central location in scholarly inquiry over the past several decades.”²⁰

The intrigue complained about by Pritchard may be unraveled by the progressive development or reform of the international norms, systems, or laws that interpret the process and the factors that impact

¹⁵ The reference to development in this article is in the context of economic development.

¹⁶ Trubek & Santos, *supra* note 7, at 4.

¹⁷ See generally, POVERTY AND THE INTERNATIONAL LEGAL SYSTEM: DUTIES TO THE WORLD'S POOR (Krista N. Schefer ed., 2013); SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW (Marie-Claire C. Segger et al. eds., 2011); GOVERNANCE, DEVELOPMENT AND GLOBALIZATION: A TRIBUTE TO LAWRENCE TSHUMA (Julio Faundez et al. eds., 2000); and INTERNATIONAL LAW AND DEVELOPMENT (Paul De Waart et al. eds., 1988).

¹⁸ Trubek & Santos, *supra* note 7, at 5.

¹⁹ Pritchard, *supra* note 14, at 4. The cast of the intrigue referred to by Pritchard comprises foreign investors and the host State with respect to the relationship between law and economic development.

²⁰ See LAW IN THE PURSUIT OF DEVELOPMENT: PRINCIPLES INTO PRACTICE i, xvii (Amanda Perry-Kessaris ed., 2010).

economic development. Economists believe that one of the factors that can influence and contribute to economic development is FDI in the territory of the host nation.²¹ Most developing countries solicit FDI to attract foreign capital that will, in turn, contribute to the economic development of the domestic economy.²² Put simply, FDI is the acquisition of assets, the transfer of capital, or the direct participation by a foreign investor in the economic activities of the host State.²³ FDI inflows into developing countries in Africa and Asia have increased since the 1980s.²⁴ The legal regime regulating FDI facilitates access to international markets, higher exports, and a means of importing foreign capital into the local economy. It is intended to create employment and impact infrastructural development of the host economy.²⁵ In other words, the inflow of FDI contributes to economic development. One reason for the need and increase of FDI to developing countries is that, regardless of the abundance of human and natural resources in these countries, these countries lack the necessary capital and technology to promote economic activities that can effectively develop the domestic economy.²⁶ The emergence and the interaction of the variables of FDI, investment treaty arbitration, and economic development in the paradigm of international investment law, is the product of the need to create a system of international law to attract investment to developing countries as a means to advance economic development.²⁷ As a result, the improvement of the international investment climate through the protection of foreign investment became one of the principal objectives

²¹ Vintila Denisia, *Foreign Direct Investment Theories: An Overview of the Main FDI Theories* 3 EUR. J. OF INTERDISC. STUD. 53, 53-59 (2010).

²² See Emma Ujah, *Foreigners Invest \$20 Billion in Nigeria within 3 Years-Okonjo-Iweala*, VANGUARD, Nov.12, 2013, at 16. (Ujah reported, quoting Nigeria's coordinating Minister for the Economy, Dr. Ngozi Okonjo-Iweala, that Nigeria's effort at attracting FDI has been successful in the last 3 years with the country up USD\$20 billion investment through FDI within the last 3 years); see also A. Ode, *The Robust Nigeria's Foreign Policy (2)*, GUARDIAN, May 16, 2013 at 84. (Ode is the spokesperson for Nigeria's Ministry of Foreign Affairs. Ode explained that "[i]n a bid to encourage and promote inflow of FDI into the country, Nigeria has signed bilateral agreements and MOUs with several countries in the areas of trade, technology cooperation, ICT, education, culture/tourism, etc.").

²³ See WTO Secretariat, *Trade and Foreign Direct Investment*, 6 PRESS/57 (Oct. 9, 1996) available at http://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

²⁴ See FOREIGN DISTRICT INVESTMENT IN SUB-SAHARAN AFRICA: ORIGINS, TARGETS, IMPACT AND POTENTIAL 1-2 (S. Ibi Ajayi ed., 2006).

²⁵ See Denisia, *supra* note 21, at 104.

²⁶ *Id.*

²⁷ See ANDREAS F. LOWENFIELD, INTERNATIONAL ECONOMIC LAW 536 (2nd ed. 2008).

of international investment law.²⁸ Accordingly, the World Bank created a Multilateral Investment Guarantee Agency (MIGA) as an incentive to attract private international investment for the purpose of promoting economic development in developing countries.²⁹ To be clear, the protection of foreign investment is based on the theory that the protection of foreign investment will encourage private international investment in developing economies. In what appears to be tacit support of this theory, the World Bank also initiated a concerted effort to design and establish a mechanism for international arbitration of investment disputes between State Parties and foreign investors.³⁰ The investment treaty arbitration mechanism initiated by the World Bank was created through the successful negotiation of the ICSID Convention.³¹ The tasks of this article are hinged on the theoretical assumption that “host States” connotes developing countries that offer investment arbitration in exchange for FDI into their domestic economies. The underpinnings of the ICSID Convention were designed to enable developing countries to give assurances for the settlement of investment disputes through arbitration in order to attract private international investments.³² This article analyzes the matrix of FDI and contribution to economic development in investment treaty arbitration under the ICSID Convention with reference to the jurisprudence of ICSID arbitral practice. Parts II-III of the article are devoted to the examination of the history of the ICSID Convention through a critical analysis of the *travaux préparatoires* and the law applicable in ICSID arbitration. In Part IV, the article argues that the mechanism for investment treaty arbitration attracts FDI. This connection between FDI and investment treaty arbitration calls for an independent consideration of contribution to economic development imperative in arbitral practice with respect to the ICSID Convention. Part V examines the classical theory of FDI as the intellectual foundation of why “contribution to economic development” should be the core element in investment treaty arbitration.

The article hypothesizes that the purpose of the ICSID Convention is the protection and promotion of foreign investment for economic

²⁸ See, Peter Muchlinski, *Policy Issues*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 4, 6 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

²⁹ For a more detailed discussion on the purpose of MIGA see IBRAHIM F.I. SHIHAT, MIGA AND FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY 22 (1988).

³⁰ See Multilateral Inv. Guarantee Agency [MIGA] Rules of Arbitration for Disputes Under Contracts of Guarantee art. 1, Jan. 1990, MIGGU Doc. GC-EQ-4, available at <http://www.miga.org/documents/Master-Rules-of-Arbitration.pdf>.

³¹ ICSID Convention, *supra* note 1, at 5.

³² *Id.* at 11.

development in host States. Accordingly, it draws inferences from the classical theory to theorize that economic development is the fundamental objective of FDI and the legitimate expectation of host States with respect to the ICSID Convention. Part VI reviews the decisions of the *SGS Cases* with reference to the definition of “investment” as the term is understood under the ICSID Convention.³³ This part of the article advances the argument that “contribution to economic development” should be the core element in investment treaty arbitration in the context of the ICSID Convention. In conclusion, the article acknowledges the difficulty that may be associated with the determination of an “investment” that contributes to economic development, but contends that relegating the element of “contribution to economic development” to the back seat of investment treaty arbitration endangers the main objective of the ICSID Convention in host States. This endangerment could generate dissatisfaction among hosts States against the ICSID Convention.

I. A BRIEF HISTORY OF THE ICSID CONVENTION AND THE PROMISE OF ECONOMIC DEVELOPMENT

At the end of the Second World War, there was a worldwide need to promote policies and programs that could spread international development, particularly in less developed countries in the third world. The attainment of political independence by third world countries from colonial masters that included Great Britain, France, Belgium, Portugal, and Spain also made international development imperative in developing countries. Against this background, the United Nations commissioned a report by the Secretary General on the international flow of private capital pursuant to Resolution 622 C (VII) passed in 1952.³⁴ Taking note of the findings of this report, this august body consequently passed a Resolution to promote the international flow of private capital for the economic development of underdeveloped countries at its 510th Plenary Meeting of 11 December 1954.³⁵ This Resolution received overwhelming support from the international community. The U.N. passed the Resolution on the basis that the flow

³³ The *SGS Cases* were better known for bringing the debate over the scope and interpretation of umbrella clauses to the fore of ICSID arbitration. Umbrella Clauses are provisions in BITs or investments agreements that create an international obligation on the host State to guarantee the observance of the investment contract it entered with the foreign investor. *See generally*, Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 *GEO. MASON L. REV.* 135, 135-77 (2006).

³⁴ G.A. Res. 622 C (VII), para. 5, U.N. Doc. A/RES/622 (Dec. 21, 1952)

³⁵ G.A. Res. 824 (IX), U.N. Doc. A/RES/824 (Dec. 11, 1954).

of private international investment to host States contributes to economic development.³⁶ The premise of the Resolution is that productive activities resulting from the international flow of private capital contributes to the standard of living and the development of human and natural resources.³⁷ The Resolution confirmed, “the flow of private investment has not been commensurate with the needs in those areas where rapid development is essential for economic progress.”³⁸ Based on the necessity of attracting foreign investment for proportionate international economic development, the Resolution recommended that countries seeking foreign investment should:

(a) Re-examine, wherever necessary, domestic policies, legislation and administrative practices with a view to improving the investment climate; avoid unduly burdensome taxation; avoid discrimination against foreign investment; facilitate the import by investors of capital goods, machinery and component materials needed for new investment; make adequate provision for the remission of earnings and repatriation of capital

(b) Develop domestic and foreign information services and other means for informing potential foreign investors of business opportunities in their countries and of the relevant laws and regulation governing foreign enterprise.³⁹

In what may be a confirmation of the purpose of creating a viable international investment climate for foreign investment as stated above, the Resolution declared that “in order for new foreign investments to be an effective contribution to the economic development of the under-developed countries, it is advisable to take into account, among other things, the situation with regard to previously established enterprises so as not to affect their normal development with the national interest.”⁴⁰ Furthermore, under Paragraph 1 (a-c), the Resolution recommended policy initiatives that might encourage and protect foreign investment in the territory of the host State.⁴¹ Admittedly, it appears that the declaration in Paragraph 5 of the Resolution points to the overall responsibility and purpose of foreign investment.⁴² This perspective may be justified by Article 1’s apparent reference to and emphasis of the economic growth of developing countries

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* ¶ 1.

⁴⁰ *Id.* ¶ 5.

⁴¹ *Id.* ¶ 1.

⁴² *Id.* ¶ 5.

as the natural consequences of the implementation of the recommendations under Article 1 (a-b).⁴³

A. Options and Limitations of the Settlement of Investment Disputes under Customary International Law

The Resolution passed by the United Nations significantly influenced the promotion of foreign investment through private international investment. It may have laid the foundation for the relationship of the variables of foreign investment and economic development. The efforts of the United Nations contributed to the principles of customary international law by regulating the principal actors in international investment law.⁴⁴ However, the traditional principles of customary international law regulating foreign investment subjected foreign investors to various barriers in their home courts as well as in the courts of the host State of their investments. Foreign investors lacked legal standing under international law in host States.⁴⁵ Since States are the traditional subject of international law, foreign investors must go through their home States' and host States' legal systems to settle foreign investment disputes.⁴⁶ Also, as Judge Tomka rightly noted, under customary international law, a State is only responsible for a breach of an international obligation occasioned by an unlawful act inimical to the principles of customary international law.⁴⁷ As a result, private disputes between foreign investors and State Parties became very difficult to pursue.⁴⁸

Some scholars suggest, under customary international law, that a State may assert sovereign immunity to restrict the jurisdiction or authority of a foreign court with respect to claims against the State or to protect that State's property against foreign enforcement measures.⁴⁹ In a case where a State asserts sovereign immunity, a foreign investor has limited options to pursue foreign investment claims. Simi-

⁴³ *Id.* ¶ 5.

⁴⁴ See Muchlinski, *supra* note 28, at 6. (Stating that “[t]he earliest legal rules concerning foreign investors and investment assumed a tripartite set of actors: the home state, the host, and the investor”).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Peter Tomka, *Are States Liable for the Conduct of Their Instrumentalities?: Introductory Remarks*, in STATE ENTITIES IN INTERNATIONAL ARBITRATION 7, 8-9 (IAI Ser. on Int'l Arbitration No. 4) (Emmanuel Gaillard and Jennifer Younan eds., 2008).

⁴⁸ See CHRISTOPHER F. DUGAN ET. AL., INVESTOR-STATE ARBITRATION 11, 20 (2008) (The authors explained that the assertion of sovereign immunity by the host State is absolute to prevent foreign investment claims against the State Party).

⁴⁹ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT.78-80 (2004) (1994).

larly, a foreign investor may also be denied legal process to assert investment claims based on the “act of state doctrine.”⁵⁰ Under this doctrine, the home State of the foreign investor denies the investor access to its court system on the ground that the cause of action is the act of a foreign state not subject to the jurisdiction of the investor’s home state.⁵¹ Therefore, the only clear avenue for the foreign investor to pursue investment claims against foreign states is through diplomatic intervention, or what is generally referred to as “gunboat diplomacy.”

Diplomatic intervention, or gunboat diplomacy, exists because of the international law obligation of States to protect alien property for the development of trade and investment in developing countries.⁵² In other words, this obligation under customary international law falls under the rubric of the “Responsibility of States for Injuries to Aliens.”⁵³ Gunboat diplomacy allows foreign investors to obtain relief in respect of foreign investment claims through their government diplomatic intervention or the use of armed force.⁵⁴ Capital export countries mainly employ gunboat diplomacy in cases of expropriation of alien property or investments.⁵⁵ However, gunboat diplomacy brings

⁵⁰ *See id.*

⁵¹ *See* David L. Jones, *Act of Foreign State In English Law: The Ghost Goes East*, 22 VA. J. INT’L L. 433, 435-56 (1982) (discussing the rule of non-justiciability in the context of the act of a foreign State); *see also* *Banco Nacional de Cuba v. Sabbatino*, 176 U.S. 398, 436-37 (1964) (where the United States Supreme Court held, *inter alia*, in an expropriation case that: “However offensive to the public policy of this country and its Constituent States an expropriation of this kind may be, we conclude that both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.”).

⁵² *See* Francis J. Nicholson, *The Protection of Foreign Property under Customary International Law*, 3 B.C. L. REV. 391, 391-93 (1965) (explaining that the development of international trade and investment created certain principles which placed an obligation on nations to protect the acquired property rights of foreigners).

⁵³ *Id.*; *see also* Edwin M. Borchard, *Theoretical Aspects of International Responsibilities of States*, in MAX-PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW 223, 224-30 (1929), http://www.zaoerv.de/01_1929/1_1929_1_a_223_250.pdf (discussing the theories and foundation of the international Responsibilities of State for injuries to alien property as a part of international law).

⁵⁴ Christopher K. Dalrymple, *Politics and Foreign Investment: The Multilateral Investment Guarantee and the Calvo Clause*, 29 CORNELL INT’L L.J. 161, 164 (1996).

⁵⁵ The allegation of expropriation of alien property or foreign investment against the host State is one of the most critical factors that define the nature of foreign investment disputes from the prism of investment treaty arbitration. Expropriation or nationalization of foreign investments in the territory of the host State is

limited succor to some foreign investors.⁵⁶ There are notable examples, such as where the United States and France employed it on behalf of their foreign investors in Venezuela and Mexico respectively in the 1860s.⁵⁷

Recourse to gunboat diplomacy in order to settle foreign investment disputes requires foreign investors to prove that they exhausted all local remedies to no avail.⁵⁸ A foreign investor may also have to prove citizenship to his home government.⁵⁹ The exhaustion of local remedies subjected foreign investors to the jurisdiction of the legal system of the host State. On the exhaustion of local remedies, Borchard explains that “the government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion.”⁶⁰ The foreign investor’s home State may refuse to directly seek relief on behalf of an investor for political reasons, regardless of whether or not the foreign investor has a good claim under international law.⁶¹ From the perspective of the foreign investor, subjecting investment claims to the jurisdiction of the host government may lead to a conflict of interest between the host government, the home government, and the foreign investor, thus creating an institutional bias.⁶² The conflict of interest between the foreign investor and the home State may also arise because of political expediency in the diplomatic relationship between the home State and the host State.⁶³ Salacuse has expressed the frustration of foreign investors this way:

permissible under international investment law. However, it must be for a public purpose, in accordance with due process of law and payment of compensation. The payment of adequate compensation has, more often than not, been the bone of contention in cases where expropriation is alleged against the host State by the foreign investor. Expropriation may be direct or indirect. Expropriation may be considered direct and easily ascertained, where an allegation of the actual taking of the alien property or foreign investment in the territory of the host State can be sustained against the latter. *See generally* Homayoun Mafi, *Controversial Issues of Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 18 INT’L J. HUMANITIES 83-85 (2011).

⁵⁶ DUGAN ET AL., *supra* note 48, at 27.

⁵⁷ *Id.*

⁵⁸ *Id.* at 30.

⁵⁹ *Id.* at 32.

⁶⁰ EDWIN M. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD TO THE LAW OF INTERNATIONAL CLAIMS* 817 (1925); *see also* DUGAN ET AL., *supra* note 48, at 30.

⁶¹ JESWALD W. SALCUSE, *THE LAW OF INVESTMENT TREATIES* 40, 40-41 (2010).

⁶² *Id.*

⁶³ *Id.*

The potential for conflict among the three parties [the foreign investor, the host country and the home country] is ever present. In most instances, conflicts arising out of foreign investments, results in disputes between the investor on the one hand, and the host country government, on the other. The home country of the investor may become engaged at the encouragement or request of its national. In such conflicts, the host country often considers the dispute to be subject to the host country law and host country legal and judicial process . . . [the] host government tends to see foreign laws and foreign courts as irrelevant to any issues of disagreement with foreign investors and may view any potential interference as an outright challenge to national sovereignty.⁶⁴

In addition to the issue of conflict of interest, there are also potentially serious questions about the impartiality and the credibility of the host country's legal system. This is due to the probable influence or prejudice of the host government against the foreign investor.⁶⁵ At the same time, the foreign investor has no recourse to the home country's legal system because of the doctrine of state sovereign immunity in customary international law.⁶⁶ Limited options to settle investor disputes present difficulties as they make foreign investors wary and skeptical about the prospects of their investments abroad.

Ultimately, the protection of foreign investment became a problematic issue in the international efforts aimed at promoting foreign investment for economic development. The economic development of the host State and the home State of the foreign investor could have been gravely affected if something was not done to address the legitimate concerns of foreign investors. Foreign investors from developed countries desire bigger foreign markets for investment in order to maximize FDI and repatriate profits that contribute to economic development in their home States. In contrast, developing countries want to attract foreign investment through private international investment for economic development.⁶⁷ Therefore, there arose a potential peril to the variables of foreign investment and economic development because there was no effective mechanism to protect foreign investment nor overcome its limitations vis a vis the settlements or adjudication of foreign investment claims. In other words, the absence of a generally

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ See Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, 36 FIN. & DEV. 34, 36 (1999), available at <http://www.imf.org/external/pubs/ft/fandd/1999/03/pdf/mallampa.pdf>.

acceptable system for the resolution of foreign investment disputes became the weakest link in the international quest for the promotion and protection of foreign investment. The problem became a significant issue for international organizations charged with international development, including the World Bank.

B. The World Bank, The ICSID Convention, and the Resolution of Investment Disputes

The World Bank,⁶⁸ established in 1944, assisted European postwar reconstruction and development at the end of World War II. With its success in Europe, the bank's responsibilities metamorphosed into pursuing programs for the global reduction of poverty and development in third world countries.⁶⁹ In the 1960s, the World Bank became concerned with the problem of settling disputes between foreign investors and host governments as an issue affecting the promotion of foreign investment.⁷⁰ On several occasions, the foreign investors and host governments approached the World Bank to mediate the settlement of their investment disputes.⁷¹ These overtures to the Bank to intervene were made against the background of the limited and unacceptable options open to foreign investors and governments under customary international law.⁷²

In a note to the Executive Directors of the World Bank on "Settlement of Disputes between Government and Private Parties," the General Counsel of the World Bank suggested the establishment of international arbitration as a way out of the imbroglio.⁷³ The General Counsel phrased the problem this way:

⁶⁸ See ICSID Convention, *supra* note 1. The World Bank as used in this context is distinguished from the World Bank Group. The World Bank Group currently consists of five organizations. Full details of the World Bank Group organizations are available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Jan.24, 2014).

⁶⁹ See *World Bank History*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS>.

⁷⁰ See Gautami Tondapu, *International Institutions and Dispute Settlement: The Case of ICSID*, 22 BOND L. REV. 81, 83 (2010).

⁷¹ See Excerpt of the Address by the President of the World Bank to the Annual Meeting of its Board of Governors, in HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 3 (Vol. II, Part 1, ICSID Publication 1968) (hereinafter HISTORY OF THE ICSID CONVENTION).

⁷² *Id.*

⁷³ *Id.*

1. The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made. In many cases these studies have recommended the establishment of international arbitration and/or conciliation machinery.
2. The absence of adequate machinery for international conciliation and arbitration often frustrates attempts to agree on an appropriate mode of settlement of disputes. Tribunals set up by private organizations such as the International Chamber of Commerce are frequently unacceptable to governments and the only public international arbitral tribunal, the Permanent Court of Arbitration, is not open to private claimants.⁷⁴

The General Counsel then proposed the establishment of an international mechanism for the conduct of arbitration of investment disputes through the creation of a permanent tribunal and the provision of facilities for conciliation as an alternative to arbitration. The General Counsel based his suggestions on the premise that States should recognize the possibility of direct access by foreign investors to an international platform for the settlement of disputes and that agreement to submit such disputes to international agreements are binding international obligations.⁷⁵ On September 19, 1961, recognizing that the World Bank was not fully equipped to resolve investment disputes, the President of the World Bank echoed the urgent need for an international arbitration system for investment disputes. The President declared that:

At the same time, our experience has confirmed my belief that a very useful contribution could be made by some sort of a special forum for the conciliation or arbitration of these disputes. The results of an inquiry made by the Secretary General of the United Nations showed that this belief is widely shared. The fact that governments and private interests have turned to the Bank to provide this assistance indicates the lack of any other machinery for conciliation and arbitration which is regarded as adequate by investors and governments alike. I therefore intend to explore with other institutions and

⁷⁴ *Id.* at 2.

⁷⁵ *Id.*

other member governments whether something might not be done to promote the establishment of a machinery of this kind.⁷⁶

The proposal and the suggestions of the General Counsel to the Executive Directors of the World Bank thus laid the foundation for the process to create the ICSID Convention.

The ICSID Convention is a product of three stages of intense negotiations: a World Bank internal drafting stage, regional meetings of legal experts from participating States, and a convocation of member-states delegates.⁷⁷ The convocation of delegates constituted the “Legal Committee” that prepared the final draft of the Convention for approval by the World Bank Executive Directors.⁷⁸ The most critical consideration for the birth of the Center came out of the need to look for innovations that could accelerate international economic development. The discussions started in June of 1962 when the World Bank commissioned a working group under the leadership of Aron Broches, the General Counsel of the Bank.⁷⁹ The World Bank mandated the working group to produce a draft Convention for internal consideration.⁸⁰ The first draft Convention produced by the working group extended jurisdiction to any dispute between the parties with a minimum amount in dispute of \$100,000, without reference to any subject matter restrictions.⁸¹ Upon review of the initial draft produced by the World Bank working group, others raised questions concerning the need to separate political or commercial disputes from disagreements over legal and contractual rights.⁸²

The questions raised in the initial draft laid the foundation for the exclusion of political or commercial disputes from the jurisdiction of the ICSID.⁸³ The second internal draft submitted in October of 1963 limited the jurisdiction of the Center to “any existing or future investment dispute of a legal character.”⁸⁴

Having specified and distinguished political or commercial disputes from foreign investments, why was the term “investment” not

⁷⁶ *Id.* at 3.

⁷⁷ World Bank, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of other States*, ¶ 7 (1965), available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section02.htm> (*hereinafter* Report of Executive Directors).

⁷⁸ *Id.*

⁷⁹ Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 282 (2010).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

defined? A consensus existed among members of the World Bank working group that investment disputes, to be adjudicated by the Tribunals constituted pursuant to the ICSID rules, must be purely of a legal character.⁸⁵ The earliest omission to define “investment” occurred when officials of the World Bank involved in the process declared their keenness not to create a process that could lead to incessant disputes over foreign investments.⁸⁶ Officials expressed the view that “to include a more precise definition would tend to open the door to frequent disagreements as to the applicability of the Convention to a particular undertaking, thus undermining the primary objective.”⁸⁷ It is evident from the preamble of the ICSID Convention that the need for economic development through private international investments is the main purpose of the ICSID Convention.⁸⁸ The following propositions are discernible from the preamble of the ICSID Convention: (i) to give assurances in writing to foreign investors mostly from the developed economies of the protection of foreign investment, and (ii) to encourage international economic development through private investments.

In support of the discernible propositions on the objective of the ICSID Convention, the history of the Convention confirmed, “if the plans established for the growth in the economies of the developing countries were to be realized, it would be necessary to supplement the resources flowing to these countries from bilateral and multilateral government sources by additional investment originating in the private sector.”⁸⁹ Therefore, the hypothesis is this: a mechanism that does not reflect or mandate the consideration of economic development of the host State is contrary to the primary purpose of the ICSID Convention. Once there is the admission of foreign investment, there should be a corresponding extension of the term investment to include contribution to economic development. But, the deliberate omission to define “investment” under the ICSID Convention appears to relegate the requirement of economic development to a back seat, and prioritizes assurances given to foreign investors within the framework of the ICSID Convention. The situation makes it difficult for developing economies to maximize the benefits associated with the purpose of the ICSID Convention.

⁸⁵ *Id.*

⁸⁶ ANTONIO R. PARRA, *THE HISTORY OF ICSID* 356 (2012).

⁸⁷ *Id.*

⁸⁸ ICSID Convention, *supra* note 1, at 1.

⁸⁹ Mortenson, *supra* note 79, at 263 n.14.

1. *The Council of Legal Experts*

This stage of the history of the Convention involved consultative meetings of legal experts of the negotiating parties that took place in Addis Ababa, Santiago, Geneva, and Bangkok between December 1963 and May 1964.⁹⁰ During this phase, the contentious issue of the meaning of “investment” created a dichotomy between capital-importing countries and capital-exporting countries.⁹¹ Capital-importing countries wanted a precise definition of investment while the capital-exporting countries preferred an unrestricted approach to the nature of disputes the Center could adjudicate.⁹² It is on record that Sweden canvassed for the exclusion of the term altogether.⁹³

To resolve the opposing contentions represented above, the World Bank proposed a definition of “investment” for the first time. The Bank defined “investment” as “any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years.”⁹⁴ The developed nations contended that the proposed definition was too restrictive, in that it could create impediments to investment agreements.⁹⁵ In contrast, developing countries articulated a narrower definition of “investment.”⁹⁶ Some developing countries wanted a regulatory framework that could guarantee the exercise of sovereignty through control of internal affairs that might overlap with the conduct of FDI.⁹⁷

The working group reported that there was an impasse between the contending blocs and within the working group itself on how to define “investment.”⁹⁸ It appears that the World Bank favored a broad definition of “investment” to protect international investments. This is because there was a consensus on the need to spread development to emerging economies, but not that the protection of foreign investment was the problematic issue. It is debatable whether the interests of foreign investors would be better served by a broader meaning of “investment,” but this perhaps explains the reason why the initial draft sent to the Committee of Legal Experts did not contain a proposed definition of “investment.” There is no other explanation in the history of the Convention except the reservations expressed by the working group of the World Bank at the drafting stage. The UK broke

⁹⁰ *Id.* at 283.

⁹¹ *Id.* at 284

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 286.

⁹⁵ *Id.*

⁹⁶ *Id.* at 287.

⁹⁷ *Id.* at 288.

⁹⁸ *Id.* at 289.

the impasse by proposing a solution that allows a broader reference to “investment” with powers given to State parties to stipulate their own definition of “investment.”⁹⁹ The UK’s proposition received wide support and acceptance.¹⁰⁰ The Convention eventually passed the Resolution for ratification in March of 1965.¹⁰¹ The UK’s proposal did not define “investment” per se, but rather deferred the issue to State parties in their conduct of FDI.¹⁰²

On the notification mechanism, Article 25 (4) of the ICSID Convention provides that “[a]ny Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Center of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Center.”¹⁰³

The solution proposed by the United Kingdom on the definition of “investment” may be contrary to one of the primary purposes of the Convention. It appears to be tailored to cater to the protection of foreign investments without any economic development considerations from the perspective of the host State. There was considerable agitation that the meaning of “investment” ought to be in accordance with the public interest.¹⁰⁴ According to the General Counsel of the World Bank, “nearly all the definitions [of investments] which had been proposed were in fact definitions of what the delegates involved believed their governments would in fact wish to submit to the center.”¹⁰⁵

Similarly, the consent provisions under Article 25 (4) enable host States to limit foreign investments in areas they wish not to submit to the jurisdiction of the Center to protect the State advancement of economic development.¹⁰⁶ Ultimately, the consent provisions could foreclose investment opportunities that may lead to economic development. Either way, critics defeated the consideration for economic development as the fundamental purpose of the ICSID Convention. Commenting on the controversy surrounding the omission to define “investment,” Mortenson argued that there was an unsuccessful attempt to define the term.¹⁰⁷ He stated that the consequence of the “failed” definition of “investment” is to give State parties to the ICSID Convention the freedom to define the term in their individual transac-

⁹⁹ *Id.* at 292.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 290-91.

¹⁰³ CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 82 (2001).

¹⁰⁴ Mortenson, *supra* note 79, at 289-90.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 293-94.

¹⁰⁷ *Id.* at 257.

tions.¹⁰⁸ Mortenson's analysis is incomplete as it fails to give adequate consideration to the implication of his argument on "contribution to economic development" as one of the main objectives of the ICSID Convention. The commentator was more frustrated about the failure of the Convention to define "investment" in much broader terms to include "any plausible economic activity" because he saw the compromise in Article 25 (4) as an appeasement to an influential Latin American Executive Director of the World Bank.¹⁰⁹

2. *The International Center for the Settlement of Investment Disputes*

The ICSID Convention is a multilateral treaty that provides for the settlement of investment disputes through arbitration. It established the Center to provide facilities for conciliation and arbitration of investment disputes between State Parties and Nationals of the signatories to the Convention according to the provisions of the ICSID Convention.¹¹⁰ In other words, the Center facilitates the resolution of investment disputes and does not by itself directly adjudicate investment disputes between contending parties. Through the ratification of the ICSID Convention, State Parties consent to the enforcement of the protections of foreign investments in exchange for private international investments to develop the host economy.¹¹¹ Sornarajah contends that a critical factor influencing the negotiation of the ICSID Convention was the desire of developed economies to increase protections for their investors abroad.¹¹² It has been held that the Center is conducive to the security of foreign investments through the provision of the mechanism for investment treaty arbitration.¹¹³ Therefore, it may be argued that the Center was established as part of a mechanism for the protection of foreign investments.¹¹⁴

The primary seat of the Center is the principal office of the World Bank in Washington, D.C. But, the seat of the Center for the

¹⁰⁸ *Id.* at 292.

¹⁰⁹ *Id.*

¹¹⁰ See ICSID Convention, *supra* note 1, Art. 1(2).

¹¹¹ See Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, GLOBAL BUS. & DEVEL. L.J. 337, 338 (2007) (analogously noting that "treaties offer foreign investors a series of economic rights, including the right to arbitrate claims, in hopes of attracting Foreign Direct Investment that will bring a country . . . economic stability").

¹¹² MUTHUCUMMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 41 (Cambridge Univ. Press 3rd ed. 2010).

¹¹³ Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, para. 57 (Apr. 16, 2009), available at <https://icsid.worldbank.org/ICSID/cases> (last visited Feb. 18, 2013).

¹¹⁴ *Id.*

purpose of investment treaty arbitration may be moved from place to place on the approval of the administrative council.¹¹⁵ The Center maintains a panel of Conciliators and Arbitrators that may be selected to arbitrate investment treaty claims between State parties and foreign investors.¹¹⁶ The Center's mandate is principally to address the shortcomings of customary international law in the resolution of investment disputes between private and State parties in the mechanics of foreign investment through private international investment.¹¹⁷ The advent of the Center made it possible for the first time under international law for a foreign investor to litigate claims directed against foreign states.¹¹⁸ Thus, Article 25 (1) provides that:

The jurisdiction of the Center shall apply to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated by that State to the Center) and a national of another Contracting State which the parties in dispute consented in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally.¹¹⁹

According to the ICSID Convention, a national of another Contracting State includes natural and juridical persons in law.¹²⁰ Based on Article 25 (1) of the ICSID Convention, a Tribunal constituted under the Rules of the Center may exercise jurisdiction over investment claims based on consent and agreement of the State Party and the foreign investor.¹²¹ It should be noted that the task of investment arbitration and conciliation within the framework of the Center is the responsibility of Conciliation and Arbitration Tribunals constituted pursuant to the ICSID Convention. In other words, the Center does

¹¹⁵ ICSID Convention, *supra* note 1, Art. 2.

¹¹⁶ *Id.* at Ch. I, Art. 3.

¹¹⁷ *See id.* at Introduction.

¹¹⁸ CHRISTOPH SCHREUER, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) 1 (2001) This statement may also be interpreted to mean that the right of investors to arbitrate claims against the host State may no longer be stymied by the host State legal system or the assertion of sovereign immunity.

¹¹⁹ ICSID Convention, *supra* note 1, Art. 25 (1).

¹²⁰ *Id.* Art. 25(2) a-b.

¹²¹ *See* ICSID Convention, *supra* note 1, Art. 26. For a more detailed examination of the element of consent in investment treaty arbitration see CHRISTOPH SCHREUER, CONSENT TO ARBITRATION 1, 5 (2007), available at http://www.univie.ac.at/intlaw/con_arbitr_89.pdf (last visited Jan. 9, 2013) (showing how the consent of the host State and the foreign investor to arbitrate investment claims is the bedrock of the jurisdiction of ICSID with respect to the ICSID Convention. Pursuant to the ICSID Convention, once there is consent to submit investment disputes to arbitration, that consent in itself excludes every other remedy in law).

not directly settle foreign investment disputes through arbitration or conciliation.¹²²

However, the ICSID Regulations and Rules that include the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) are not the only process for settlement of investment disputes through arbitration. There are other internationally recognized arbitration rules that may be utilized to institute investment arbitration. Examples include the United Nations Commission on International Trade Law (UNCITRAL) Rules,¹²³ the Stockholm Chamber of Commerce (SCC) Rules,¹²⁴ and the International Chamber of Commerce (ICC) Arbitration Rules.¹²⁵ However, most international investment agreements provide for ICSID arbitration.¹²⁶ Further analysis of the other Rules that may be utilized for investment arbitration are outside the scope of this article.¹²⁷ However, the analysis of the law applicable in ICSID arbitration should recognize economic development considerations in the host State.

II. THE LAW APPLICABLE IN ICSID ARBITRATION

The law applicable in ICSID arbitration comprises substantive law and procedural rules. It is widely known that substantive law must be distinguished from procedural rules where both regimes are applicable in the resolution of disputes between parties.¹²⁸ Substan-

¹²² Report of Executive Directors, *supra* note 77, para. 15.

¹²³ United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, available at <http://www.uncitral.org>.

¹²⁴ The Arbitration Institute of the Stockholm Chamber of Commerce, Rules, available at <http://www.sccinstitute.com/skiljeforfarande-2/regler-4.aspx>.

¹²⁵ International Chamber of Commerce, ICC Rules of Arbitration, available at <http://iccwbo.org>.

¹²⁶ Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENTS & TRADE LAW 231 (2004).

¹²⁷ See *id.* (showing that the ICSID Arbitration Rules and the UNCITRAL Rules are the most commonly used Rules in investment arbitration. State Parties and foreign investors often define “investment” in BIT(s) and other international investment agreements that may be applicable to the investment disputes. Under the other arbitration Rules such as UNCITRAL, ICC, SCC, a definition of investment only need satisfy the BIT or investment agreement definition, whereas an ICSID claim would need to satisfy both the definition in the BIT itself and the ICSID Convention. The test whether an “investment” exists in an ICSID claim is often referred to as the “double barreled” test or the “double keyhole approach”. For a further discussion of the “double barreled” test in ICSID arbitral practice, see also K. Yannaca-Small, *Definition of “Investment”: An Open-ended Search for a Balanced Approach*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 249-50 (2010).

¹²⁸ See JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 76-80 (14th ed. 2008).

tive law determines the rights and obligations while procedural rules provide the framework for the enforcement of the rights and obligations defined by substantive law.¹²⁹ The State party and the foreign investor choose the law applicable to ICSID arbitration based on the doctrine of party autonomy, but ICSID arbitration procedural law or rules are dictated by the relevant provisions of the ICSID Convention. In other words, while the parties to international arbitration within the framework of the ICSID Convention may agree on the applicable procedural law, such agreement cannot be contrary to the procedural provisions of the ICSID Convention. This limitation applies even where a particular procedural provision could only be read into the letters of the ICSID Convention in the context of investment treaty arbitration.

A typical example is offered by the principle of public policy in the application of procedural rules to regulate international arbitration. Along this line, Hirsch elaborates that the doctrine of public policy “prohibits an arbitration tribunal from applying rules that are contrary to the public policy of the state in which an arbitration is being conducted or that of the international community.”¹³⁰ Hirsch’s analogy is a common principle acceptable in international commercial arbitration, but it may be applicable to investment treaty arbitration on the theory that arbitral Tribunals may not apply a procedural rule that may violate a peremptory norm of international law. In what appears to be an attempt to justify the extension of the doctrine of public policy to ICSID arbitration, this article is drawn to the instructive hypothesis of Schreuer who notes that:

The matter is different with regard to certain basic international tenets that may be described as the public policy of the international community. These principles would include but not be restricted to the peremptory rules of international law. Examples are the prohibition of slavery, piracy, drug trade, terrorism and genocide, the protection of the basic principles of human rights and the prohibition to prepare and wage an aggressive war. Otherwise applicable rules, whether contained in the investment agreement itself or adopted by reference, which violate these basic principles, would have been disregarded by an ICSID tribunal. If any theoretical justification is needed for this conclusion, it can be found in the foundation of ICSID in the Convention and hence in in-

¹²⁹ MOSHE HIRSCH, *THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES* 116 (1993).

¹³⁰ *Id.* at 113.

ternational law which, in a wider sense, is the *lex fori* of ICSID arbitration.¹³¹

Schreuer's postulation above is significant to the theme of this article in two ways. First, it alludes to an international public policy with reference to investment arbitration in the context of the ICSID Convention. Second, it references the foundation of the ICSID Convention as the premise of the consideration of public policy. It seems self-evident that the foundation of the ICSID Convention and, by extension ICSID arbitration, is international economic development and the protection of foreign investment. Therefore, it would seem that the determination of the law applicable in ICSID arbitration should recognize considerations for contribution to economic development and the protection of foreign investment. More so, it is a basic tenet of the interpretation of treaties that a treaty like the ICSID Convention should be interpreted according to its object and purpose.¹³²

The substantive law applicable to ICSID arbitration is determined in accordance to the provision of Article 42(1) of the ICSID Convention, which provides:

The Tribunal shall decide disputes in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including rules on the conflict of laws) and such rules of international law that may be applicable.¹³³

Article 54(1) of the ICSID Additional Facility Rules confirms the salient provisions of Article 42(1) of the ICSID Convention.¹³⁴

Regardless of the clear provision of Article 42(1), it has been suggested that, in practice, arbitral Tribunals employ a combination of the intention of the parties and the law that has a reasonable connection to the investment dispute in the determination of the substantive law that is applicable in international arbitration.¹³⁵ This suggestion

¹³¹ Schreuer, *supra* note 118, para. 33.

¹³² See Vienna Convention on the Law of Treaties, art. 31(1), May 29, 1969, 1155 U.N.T.S. 335 (entered into force Jan. 28, 1980), available at http://www.un-treaty.un.org/ilc/texts/instruments/. . . /conventions/1_1_1969.pdf (last visited Mar. 9, 2013).

¹³³ ICSID Convention, *supra* note 1, Art. 42(1).

¹³⁴ ICSID Additional Facility Rules, art. 54(1), Apr. 2006, ICSID/11 ("The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.")

¹³⁵ HIRSCH, *supra* note 129, at 117.

is supported by the opening sentence of Article 42(1), which accords with the doctrine of party autonomy and encourages the State parties and foreign investors to express their intention with reference to choice of law to enable a Tribunal to give effect to that intention.¹³⁶ When read in full, Article 42(1) draws a sharp distinction between the applicable law chosen by the State party and the foreign investor and the responsibility bestowed on the Tribunal to apply the domestic law of the host State and principles of international law subject to conflict of law rules.¹³⁷ Pursuant to Article 42(1), the choice of law agreed to by the State party and the foreign investor may be in a self-contained investment agreement or national investment legislation.¹³⁸ ICSID jurisprudence is consistent with the principle that where there is a conflict between domestic and international law, the latter prevails.¹³⁹ Similarly, one author explains that “where the tribunal can find no guidance from the investment agreement on a particular issue, this may be treated by the tribunal as an ‘absence of agreement’ on the applicable law concerning that particular question.”¹⁴⁰ Once a Tribunal determines that there is an absence of agreement on the choice of law, that Tribunal may be guided by the second sentence of Article 42(1) which mandates an ICSID arbitration Tribunal to apply domestic law and the rules of international law that may be applicable.¹⁴¹ The connection of foreign investment to domestic law may arise out of a contract between the State party and the foreign investor.¹⁴² Once there is a clear choice of law between the investor and the State Party in the investment contract, the Tribunal should respect the intention of the parties pursuant to the first part of Article 42(1).¹⁴³

¹³⁶ See ICSID Convention, *supra* note 1, Art. 42(1).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See, e.g., CME Czech Republic B.V. v. The Czech Republic, UNCITRAL Arbitration Proceedings, Final Award, Mar.14, 2003) 9 ICSID Rep. 291, para. 91, where the Tribunal held, inter alia, that “[t]o the extent that there is a conflict between a national law and international law, the arbitral tribunal shall apply international law.”

¹⁴⁰ Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, in 19 STUDIES IN TRANSNATIONAL ECONOMIC LAW: ARBITRATING FOREIGN INVESTMENT DISPUTES, PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 401, 406 (Norbert Horn ed., 2004).

¹⁴¹ *Id.*

¹⁴² Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 191, 196 (Katia Yan-naca-Small ed., 2010).

¹⁴³ See Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law*, in THE LEADING ARBITRATOR’S GUIDE TO INTERNATIONAL ARBITRATION 185, XX (Lawrence W. Newman & Richard D. Hill eds., 2nd ed. 2008).

However, the language of the second sentence of Article 42 (1) appears to give ICSID arbitration Tribunals the discretion to determine the applicable law through an analysis of the relevant law of the host state and the principles of international law.¹⁴⁴ On one hand, and with reference to the second sentence of Article 42 (1), the host state law is relevant only to the extent that it is not in conflict with the principles of international law.¹⁴⁵ On the other hand, the exercise of discretion conferred on arbitral Tribunals by the second sentence of Article 42 (1) could be unpredictable and lead to inconsistency in the interpretation of the second sentence of Article 42 (1) of the ICSID Convention.¹⁴⁶ The major driving force of this distinction is the extent of the application of domestic law and rules of international law.¹⁴⁷ Banifatemi comments that a fundamental problem for Tribunals may be striking a balance of the law applicable in investment arbitration in the absence of an unequivocal choice of law clause.¹⁴⁸ Two ICSID arbitration cases demonstrate the unpredictability of arbitral Tribunals and find support in Banifatemi's skepticism with reference to the second sentence of Article 42 (1).

In *Wena Hotels Ltd v. Arab Republic of Egypt*,¹⁴⁹ the ad hoc committee considered whether the Tribunal applied the applicable Egyptian law pursuant to the second sentence of Article 42(1).¹⁵⁰ In the absence of a clear choice of law pursuant to Article 42(1), the ad hoc Committee held that in determining the applicable law, the his-

¹⁴⁴ Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, Of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18(2) ICSID REV. 375, 380 (2003) ("International law is thus part of the equation from the outset. The task for the tribunal deciding on any dispute pursuant to the second sentence of Article 42(1) is therefore to determine the respective roles of the law of the host State and of international law.").

¹⁴⁵ *Id.* at 381 ("A cursory reading of the literature and case law on the topic might lead to the conclusion that there exists a quasi-unanimous understanding according to which, in the absence of a choice of law by the parties, the role of international law is limited to supplementing the law of the host State where it contains *lacunae* or to correcting it where it is inconsistent with international law. Under this reading, the word 'and' in the second sentence of Article 42(1) is understood as meaning 'and, in case of *lacunae*, or should the law of the Contracting State be inconsistent with international law.'").

¹⁴⁶ *See generally id.* at 398 ("In the context of the choice of law process of the second sentence of Article 42(1) . . . the corrective role of international law is not devoid of ambiguities.").

¹⁴⁷ *See id.* at 380.

¹⁴⁸ Banifatemi, *supra* note 144, at 201.

¹⁴⁹ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding (Feb. 5, 2002), 6 ICSID Rep. 129 (2004), 41 I.L.M. 933 (2002).

¹⁵⁰ *Id.* ¶ 21.

tory of the ICSID Convention allowed for both domestic and international law to have a role.¹⁵¹ It added that both legal orders could be applied where there is justification, and likewise, international law can be applied by itself.¹⁵² This decision is in sharp contrast with the ruling of the Tribunal in *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*.¹⁵³ In this annulment proceeding, the ad hoc Committee considered the question whether the application of domestic law pursuant to Article 42 (1) can be fulfilled by reference to one basic principle.¹⁵⁴ The ad hoc Committee apparently examined this query against the second sentence of Article 42(1) of the ICSID Convention.¹⁵⁵ In response to the question, the ad hoc Committee held that “Article 42(1) clearly does not allow the arbitrator to base his decision *solely* on the ‘rules’ or ‘principles of international law.’”¹⁵⁶ According to the ad hoc Committee, the “arbitrators may have recourse to the ‘principles of international law’ *only after* having inquired into and established in the content of the law of the State party to the dispute . . . and *after* having applied the relevant rules of the State’s law.”¹⁵⁷

III. DOES INVESTMENT TREATY ARBITRATION MECHANISM ATTRACT FDI?

On the hypothesis that FDI contributes to economic development, it is fair to ask whether investment treaty arbitration mechanism attracts FDI.¹⁵⁸ It has been suggested that the substantive or procedural right to investment treaty arbitration is one of the strongest incentives for the protection of foreign investment in the host State.¹⁵⁹ As mentioned earlier, investment arbitration is designed to restore investors’ confidence and promote foreign investment against the limitations presented by the traditional methods of investment dispute resolution under customary international law.¹⁶⁰ The protection of foreign investment is a critical component of the international in-

¹⁵¹ *Id.* ¶ 37

¹⁵² *Id.* ¶ 40.

¹⁵³ *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Annulment Proceedings (May 3, 1985), 2 ICSID Rep. 95 (1994).

¹⁵⁴ *See id.* ¶ 68.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ¶ 69.

¹⁵⁷ *Id.*

¹⁵⁸ *See e.g.* Franck, *supra* note 111, at 354 (“Investment Treaty Arbitration: Promoting FDI?”).

¹⁵⁹ *Id.* at 341.

¹⁶⁰ *See supra*, Part 1.A.

vestment regime.¹⁶¹ It is unlikely that a foreign investor will engage in FDI in the host State without concrete assurances for the protection of foreign investment.¹⁶² One way this has been done is through the consent to investment treaty arbitration, a means by which the foreign investor can enforce his substantive and procedural rights against the host State.¹⁶³

Before embarking on the journey that metamorphosed into the ICSID Convention, the World Bank also espoused that the proposed dispute resolution mechanism is aimed to improve the investment climate and would thereby tend to promote the flow of private capital.¹⁶⁴ It was against this background that the World Bank took steps to study an international arrangement to facilitate the settlement of investment disputes between State parties and foreign investors that eventually led to the ICSID Convention.¹⁶⁵ However, protection of foreign investment is not the only factor that may stimulate FDI.¹⁶⁶ Potential foreign investors may also consider economic and political factors like market size, production costs, and political stability of the host State.¹⁶⁷ Nonetheless, the protection of foreign investment appears to be one of the most critical considerations in the conduct of FDI from the perspective of the foreign investor.¹⁶⁸ Thus, it would seem that if there is no protection mechanism, the consideration of the other factors may become unnecessary.

Nevertheless, the influence of the dispute settlement mechanism in attracting FDI is a contested issue. Some commentators believe that dispute settlement mechanisms, such as arbitration, attract FDI, but others insist that isolating investment arbitration from other substantive treaty rights may be impracticable.¹⁶⁹ There is limited

¹⁶¹ See Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. 131, 136 (“[T]he expansion of investment protections is designed to facilitate increased globalization through international investment.”).

¹⁶² See e.g. Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties*, 22 (William Davidson Inst., Working Paper No. 587, 2003), available at <http://econpapers.repec.org/paper/wdipapers/2003-587.htm> (“In the extreme, the distrust on both sides can be so large that little or no investment takes place, even when this investment would be beneficial to both parties.”).

¹⁶³ See generally, Franck, *supra* note 111, at 341-45.

¹⁶⁴ See DUGAN ET AL., *supra* note 14, at 49.

¹⁶⁵ See *id.*

¹⁶⁶ See Franck, *supra* note 111, at 349.

¹⁶⁷ See *id.*

¹⁶⁸ See, e.g., Tobin & Rose-Ackerman, *supra* note 162, at 22.

¹⁶⁹ Compare Franck, *supra* note 112, at 354-55 (stating that there is mixed evidence that investment treaties promote foreign direct investment), and Swenson, *supra* note 162, at 133-34 (contending that dispute-settlement procedures under

empirical evidence in favor of either position of the debate.¹⁷⁰ However, based on the antecedents of the ICSID Convention, the limitations of customary international law on the settlement of disputes between the foreign investor and the State party, and the relationship of FDI to economic development, a brief examination of the hypothesis on the issue is relevant to the task of this article.

Franck employed three hypothetical models with some evidence to explain the likely impact of investment treaty arbitration in attracting FDI to developing and host States.¹⁷¹ These models are: the Place Holding Model, the Political and Economic Reality Model, and the Market Liberalization Model.¹⁷² Franck adopts these models to describe the overriding consideration of foreign investors that determines the flow of private international capital compared to the hypothesis that investment treaty arbitration mechanism attracts FDI.¹⁷³ With reference to the Place Holding Model, the author theorized that foreign investors may overlook the consideration of investment treaty arbitration mechanisms to invest in a country that will provide an opportunity for them to establish a place in the economy of the host country.¹⁷⁴ The author cited China as a typical example of this model.¹⁷⁵ Franck conceded that an empirical evaluation of China's BITs may give a better picture of the effect of its BITs.¹⁷⁶ But China's success with attracting FDI has been traced to its extensive treaty network, offering an investment treaty arbitration mechanism to foreign investors for settlement of investment disputes.¹⁷⁷ Nonetheless, Franck's theory may be true prior to China's reform and expansion of its investment treaty network including its unconditional consent to arbitration under the ICSID Convention.

On the hypothesis of the Political and Economic Reality Model, Franck articulated that political and economic stability of the host State will make provisions for investment treaty arbitration unneces-

investment treaties reduce the uncertainty foreign investors believe they face in a host State), with Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties increase Foreign Direct Investment in Developing Countries?*, LSE RESEARCH ONLINE 28 (Feb. 2006), [http://www.eprints.lse.ac.uk/627/1/World_Dev_\(BITs\).pdf](http://www.eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf) (stating that foreign direct investments negligibly increased following a substantial increase in bilateral investment treaties.)

¹⁷⁰ See Franck *supra* note 111, at 355

¹⁷¹ *Id.* at 357

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ *Id.* at 359.

¹⁷⁵ *Id.* at 358.

¹⁷⁶ *Id.* at 358-59.

¹⁷⁷ NORA GALLAGHER & WENHU SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 28, 29 (Oxford Univ. Press, 2009).

sary.¹⁷⁸ Franck referred to Australia as an example, citing the Free Trade Agreement between Australia and the United States that retains permission with the Contracting Parties to permit arbitration of investment claims between the foreign investor and the State party.¹⁷⁹ It is conceivable that a stable economic and political environment may positively impact FDI in the host state, but the premise of this model appears to be based on the presumption that in a stable political environment investment disputes are rare and unlikely. Even where they occur, the decision to authorize investment arbitration lies with the Contracting Parties, as in the case between Australia and the United States concerning the Australian-United States Free Trade Agreement (AUSFTA).¹⁸⁰ In fact, Article 11.16 (1) of AUSFTA provides:

If a [Contracting] Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this chapter and that, in the light of such change, the Parties should consider allowing an investor of a party to submit to arbitration with the other Party a claim regarding a matter within the scope of this chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.¹⁸¹

Notwithstanding the above provision, Article 11.16(2) of AUSFTA allows an investor to bring or arbitrate an investment claim directly against the other Party to the extent that it is permitted under that Party's law.¹⁸² The provision in the AUSFTA may be likened to diplomatic intervention. The requirement of consultation at the instance of either of the State Parties may subject investors to the same limitations under customary international law that negatively impacted FDI. The conflicts of interest that may result through diplomatic intervention spurred consideration for an alternative international arrangement for the settlement of investment dispute that was championed by the World Bank.¹⁸³ Under international law, the espousal of diplomatic intervention and protection in the context of

¹⁷⁸ Franck, *supra* note 111, at 361.

¹⁷⁹ *Id.*

¹⁸⁰ Australia-United States Free Trade Agreement, May 18, 2004 (entered into force 1 January 2005), <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text> (last visited Mar. 13, 2013) [hereinafter AUSFTA].

¹⁸¹ *Id.* Art. 11.16(1).

¹⁸² *Id.* Art. 11.16(2).

¹⁸³ Franck, *supra* note 111, at 371-73.

international investment law is absolutely within the discretion of States.¹⁸⁴ The exercise of this discretion, more often than not, is subject to overriding political interests that may be at variance with the interests of the foreign investor.¹⁸⁵

Furthermore, through the Market Liberalization Model, Franck explains that reformation and modernization of an international investment regime in the host State will attract FDI regardless of whether or not there exists a mechanism for investment treaty arbitration.¹⁸⁶ The author relied on the limited presence or absence of investment treaty arbitration mechanisms in the international investment regimes of countries such as Brazil and Ireland. Franck made her strongest point with the examples of Brazil¹⁸⁷ and Ireland,¹⁸⁸ which have a commendable attraction of FDI in spite of the near absence of provisions for investment treaty arbitration in their respective international investment regimes. But, as the author noted, some trading countries are still skeptical and have been urging Brazil, for example, to reform its international investment regime to reflect international standard and best practices that includes investment treaty arbitration.¹⁸⁹

There is no question that investment treaty arbitration mechanism is an incentive that can attract FDI to host States. Justice Mohammed Uwais, a former Chief Justice of Nigeria, argued that the mechanism for investment arbitration is a critical element to attract foreign investments into Nigeria, a developing country. According to Justice Uwais, “[t]he importance of international arbitration as the preferred choice of settlement of commercial and investment disputes cannot be over-emphasized.”¹⁹⁰ Some commentators merely suggest that an investment treaty arbitration mechanism should not be isolated from other treaty rights contained in international investment

¹⁸⁴ JUHA KUUSI, *THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS* 36-40 (Saxon House, 1979).

¹⁸⁵ *Id.*

¹⁸⁶ Franck, *supra* note 111 at 362.

¹⁸⁷ *Id.* Brazil has no BIT in force. Resolution of foreign investment disputes are regulated by national investment legislation.

¹⁸⁸ *Id.* at 362-63. The Republic of Ireland has only one BIT in force, which is with the Czech Republic. *See* Agreement between the Czech Republic and Ireland for the Promotion and Reciprocal Protection of Investments, signed Jun. 28, 1996 (entered into force Dec. 1, 2011) (Czech-Ireland BIT), available at <http://www.dfa.ie/. . . /TREATY%20Series%202012/no.26%20of%202012.pdf>, (last visited Mar. 11, 2013).

¹⁸⁹ Franck, *supra* note 111, at 364.

¹⁹⁰ Mohammed Uwais, *Arbitration Will Attract Foreign Investment to Nigeria*, VANGUARD NEWSPAPER (LAGOS), Nov. 26, 2013, <http://www.vanguardngr.com/editions/> (last visited Nov. 26, 2013).

agreements.¹⁹¹ Even if one concedes to the reservations of the “non-isolationists,” it is hypothesized that the concept of the protection of foreign investment is incomplete without a mechanism for investment treaty arbitration. This article contends that investment treaty arbitration mechanisms attract FDI. One of the major reasons for the proliferation of investment treaties is the procedural and substantive rights it offers to foreign investors to arbitrate investment claims directly against the host State.

IV. A BRIEF ANALYSIS OF THE CLASSICAL THEORY OF FDI

The classical theory of foreign investments explains the relationship between foreign investment and economic development.¹⁹² The classical theory of foreign investment theorizes that the purpose of foreign investment is to develop the host economy.¹⁹³ The premise of this theory is that foreign investments ought to be utterly beneficial to the host economy.¹⁹⁴ This theory supports the hypotheses of this article on the relationship between foreign investment and economic development. Ball conveyed a convincing thesis on what appears to be the basis of the classical theory when he noted that “nations that elect to pursue policies that tend to eliminate the private sector or discriminate against outside investment should be aware that they are denying themselves a source of capital that could otherwise greatly speed their own economic development.”¹⁹⁵ Finding support in Ball, Sornarajah explains that the classical theory is supported by the fact that foreign capital exported into the host State through the process of foreign investment could be used for the public good which translates to economic development.¹⁹⁶ In this regard, Schreuer added that the impact of foreign investment on the host State economy accelerates creation of employment, infrastructural development, and technology transfer, and positively impacts facilities such as health care and transportation for the benefit of the investor and the domestic economy.¹⁹⁷ The main gist of the classical theory is in accord with development economics, which encourages the economic interaction of local

¹⁹¹ Stephan W. Schill, *Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?*, 4TH GLOBAL ADMIN. L. SEMINAR (June 13-14, 2008).

¹⁹² See generally Sornarajah, *supra* note 112, at 48-52.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ George Ball, Address to the United Nations Conference on Trade and Development, (1964) extracted from Kuusi, *supra* note 184, at 37.

¹⁹⁶ Sornarajah, *supra* note 112, at 51.

¹⁹⁷ *Id.*

resources with private international capital to maximize the benefit of foreign investment to the domestic economy.¹⁹⁸

Development economics is a branch of economic theory that specifically focuses on institutions and policies that regulate the process of economic development in under-developed countries.¹⁹⁹ The theory of economic development is a form of economic liberalism that metamorphosed from a movement concerned with finding an end to international poverty.²⁰⁰ The theory of economic liberalism is based on the assumption that industrialization is the path to economic development, and that developing countries should create an environment for the capital that will facilitate industrialization for such development.²⁰¹ The classical theory is further strengthened by the notion that no meaningful economic development can take place in developing countries in the absence of foreign investment. As a result, the standing of foreign investment as a critical component of the international development agenda cannot be overemphasized.²⁰²

Furthermore, the place and importance of foreign investment created the need for concerted efforts by international institutions not only to facilitate the flow of international investment, but to create measures and international policies that might guarantee the protection of investments. Sornarajah's thesis articulates that "focus on these beneficial aspects of the foreign investment flows enables the making of the policy-oriented argument that foreign investment must be protected by international law."²⁰³

The prescriptions of the classical theory may also be reflected in international instruments regulating the conduct of international investment law. The preamble of the ICSID Convention that alludes to the promotion and protection of foreign investment for the economic development of the host State is a classic expression of the classical theory of foreign investment.²⁰⁴ Similarly, the purpose and object of most international investment treaties are expressed in accordance with the hypotheses of the classical theory of foreign investment.²⁰⁵ The classical theory may also find eloquent expression in what Yusuf describes as the progression from the "rules of abstention" to the "rules

¹⁹⁸ Cf. *id.* at 51.

¹⁹⁹ See Debraj Ray, *Development Economics*, 1-5 (2007), available at <http://www.econ.nyu.edu/user/debraj/Papers/RayPalgrave.pdf> (last visited Mar. 13, 2013).

²⁰⁰ *Id.*

²⁰¹ *Id.* See also KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, INTERPRETATION* 90 (2010).

²⁰² Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 J. WORLD INVEST. & TRADE 357 (2007).

²⁰³ Sornarajah, *supra* note 112, at 52.

²⁰⁴ *Id.* at 50.

²⁰⁵ *Id.*

of international co-operation” in the development of the rules of international law to reflect the emergence of a legal framework for economic development in developing countries.²⁰⁶ Yusuf uses his thesis to argue the case for a special treatment for low-income countries as the basis to address the reality of economic inequality.²⁰⁷ In Yusuf’s analysis, “the rules of abstention” created a system where interaction between sovereign States was dominated by the politics of avoiding war that was based on reciprocity, with little or no emphasis on international cooperation between States.²⁰⁸ The premise of the “rules of international co-operation” progresses from the theory of abstention that recognizes the need for maximizing international collaborative efforts “which in turn may widen the perception of these common interests and of the collaborative efforts to be undertaken in their pursuit.”²⁰⁹ Yusuf added that the emergence of international co-operation was necessitated by the occurrence of international events that shaped the character of international law in the nineteenth and twentieth centuries.²¹⁰ The author alluded to the Russian Revolution of 1917 and the emergence of the socialist States in Eastern Europe, a massive trend of independence of former colonies in Asia and Africa, and the greater involvement of States in the control of economic activities prior to World War II.²¹¹

Nevertheless, the classical theory of foreign investment has been criticized for promoting inequality in the host State and for not doing enough to eradicate poverty among the poor in the host State.²¹² In this sense, poverty is a symptom of underdevelopment in the host State. There are also legitimate concerns that the repatriation of capital by the foreign investor from the host State is much more than the capital inflow associated with the particular investment, thereby denying the host economy much needed capital that could be reinvested into the local economy to promote economic development. Similarly, technology transfer to the host State through foreign investment may not be as advantageous as presumed. According to Sornarajah, “it is usually the case that the technology that is introduced into the host state has become obsolescent in its state of origin.”²¹³ Indeed, the transfer of management skills to local workers is uncommon with for-

²⁰⁶ ABDULQAWI YUSUF, *LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES: A STUDY IN THE EVOLUTION OF INTERNATIONAL LAW* 24, 24-25 (1982).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 24.

²⁰⁹ *Id.* at 24-25.

²¹⁰ *Id.*

²¹¹ *Id.* at 25.

²¹² VANDELDELDE, *supra* note 201, at 97.

²¹³ Sornarajah, *supra* note 112, at 49.

foreign investors in host States.²¹⁴ The social corporate responsibility of foreign investors in the form of infrastructural development that may include provision of healthcare, education, energy, and social services are illusory in most cases.²¹⁵ The criticisms of FDI in this respect are valid. For example, the presence of oil giants Shell Global and Chevron Oil operating in Nigeria's oil-rich Niger Delta has done little to improve the economic development of the Ogoni region.²¹⁶

Despite the legitimate questions and criticisms of the classical theory of foreign investment, its underpinnings still dominate the phenomenon of globalization. As shown above, the classical theory is at the heart of international investment law's progressive development. The purpose of FDI, from the perspective of the host State, is not in doubt; the protection of international investments in the host State was at issue because of the limitations for the protection of foreign investment created for the foreign investor by the nuances of customary international law. The promotion and protection of international investment should not be divorced from the purpose of international investments. The criticisms of the classical theory of foreign investment perhaps demonstrate that the problem with the classical theory is how to properly harness its tenets to ensure protection and promotion of foreign investment for economic development. If there is evidence that foreign investment promotes economic growth, then there is a stronger case for the recognition that foreign investment "contribute[s] to the economic development" of the host State in the context of investment arbitration.

V. THE *SGS CASES* REVISITED: WHY "CONTRIBUTION TO ECONOMIC DEVELOPMENT" SHOULD BE CONSIDERED IN ICSID ARBITRATION.

It is important to understand the divergent interests of the major players in foreign investment when defining the term "investment."²¹⁷ These interests may be reflected by two important considerations. First, foreign investors either directly or, within the framework of an applicable international investment agreement, usually ensure that foreign investments are structured beyond a mere

²¹⁴ *Id.* at 49-50.

²¹⁵ *Id.* at 50.

²¹⁶ *Id.* at 79.

²¹⁷ From an investment treaty arbitration perspective, the major players connected with conduct of FDI within the framework of Bilateral Investment Treaties and other international investment agreements are: the foreign investors (which is either a natural or legal person from the State party), the host government and ICSID. See STEPHEN D. COHEN, *MULTINATIONAL CORPORATIONS AND FOREIGN DIRECT INVESTMENTS* (2007).

contractual relationship to maximize the advantages offered by international arbitration. Such safeguards are mostly determined through an assessment of the definition of “investment” in an investment agreement or other laws that form part of the host State’s legal framework for the conduct of foreign investment relating to the transaction in issue.²¹⁸ Second, host States prefer a definition of “investment” that could stimulate the flow of foreign investments that have the potential to impact economic development. In what appears to be a confirmation of these contrasting interests, it has been argued that, “treaties [BITs] offer foreign investors a series of economic rights, including the right to arbitrate claims in hopes of attracting FDI that will bring a country infrastructure projects, financing, know-how, new jobs, and economic reality.”²¹⁹

These contrasting interests on the definition of “investment” under the ICSID Convention were played out in the ICSID arbitration case of *SGS Societe Générale de Surveillance S.A. v. Republic of the Philippines*.²²⁰ In this case, the Republic of the Philippines entered into an agreement with Societe Générale de Surveillance S.A. (SGS), a Swiss company, to carry out, on an exclusive basis, Pre-Shipment Inspection (PSI) in any country of export to the Philippines.²²¹ Under the contract, inspection would cover quality, quantity, and price comparisons.²²² The relevant articles of the agreement required SGS to maintain a liaison office in the Philippines and to provide, free of charge, training courses for the Philippines Bureau of Customs (BOC), the provision of customs equipment to the BOC and maintenance thereof, intelligence/investigative consultants, and a library stocked with the most comprehensive trade publications from the twenty leading exporting countries to the Philippines.²²³ The agreement at issue provided that all provisions were to be governed in all respects and construed in accordance with the laws of the Philippines, and all disputes in connection with the obligations of either party to the agreement shall be filed in the Regional Trial Courts of Makati or Manila.²²⁴ In exchange for the performance of SGS’s obligations, the Philippines agreed to pay SGS, in Swiss francs, a fee amounting to 0.6

²¹⁸ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Individual Concurring Opinion, ¶ 2, (Mar. 15, 2002), 6 ICSID Rep. 310 (2004).

²¹⁹ Franck, *supra* note 111, at 338.

²²⁰ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objection to Jurisdiction, ¶¶ 99-100, (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

²²¹ *Id.* ¶ 19.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* ¶ 22.

percent of the Free On Board (FOB) value declared on the exporter's final settlement invoice covering each shipment inspected.²²⁵ The Philippines and Switzerland have a binding treaty agreement for the Promotion and Reciprocal Protection of Investments.²²⁶

SGS commenced investment treaty arbitration for alleged breaches of the agreement between it and the Republic of the Philippines by relying on the provisions of the Swiss-Philippines BIT.²²⁷ Citing relevant provisions of the BIT, SGS initiated arbitration under Article 25(1) of the ICSID Convention contending that: there is a dispute of a legal nature, arising directly out of an investment, between a contracting State and a national of another contracting State, and the parties have consented in writing to ICSID arbitration.²²⁸ The Republic of the Philippines challenged the jurisdiction of the Tribunal, contending that there was no "investment" in the Philippines in accordance with the purpose of the ICSID Convention.²²⁹ The Philippines also argued that the dispute was purely contractual.²³⁰ The Tribunal found for SGS, holding that the circumstances and elements of the services provided by SGS were sufficient to qualify the service as one provided in the Philippines.²³¹ According to the Tribunal, "[s]ince it was a cost to SGS to provide it, this was enough to amount to an "investment" in the Philippines within the BIT."²³²

In the earlier case of *SGS Societe Générale de Surveillance S.A. v. Islamic Republic of Pakistan*,²³³ SGS and the Islamic Republic of Pakistan entered into a PSI Agreement signed in 1994 similar to the service agreement signed with the Philippines. The PSI Agreement included an arbitration clause that provided that all disputes must be

²²⁵ *Id.* ¶ 20.

²²⁶ *Accord Entre la Confédération Suisse et la République des Philippines Concernant la Promotion et la Protection Réciproque des Investissements*. [Agreement Between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investment], Switz.-Phil., Mar. 31, 1997, available at http://unctad.org/sections/dite/ia/docs/bits/switzerland_philippines_fr.pdf (last visited Feb. 24, 2014).

²²⁷ *Philippines*, 8 ICSID Rep. 518, ¶ 26.

²²⁸ The ICSID Convention established the jurisdictional requirements of investment treaty arbitration. ICSID Convention, *supra* note 1, at Art. 25(1).

²²⁹ *Philippines*, 8 ICSID Rep. 518, ¶ 51

²³⁰ *Id.*

²³¹ *Id.* ¶ 112 (concluding that the dispute regarding "services" was within the meaning of Article 25(1) of the ICSID Convention).

²³² *Id.* p 103 (explaining the elements are sufficient when taken together).

²³³ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, (Aug. 6, 2003), available at <https://icsid.worldbank.org/ICSID/FrontServlet> (last accessed Feb. 9, 2003).

settled in Pakistan.²³⁴ The dispute in this case arose when SGS alleged a breach of contract against Pakistan for failing to make timely payments under the contract.²³⁵ When communications initiated by the parties to resolve the issue failed, SGS filed suit against Pakistan in the Swiss Court of First Instance in Switzerland.²³⁶ Pakistan prevailed in the Swiss courts²³⁷ when it contended that, in the PSI Agreement, the parties had chosen to arbitrate any disputes arising out of the contract before an arbitration tribunal in Pakistan.²³⁸ SGS later brought a claim against Pakistan at the Center in accordance with Article 9(2) of the Swiss-Pakistan BIT that provided for arbitration within the framework of the ICSID Convention.²³⁹ Before the Tribunal, SGS contended that Pakistan violated Article 11 of the BIT by failing to guarantee observance of its contractual commitments.²⁴⁰ The tribunal, while siding with Pakistan held that it had no jurisdiction over contractual claims and decided conclusively in favor of SGS that it has jurisdiction over SGS BIT claims.²⁴¹

The focus of this article is the impact of the Tribunals' decision on the definition of "investment" with respect to considerations of contribution to economic development. It is apparent that the Tribunals in the SGS cases adopted a broad interpretation of the BITs in question to determine that the service contracts and subject matter of the disputes were protected "investments" in the applicable BITs. SGS prevailed on the issue of jurisdiction in the Philippines case because that Tribunal was of the view that since "a substantial and non-severable aspect of the overall service was provided in the Philippines . . . SGS entitlement to be paid was contingent upon that aspect."²⁴² However, the basis of the definition of "investment" ought to be the inten-

²³⁴ *Id.* ¶ 1.

²³⁵ *Id.* ¶ 12.

²³⁶ *Id.* ¶ 19-20.

²³⁷ *Id.* ¶ 23. The Swiss Courts rejected SGS claim because of the arbitration clause in the PSI agreement.

²³⁸ *Id.*

²³⁹ *Id.* ¶ 101 (explaining Pakistan consented to submit all disputes to arbitration).

²⁴⁰ Entre la Confédération Suisse et la République Islamique du Pakistan Concernant la Promotion et la Protection Réciproque des Investissements [Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investment], Switz.-Pak., July 11, 1995. *available at* http://unctad.org/sections/dite/ia/docs/bits/switzerland_pakistan_fr.pdf (last visited Jan. 9, 2014).

²⁴¹ Matthew Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*, 43 *TEX. INT'L L. J.* 523, 539 (2008) (examining the tribunal's reasoning regarding jurisdiction).

²⁴² *Philippines*, 8 *ICSID Rep.* 518, ¶ 102 (explaining the tribunal's view of jurisdiction).

tion of the State party and the foreign investor on what constitutes an “investment” within the framework of the ICSID Convention, and not on the discretion of an arbitral Tribunal unsupported by any concrete rules of interpretation within the enabling ICSID Convention with reference to the definition of “investment.”

It is a truism that the foreign investor has had no part in the negotiation of the ICSID Convention. This fact raises the issue of investment in “Arbitration without Privity”²⁴³ and undermines the relevance of the intention of the State party and the foreign investor in the context of ICSID arbitration and treaty law. Generally, the agreement to arbitrate is a contract binding on the parties that have agreed to it. However, this article contends that the investor-state relationship, with reference to ICSID arbitration, integrates the concept of privity because the ICSID Convention was formulated between States for the benefit of the States parties and nationals of other States.

In the Philippines case, the Tribunal accepted SGS’s argument that its assets in the Philippines pursuant to the contract, juxtaposed with the BIT under review, fell within the “non exhaustive definition of [foreign] investments under Article 1(2) of the BIT.”²⁴⁴ In that Tribunal’s determination of an “investment,” this paper contends that the Tribunal should have made a “contribution to economic development” consideration of the protected investment in accordance with the purpose of the ICSID Convention. Once the issue of whether or not there is an “investment” in the territory of the host State is raised by either the State party or foreign investor, a Tribunal should consider “contribution to economic development” of the investment in issue. The protection of foreign investments and the attraction of foreign capital to promote domestic economic development are paramount to the conduct of foreign investment in host States. The protection of foreign investments through the mechanism of the ICSID Convention makes it imperative to consider why States enter into International Investment Agreements (“IIAs”).

On the intentions of States in entering IIAs and in international investment law, Garcia-Bolivar opined that States enter into IIAs to protect foreign investments with the expectation to attract foreign capital to promote domestic economic development.²⁴⁵ Garcia-Bolivar argued that the expectation of States should be interpreted to

²⁴³ See generally Jan Paulsson, *Arbitration Without Privity*, 10 FOREIGN INV. L.J. 232, 232-57 (1995).

²⁴⁴ *Philippines*, 8 ICSID Rep. 518, ¶¶ 48-49.

²⁴⁵ Omar E. Garcia-Bolivar, *Economic Development at the Core of the International Investment Law Regime*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 587 (Chester Brown & Kate Miles eds., 011).

include the protection of foreign investment and the anticipated domestic economic development of the host economy.²⁴⁶

In the face of the inconsistent approach of arbitral practice to “contribution to economic development” as a core element in investment treaty arbitration,²⁴⁷ the arbitral panel in *Malaysian Historical Salvors Sdn. Bhd v. Malaysia* held that, for a foreign investment to come under the adjudicative mechanism of the ICSID, it must be shown that there is a substantial contribution to the economic development of the recipient State.²⁴⁸ Prior to this case, the panel in *Ceskoslovenska Obchodni Banka, A.S v. Slovak Republic*²⁴⁹ relied on the preamble of the ICSID Convention to infer “an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”²⁵⁰

Other Tribunals have disagreed with the approach of the arbitral Tribunals in the *Malaysian Historical Salvors* and *Slovak Republic*. As shown in this article, arbitral Tribunals have registered inconsistent views with respect to defining investment. On the other hand, Garcia-Bolivar’s proposition was based on what ought to be the basic core element of the adjudicative principle of treaty investment arbitration.²⁵¹ Still, it is argued that international investment agreements should contain express provisions that reflect the intentions of the State parties that execute BITs.

The purpose and preamble of investment agreements are insufficient to convey the intention of the State parties of BITs. A system of arbitration that leaves room for speculation as to the parties’ intentions with investment treaty arbitration is bound to produce inconsistencies that could negatively impact the credibility of the process. The conduct of FDI through BITs, though revolutionary, cannot sustain the development of international investment law if its purpose is only to correct the limitations of multilateral treaties to resolve the uncertainties of customary international law in favor of foreign investors from developed economies.

Garcia-Bolivar’s thesis is in accord with the dissenting opinion of Judge Shahabuddeen in *Malaysian Historical Salvors v. Malay-*

²⁴⁶ *Id.*

²⁴⁷ See *Malaysian Historical Salvors, SBN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, ¶¶ 13-16 (April 16, 2009), available at <http://www.worldbank.org/icsid/cases> (last accessed Dec. 7, 2013).

²⁴⁸ *Id.* ¶61.

²⁴⁹ *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, (May 24, 1999), available at <http://www.worldbank.org/icsid/cases> (last accessed Dec. 22, 2013).

²⁵⁰ *Id.* ¶ 64.

²⁵¹ Garcia-Bolivar, *supra* note 245.

sia.²⁵² Judge Shahabuddeen pointed out that a proper consideration of ICSID objective jurisdiction with reference to the definition of “investment” includes a requirement for a consideration of “contribution to the economic development of the host state.”²⁵³ According to Judge Shahabuddeen, “the need for a contribution to the economic development of the host State is consistent with both the formative documents of ICSID and case law.”²⁵⁴ Indeed, the preamble of the ICSID Convention states, *inter alia*, that the ICSID Convention was formulated “considering the need for international co-operation for economic development, and the role of private international investment therein; bearing in mind that from time to time disputes may arise in connection with such investments between Contracting States and nationals of other Contracting States.”²⁵⁵ Commenting on the preamble of the ICSID Convention, the Tribunal in *Slovak Republic* stated that “[t]his language permits an inference that an international transaction which contributes to the co-operation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”²⁵⁶ Similarly, in *Patrick Mitchell v. Democratic Republic of the Congo*, the Tribunal cited the opinion of Schreuer on the interpretation of the preamble of the ICSID Convention, that contribution to economic development is the “only possible indication of an objective meaning’ of the term ‘investment.’”²⁵⁷

If the *raison d'être* of the host States for entering IIAs is to attract capital that would finance and promote economic development, a consideration of whether or not a particular transaction is an “investment” within the scope of Article 25(1) of the ICSID Convention ought to include contribution to economic development. This article contends that the objective requirements of Article 25(1) of the ICSID Convention, with reference to the definition of “investment,” when considered together with the purpose of the ICSID Convention, put economic development and the protection of foreign investments at the core of ICSID arbitration and the international investment law regime. Therefore, in the absence of a concrete definition of “investment” in the ICSID Convention, an “investment” should not be determined under the ICSID Convention in the absence of a consideration of contribution

²⁵² *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, (Shahabuddeen, J., dissenting), (Apr. 16, 2009), available at <http://www.worldbank.org/icsid/cases> (last visited Dec. 7, 2013).

²⁵³ *Id.* ¶ 65.

²⁵⁴ *Id.* ¶ 15.

²⁵⁵ See ICSID Convention, *supra* note 1, at 11.

²⁵⁶ *Ceskoslovenska Obchodni Banka*, ICSID Case No. ARB/97/4, at ¶ 64.

²⁵⁷ *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 31 (Nov. 1, 2006).

to economic development. Such construction would be contrary to the object and purpose of the ICSID Convention.

The view of the Tribunal in *Joy Mining Machinery Limited v. Arab Republic of Egypt*²⁵⁸ ought to guide arbitral Tribunals. This Tribunal made a convincing point when it held that, for the purpose of ICSID jurisdiction, the parties to an investment dispute cannot by agreement define “investment” outside the objective requirements of Article 25 of the Convention, otherwise Article 25’s definition of “investment” will be nugatory.²⁵⁹ If the SGS Tribunals had considered contribution to economic development of the host State, substantial parts of the contract in the SGS cases that were performed outside the host State might have been critical in the determination of the meaning of “investment” with reference to Article 25(1) of the ICSID Convention.

However, a fundamental weakness of the consideration of contribution to economic development within the meaning of Article 25(1) of the ICSID Convention is how to determine investments that contribute to the domestic economic development of the host State. Do they have to be substantial, significant, or only minimal? ICSID case law on the consideration of contribution to economic development has been inconsistent on the issue. Some Tribunals that have attempted to consider contribution to economic development in the context of Article 25(1) of the ICSID Convention have applied different paradigms on what transactions constitute a contribution to the economic development of the host State. In *Malaysian Historical Salvors*, the Tribunal held that for a transaction to contribute to the economic development of the host State, the “contract must have made a significant contribution to the development of the respondent.”²⁶⁰ According to this Tribunal, “were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an investment.”²⁶¹ However, in *CSOB*, the Tribunal considered the benefits of a loan contribution to the host State’s public interests to reach a decision that the loan, even though devoid of visible transfer of resources, was an “investment” that contributed to the economic development of the Slovak Republic.²⁶²

²⁵⁸ *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award, ¶ 50 (Aug. 6, 2004), 19 ICSID Rev. FILJ 486 (2004).

²⁵⁹ *Id.*

²⁶⁰ *Malaysian Historical Salvors*, ICSID Case No. ARB/05/10, at ¶ 124.

²⁶¹ *Id.* ¶ 123.

²⁶² *Ceskoslovenska Obchodni Banka*, ICSID Case No. ARB/97/4, at ¶ 76.

In the more recent case of *Inmaris v. Ukraine*,²⁶³ contribution to economic development was disregarded altogether. The investment dispute in that case arose over a contract to renovate and operate a ship owned by the Respondent for tourism and training purposes.²⁶⁴ The Tribunal rejected a formal approach to apply the test and held instead that “[t]he State Parties to a BIT agree to protect certain types of economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means that they believe that the activities constitute an ‘investment’ within the meaning of the ICSID Convention as well.”²⁶⁵

The majority of the Tribunal in *Malaysian Historical Salvors* annulled the award of the sole arbitrator because considering contribution to economic development elevated the criteria to a jurisdictional requirement that excluded “small contributions of a cultural and historical nature,” which was not supported by the ICSID Convention.²⁶⁶ Still, in the opinion of this article, the difficulty and inconsistency expressed by some Tribunals in the analysis of the criteria should not be construed to mean that contribution to economic development is irrelevant with reference to the meaning of “investment” in the ICSID Convention. In the absence of a concrete definition of “investment” under Article 25(1) of the ICSID Convention, the Convention will be meaningless if Article 25(1) is construed to exclude contribution to economic development contrary to the purpose of the ICSID Convention from the perspective of the host States. As a Tribunal rightly noted, “there exists a definition of an investment within the meaning of the ICSID Convention.”²⁶⁷

VI. CONCLUSION

In view of the preceding analysis, the mechanism of foreign investment and investment treaty arbitration particularly under the ICSID Convention should not be divorced from the goal of contribution to economic development. The expectation of host States in international investment law is the utilization of foreign capital to promote and advance economic development. This expectation with reference to the ICSID Convention cannot be fully achieved in the absence of an independent consideration of the element of contribution to economic

²⁶³ *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 129 (Mar. 8, 2010).

²⁶⁴ *Id.* ¶ 35.

²⁶⁵ *Id.* ¶ 130.

²⁶⁶ *Malaysian Historical Salvors*, Icsid Case No. ARB/05/10, ¶ 80(b).

²⁶⁷ *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 232 (Mar. 8, 2008).

development in the determination of an “investment” in ICSID arbitral practice.

It has been argued in this article that the presence of the principles of the classical theory of FDI in international investment agreements is a testament to the paramount importance of economic development.²⁶⁸ This article contends that there is no logical counter to the theory that contribution to economic development is the reason that developing countries as host States embraced the idea of the ICSID Convention. The expectation of contributing to economic development explains the positive attitude shown by most developing countries in the process leading to the conclusion of the ICSID Convention and the establishment of ICSID. For example, Tunisia was the first State to sign the ICSID Convention on May 5, 1965, and Nigeria was the first State to ratify the ICSID Convention on August 23, 1965.²⁶⁹ While it may be conceded that the inconsistent investment arbitration jurisprudence as to the definition of “investment” may have contributed to the relegation of the consideration of contribution to economic development, it is submitted that the embracing rubric of the ICSID Convention should be interpreted by arbitral Tribunals beyond the protection of foreign investment to include consideration for contribution to economic development of the State. This will ensure a balanced approach to the interpretation and application of the principal objective of the ICSID Convention that might create a better opportunity for host States to maximize the benefits of the ICSID Convention in the context of investment treaty arbitration.

The reasoning of most arbitral Tribunals that international investment arbitration mechanism has the final say on the adjudication of investment disputes makes it more imperative for host States to reform their international investment regimes to reflect their legitimate expectations. It is hoped that such a normative and legislative approach might bring the issue of contribution to economic development to the altar of international arbitration to get the proper attention in the context of the ICSID Convention. Ignoring considerations for contribution to economic development in investment treaty arbitration could fuel dissatisfaction among host States against the ICSID Convention.

²⁶⁸ See *supra* Part II.

²⁶⁹ AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PREPARATION AND INSTITUTIONAL DEVELOPMENT 221 nn.36-37.

ASSESSING EFFECTIVENESS OF INTERNATIONAL PRIVATE REGULATION IN THE CSR ARENA

By: Martijn W. Scheltema¹

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1. INTRODUCTION

One might take many angles on the effectiveness of international private regulation.² These turn on the method of assessing effectiveness. This method might involve a legal perspective. However, one may acknowledge the importance of other scientific disciplines to assess the effectiveness of international private regulation, too. In this respect an economic, sociological, or psychological/behavioral avenue are all avenues for exploration.³ Obviously, the more avenues that demonstrate effectiveness, the more effective private regulation is deemed to be. Moreover, an integrated approach is required to thoroughly assess the effectiveness of international private regulation. However, the notion of effectiveness is unspecified. One might use this notion of effectiveness in addition to the legal or sociological avenue or as a synonym for impact assessment (which adopts insights from the economic and sociological approach). I define effectiveness, in line with my call for an integrated approach, as an overarching notion entailing legal, economic, sociological, and psychological/behavioral avenues. Therefore, this article outlines a methodology that adopts all of these approaches and uses insights from all of these disciplines to find *ex ante* indicators predicting the effectiveness of international private regulation and to find instruments to measure the effectiveness thereof *ex post* in comparison with other international private regulation.⁴ Because international private regulation is omnipresent in the international arena and might differ depending on locale, this contribution will focus on international private regulation in the Corporate Social Responsibility (“CSR”) arena.⁵

² International private regulation is also referred to as transnational private regulation to distinguish it from inter-state regulation. However, the term transnational is also used to point at inter-state regulation. Therefore, the term transnational does not offer more clarification. Still it is important to notice that international private regulation is not inter-state regulation, but either regulation set by private entities or non-binding rules/principles emanating from governmental entities or multi stakeholder initiatives.

³ See *infra* Part 2.2.

⁴ Therefore, this methodology might be less fit to assess the effectiveness of local initiatives. Furthermore, comparing the effectiveness of international private regulation might be more viable at this stage than establishing an overarching global framework entailing requirements for this type of regulation because relevant stakeholders do not (yet) agree on these requirements throughout the global CSR arena. However, eventually overarching global standards (throughout the CSR arena) might be derived by comparing these initiatives.

⁵ Hence, the methodology is best equipped to assess the effectiveness of international private regulation that covers one or, preferably more, of the CSR topics (human rights, environment, labor conditions, prevention of corruption, and evasion of taxes).

2. INTERNATIONAL PRIVATE REGULATION

International (or transnational) private regulation (in the CSR area), sometimes referred to as self-regulation (which seems to be a narrower term), has a very broad meaning and encompasses many different private regulatory frameworks.⁶ Self-regulation is defined as a set of private norms that have been established, sometimes in collaboration with others, by those who are bound by these rules: their representatives or an overarching body and these norms being enforced.⁷ Self-regulation might also be defined as a framework in which societal actors to a certain extent accept responsibility for establishing and/or applying and/or enforcing such rules, if applicable, within a legislative or legal framework.⁸ The key actors in such regimes include both non-governmental organizations (“NGOs”) and enterprises.⁹ Although private regulation in many instances has a self-binding effect, in many cases it also intentionally affects third parties.¹⁰ International private regulatory regimes are international (or transnational) in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties. International or transnational private regulation differs from traditional domestic forms of private regulation because of its broader scope and reduced specificity in many cases.¹¹

Sometimes private regulation is referred to as soft law. Although soft law is connected with private regulation, it is not the same. Soft law, on the one hand, stems from public entities (the common regulator), and on the other hand is not part of public regulation

⁶ See, e.g., Larry Cata Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Regulator*, 39 Conn. L. Rev., 1739, 1751-60 (2007). The explanation in this contribution focuses on international private regulation which has regulatory intentions or effects on social and economic behavior. Norms governing such matters as identity are not a subject of research.

⁷ Arno Overmars, *Effecten van Gedragcodes: Twee Recente Cases*, in Bestuurswetenschappen 14, 16 (2011).

⁸ IVO GIESEN, *ALTERNATIEVE REGELGEVING IN PRIVAATRECHTELIJKE VERHOUDINGEN 74-78* (Kluwer, Deventer, the Netherlands 2007) (advice for the Dutch Lawyers Association).

⁹ Colin Scott et al., *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J.L. & Soc’y 1, 3 (2011).

¹⁰ Cf. Anthony Ogus & Emanuela Carbonara, *Self-regulation*, in PRODUCTION OF LEGAL RULES 228, 228-30 (Francesco Parisi ed., 2d ed. 2011). For example in supply chain regimes rights of third parties might be implemented or protected. See, e.g., Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT’L L.J., 1557, 1582, 1589 (2013).

¹¹ Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J.L. & Soc’y 163, 164 (2011).

(commonly referred to as hard law). In that respect soft law is different from private regulation that might, as will be elaborated on herein, become part of public regulation. Furthermore, unlike soft law, international private regulation provides for hard sanctions.

Many different private regulatory frameworks exist, especially at the global level. However, the term international, or transnational, private regulation lacks a comprehensive and integrated set of common principles.¹² This stems from international private regulation that rarely takes the form of formal and informal delegation of rule-making by public entities and using a broad range of regulatory devices that might be of a rather soft legal nature (such as codes), but also of a hard nature (such as contracts).¹³ Furthermore, virtually anyone could undertake private rulemaking because no restrictions are imposed by law, unlike the process of formal rulemaking by public entities.

Many examples of international private regulation are found in the field of CSR. These regimes codify, monitor, and in some cases certify firms' compliance with labor standards, environmental, human rights, and anti-corruption.¹⁴ These regimes provide a response to broader political conflicts over the appropriate balance between states and markets in determining such matters as the entitlement to the protection of human rights and protection of the environment.¹⁵ Therefore, these regulatory regimes deal with matters that used to be the prerogative of governments, but are increasingly implemented by enterprises. It should be noted that research has revealed the considerable decrease of the number of treaties and the increase of private regulatory frameworks since 2000. These private regimes depend on politics and hold a kind of global governance without global government.¹⁶ Beside the CSR forms of international private regulation on which this paper focuses, international private regulation exists in many other areas, including financial aspects of firms governed by rat-

¹² Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. Soc'y 20, 21 (2011).

¹³ Curtin & Senden, *supra* note 11, at 164. It is pretended that regulation should be made at the closest possible level to the regulate. See Ogus & Carbonara, *supra* note 10, at 230. In between soft law and contracts are model agreements to be used in a certain industry. See, e.g., THE MODEL MINING DEVELOPMENT AGREEMENT, MMDA (2013) available at http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf. See also VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org> (last visited March 13th 2013) which is also connected to the extracting industry.

¹⁴ Cf. Scott et al., *supra* note 9, at 3.

¹⁵ *Id.* at 3-4.

¹⁶ *Id.* at 4.

ing agencies and accounting firms.¹⁷ Other regimes address activities characterized by market-oriented needs for intervention and coordination, as with technical standards regimes.

2.1 *Four Types of International Private Regulation*

Some CSR regimes are primarily driven by industry, while others are driven by joint endeavor of industry and NGOs. The latter regimes are often complimented by public intervention or public involvement.¹⁸ These regimes pursue different objectives and incorporate multiple dimensions and degrees of public interest depending on the composition of their respective governance bodies and the effects they have on the public at large.¹⁹ International private regulation in the field of CSR clearly reflects this. Industry driven regimes focus on rule making. These differences are reflected in the choice of governance models, the enforcement mechanisms, and particularly in the balance between judicial and non-judicial enforcement.²⁰ Taking the possibilities of enforcement and the acceptance of international private regulation, as elaborated herein, as a baseline assessment, four models in the CSR area are discernible:²¹

¹⁷ Cafaggi, *supra* note 12, at 21.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 21-23.

²¹ Besides these types, others are discerned outside the CSR area. One example is a model in which monitoring standards are led by NGOs and in which these NGOs also may set standards. An example of this model is Consumer International, Oxfam International and Amnesty international. *See, e.g., id.* at 34. Another type is an expert-led model in which the regulator is supposed to be independent from the industry, and its legitimacy is mainly based on technical expertise. *See id.* at 34-35. An example is standardization by ISO. The first type in which NGOs set standards is not common. If NGOs only monitor international private regulation, no distinct model exists in my opinion. This is because the private regulation is set by others, such as industry, a governing body in a multi-stakeholder model, or by public entities. Furthermore, the distinction between the expert-led model and the multi-stakeholder model is rather blurry, because other stakeholders participate in the technical rule-making. This is, for example, the case in the setting of standards within ISO. *See* INTERNATIONAL ORGANIZATION FOR STANDARDIZATION: STRUCTURE AND GOVERNANCE, http://www.iso.org/iso/home/about/about_governance.htm (last visited Mar. 13, 2013). Its members are national standard-setting bodies. In developed countries these national standard setting bodies are mainly private, in developing countries they are mainly represented by governmental departments or agencies. *Cf.* Cafaggi, *supra* note 12, at 37; Scott et al., *supra* note 9, at 11. Therefore, a clear distinction lacks between these types and the types I have discerned.

- 1) International private regulation driven by industry or a certain professional community, such as codes of conduct;²²
- 2) A multi-stakeholder model with a governing body in which different stakeholders participate, such as industry, NGOs, consumer representatives, and sometimes even governments.²³ In the field of CSR, this is a well-known model;²⁴
- 3) A multi-stakeholder model with a governing body (such as model 2), whereby the governing body provides access to scarce resources;²⁵ and

²² Examples of this model are the rules set to prevent child labor in the toys and garment industry. *See, e.g.,* Cafaggi, *supra* note 12, at 34; *see also* Ans Kolk & Rob van Tulder, *Setting New Global Rules? TNCs and Codes of Conduct*, 14 *Transnat'l. Corps.*, Dec. 2005, at 1 (discussing codes of conduct in the CSR area).

²³ *See* Cafaggi, *supra* note 12, at 35; Overmars, *supra* note 7, at 19, 28 (discussing this model outside of the CSR area). The governments might establish the norms (either in legislation or in collaboration with stakeholders and international organizations). If the government shapes the outline of the norms in legislation, these norms are filled in by private regulation, such as a code of conduct, meeting the government objectives. The government might also leave the establishment of the norms to the industry, but set requirements to be met. Furthermore, the government might threaten to impose legislation if industry is unable to establish private regulation. *See id.* at 19.

²⁴ Examples are the Forest Stewardship Council (FSC, sustainable wood production), Global Compact (all aspects of CSR) and the OECD-guidelines for multinational enterprises (all aspects of CSR). FSC consists of three chambers representing different interests (social and indigenous organizations, environmental organizations and economic organizations). These three chambers are coordinated by the general assembly and fully and equally represented on the multi-stakeholder board. The Global Compact principles are developed involving many stakeholders, such as governments, labor and societal organizations as well as the UN. *See* UN GLOBAL COMPACT PARTICIPANTS, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (last visited Mar. 13, 2013); *see also* Cafaggi, *supra* note 12, at 37. An example in another field is the International Swaps and Derivatives Association (ISDA). ISDA regulates on transactions in swaps and derivatives and these rules are cast in a master agreement drafted by ISDA and adapted and tailored into state legislation. Therefore there is private regulation on an international level and hard law at state level. *See id.* at 36. The ISDA example therefore may only be considered as an example of private regulation on an international level. Although a master agreement is involved, it does not fit in the contractual model because the private regulation is not spread through contracts, but by incorporation of this international private regulation in state legislation.

²⁵ Sometimes such a body might govern access to financial resources. An example is the IFC, part of the World Bank. *See* INTERNATIONAL FINANCE CORPORATION: ORGANIZATION, http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc/organization (last visited Mar. 13, 2013). Its guidelines are used in many loan agreements. Eco-labels using a certification scheme also

- 4) A contractual model in which international private regulation is spread through the use of agreements between stakeholders, for example, between enterprises in the same industry, in supply chains, or in loan or other financial agreements, such as direct foreign investment.²⁶ The contractual model is also common in the field of CSR.

The first three models are alike in the sense that they set private regulation through an organization.²⁷ The creation and monitoring of standards are implemented by using memberships and different types of regulation,²⁸ frequently reaching outside the membership of the regulatory body. It may be shaped as a federation or a multi-stakeholder model in which both individuals and organizations participate. Different stakeholders may be represented in the board or in the general assembly. In such cases, power is distributed equally among the participants.²⁹ The advantage is that all parties may work together.³⁰

might qualify. *See, e.g.*, Alejandra Gandara, *The Law and Economics of Eco-Labels* (Apr. 25, 2013) (Ph.D. thesis, Erasmus University Rotterdam), *available* at <http://repub.eur.nl/pub/39832>. An example outside the CSR area is ICANN which regulates the attribution of Internet domain names. Its board consists of technical and non-technical members with global representation.

²⁶ *See* Cafaggi, *supra* note 12, at 35-38; *see also* Cafaggi, *supra* note 10 (discussing supply chains). An example is the Model Mining Agreement, which contains CSR-norms in sections 22-27. THE MODEL MINING DEVELOPMENT AGREEMENT, *supra* note 13, §§ 22-27.

²⁷ *Cf.* Cafaggi, *supra* note 12, at 35-38.

²⁸ Codes of conduct, best practices, and social norms, for example, are discernible. *See, e.g.*, Peer Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 *J.L. & Soc'y* 50, 51-52 (2011). Many of them are of a rather soft legal nature. *See* Curtin & Senden, *supra* note 11, at 164.

²⁹ In this respect, the forum and club rule-making are discerned. The forum rulemaking consists of a formalized process in which decision-making emphasizes political rather than technical considerations. Although consensus is sought, approval of new rules by a supermajority is formally permissible. This type of rulemaking is generally less permeable to non-members than club rulemaking. The club approach to rulemaking is more informal, meaning that there is greater flexibility in the process. Decisions are more technocratic in nature, and outcomes generally require consensus. Club rule-making processes are often more accessible to interested non-members than forum rulemaking. *See* JONATHAN G.S. KOPPELL, *WORLD RULE 144* (The University of Chicago Press 2010). By and large, four features of rule-making are discernible: (i) formality (how precisely is the rule-making process stipulated in organization documents, either formal or informal); (ii) decision calculus (what is the nature of deliberations regarding proposed rules, either technical or political); (iii) decision rule (how is the decision to approve a new rule made: majoritarian, supermajoritarian, special powers, consensus); and (iv) inclusiveness (how open is the rule-making process to participation by nonmembers, either self-contained or participatory). *See id.* at 145.

In some instances, a leading constituency exists, which establishes the regulatory regime and its enforcement mechanisms and leaves other members a degree of control only by informal consultations or withdrawal as a member.³¹

2.2 Public and Private Regulation

Although international private regulation has to be discerned from, and stands next to, public regulation, this does not mean these regulatory regimes are distinct from each other. On the contrary, one may characterize the interaction between these two regimes as a melting pot.³² The state continues its deep involvement in the setting and administration of norms that govern the global marketplace, in spite of the fact that it is far from the sole author of governing regulations.³³ Markets did not simply evolve according to natural laws, but were instead subject to and the result of state regulation.³⁴

While the state still plays an important role, the relationship between the private and public spheres needs further consideration. By and large, three different forms of relationships between the public and private dimension are discernible.³⁵

1) Mutual Influence.

Mutual influence of public and private regulation encompasses two directions. On one hand, administrative law principles are applied to private organizations exercising rulemaking power at the international level. For example, administrative rules on the preparation of regulation and involving relevant stakeholders could be used in the

³⁰ Scott et al., *supra* note 9, at 11.

³¹ Cafaggi, *supra* note 12, at 35.

³² Cf. Cata Backer, *supra* note 6, at 1768-81; Larry Cata Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14:2 ILSA J. INT'L & COMP. L., 499, 508-23 (2007-2008); Larry Cata Backer, *Rights and Accountability in Development (Raid) V Das Air and Global Witness V Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations*, 10 MELBOURNE J. OF INT'L L., 1, 30-38 (2009); Larry Cata Backer, *Private Actors and Public Governance Beyond the State: the Multinational Corporation, the Financial Stability Board and the Global Governance Order*, 18 INDIANA J. OF GLOBAL LEGAL STUD., 751 (2011). See GEORGIOS DIMITROPOULOS, ZERTIFIZIERUNG UND AKKREDITIERUNG IM INTERNATIONALEN VERWALTUNGSVERBUND 224 (Mohr Siebeck, Tübingen, Germany, 2012).

³³ Zumbansen, *supra* note 28, at 54.

³⁴ *Id.* at 55.

³⁵ Cf. Cafaggi, *supra* note 12, at 44-45 (discerning four forms). See on these interactions also Burkhard Eberlein, et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 REG. & GOVERNANCE 6-11 (2014) available at <http://onlinelibrary.wiley.com/doi/10.1111/regg.12030/pdf>.

process of international private rulemaking.³⁶ On the other hand, international private regulation applies to regulate enterprises and other entities, for example through public domestic open norms.³⁷ Domestic public legislation on contract and tort may be deployed to harden international private law at the domestic level and to make binding rules that would not otherwise be enforceable. In this respect, national legislative instruments lend strength and legitimacy to international private regulation.³⁸

If mutual influence exists, it is not always easy to separate private regulation from state legislation. The rules might be set by a public actor, such as the UN, but compliance with these rules is monitored by private actors at an international level and often jointly by enterprises and NGOs. These rules might be enforced by courts at the national level.³⁹ The setting and dissemination of corporate governance rules that entail the requirement of a CSR policy, for example, operates through the migration of standards and cross-fertilization of private and public norms.⁴⁰

³⁶ A Dutch example is provided by Section 25 of the Dutch Privacy Act. On the basis of this Section, the public supervising body (CBP) has the power to decide (by means of an administrative decision) whether a code of conduct on privacy protection set by a certain industry meets the requirements of the Dutch privacy act. Section 25 of the Dutch Privacy act requires a preparation of this administrative decision using the procedure of section 3.4 of the Dutch General administrative law, which provides the opportunity to all relevant stakeholders to give their view on the decision and the underlying code of conduct. The preparation of secondary regulation in the United States also involves an opportunity for relevant stakeholders to give their view on this regulation. This procedure might also be of use to international private rulemaking entities in order to involve relevant stakeholders. *Cf. GIESEN, supra* note 8, at 149.

³⁷ Cafaggi, *supra* note 12, at 44. This raises, however, the question of interpretation of these open norms, because, unlike public regulation, easily public accessible information on the interpretation of private regulation may lack. *See, e.g., GIESEN, supra* note 8, at 121-27.

³⁸ Cafaggi, *supra* note 12, at 47-48. This raises the question under which circumstances activities can or cannot be appropriately privately regulated, and after, the role and limits of private regulation. *See Scott et al., supra* note 9, at 4.

³⁹ Regarding private regulation, specific tools to coordinate and solve conflicts are developed. Therefore enforcement is not only a matter for the national courts. However, private regulation does not have a common set of principles to bridge gaps in each regime. Domestic private law is primarily deployed to perform this function. Because of the differences between state legislation, this method generates fragmentation and inconsistencies within the same regime. *See Cafaggi, supra* note 12, at 48-49.

⁴⁰ Zumbansen, *supra* note 28, at 58, 60. An example is the Dutch corporate governance rules, originally set by the Tabaksblat committee, in which enterprises, labor unions, shareholders and the government have been represented, in connec-

In such cases, the relationship between the public and private spheres is intertwined. Because of this the relationship transforms in a variety of ways.⁴¹ This often involves the mixing of public and private legal instruments and collaboration between governmental and non-governmental actors.⁴² This serves to improve deterrence. It increases effectiveness by using targeted monitoring of transnational rules.⁴³ Collaboration favors transfer of regulatory strategies and enforcement from private to public and vice versa, as is the case for the contractual supply chain approach mentioned above.⁴⁴ This approach may reduce the number of regulatory arrangements and increase later recognition of privately designed standards by international organizations.

Therefore, in the previous instances, the private and public regimes remain autonomous, but their regulatory activities are mutually influenced.⁴⁵ This is the most common way in which public regulation co-exists with private regulation.

2) Collaborative Rulemaking

In this process, the mutual influence of public and private regulation is amplified into deliberate collaboration as private and public actors engage in the joint drafting of rules.⁴⁶ A variant on this process is where private actors draft rules that are subsequently approved or promulgated by public actors. In the latter, private actors internalize the principles upon which the public actor will promulgate the rules

tion with which rules a “comply or explain” responsibility is adopted in Section 2:391 subsection 5 of the Dutch civil code as to the financial statements of an enterprise. *See, e.g.*, Overmars, *supra* note 7, at 23. These rules, set in 1997, were revised and expanded upon in 2004. Therefore, a duty to disclose exists regarding deviation from corporate governance recommendations and the legislator chose to transpose this obligation to disclose into statutory law. *See id.* at 16. For legislation in other countries, *see* Zumbansen, *supra* note 28, at 60.

⁴¹ Scott et al., *supra* note 9, at 11.

⁴² *Id.* at 11.

⁴³ Cafaggi, *supra* note 12, at 45.

⁴⁴ *Id.* An example can be seen in Dutch environmental rules which are adopted in supply chain contracts with foreign suppliers. Because of this adoption these rules become international private regulation on a global level.

⁴⁵ *Id.* Private companies which monitor compliance with public regulation might adopt privately set standards (such as ISO-standards) to perform this task.

⁴⁶ *Id.* at 44. This might also lead to a reduction of cost for the regulatory body as well as the regulatees. *See* Fabrizio Cafaggi & Andrea Renda, *Public and Private Regulation, Mapping the Labyrinth*, (Ctr. for European Policy Studies, Working Document No. 370, 2012) available at <http://www.ceps.eu/book/public-and-private-regulation-mapping-labyrinth>.

set by private actors.⁴⁷ The setting of private regulation could take place within multi-stakeholder organizations encompassing both private and public actors, or through regulatory contracts in the form of agreements or memoranda of understanding.⁴⁸

3) Competition

Competition occurs when private actors raise the standards defined by the public actor, thereby decreasing the legitimacy of public regulation and taking leadership without being subject to the procedural requirements applied to international public law regimes.⁴⁹ Competition takes place both in vertical complementarity between transnational regulators and states and in horizontal complementarity between international organizations and intergovernmental organizations.⁵⁰

2.3 Advantages of International Private Regulation

International private regulation is an attractive instrument in the CSR area, and cannot be neglected as part of the regulatory framework.⁵¹ Furthermore, its importance is growing due to the future likelihood of a substantial increase in international private regulation.⁵² Besides this, if public regulation is lacking, international private regulation fulfills the need felt by enterprises to adopt certain regulation in the area of CSR. Private regulation also may be more effective than public regulation, because public regulation is, by its definition, involuntary in nature.

Besides this, consensus exists over the inability of states to regulate global markets. Even where international standards exist, they are hardly uniformly implemented. Therefore, for example, private

⁴⁷ Cafaggi, *supra* note 12, at 44. An example outside the CSR area is the rules applicable to the drafting and content of financial statements by international corporations. These rules, the International Financial Reporting Standards (IFRS), are set by a global private organization, the International Accounting Standardization Board (IASB). These rules are binding in the European Union because of section 3 of Regulation 1606/2002 [2002] OJ L243. See HR 24 april 2009, NJ 2009, 345 m.nt. (AFM/Spyker) (Neth.). Cf. in connection with the specifications of building products in the EU set by a private body and which have to be accepted by the EU-member states because of (sections 3, 8, 27 and annex I). Regulation 305/2011, 2011 O.J. (L 88) 5 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0005:0043:EN:PDF>.

⁴⁸ Cafaggi, *supra* note 12, at 44.

⁴⁹ *Id.* at 45.

⁵⁰ *Id.*

⁵¹ Cf. *id.* at 25-29; Overmars, *supra* note 7, at 17; Scott et al., *supra* note 9, at 4.

⁵² See *Law Scenarios to 2030*, LAW OF THE FUTURE FORUM, <http://www.lawofthefuture.org/237/law-scenarios-to-2030> (last visited March 13th 2013).

(“NGO”) led forestry protection regimes and regulation of measures preventing and diminishing the effects of climate change are implemented.⁵³ The European Commission has also called for self- and co-regulation schemes in the area of CSR, as these are important means by which enterprises seek to meet their social responsibility.⁵⁴ Additionally, some states experience difficulties in securing compliance with internationally granted human rights. This may, in part, be accommodated by international private regulation. Furthermore, international private regulation in certain industries may be necessary to create a level playing field in order to enable or benefit the introduction of CSR-standards.⁵⁵ Several other advantages and drivers of international private regulation are discerned,⁵⁶ which also apply in the CSR area:

- 1) The need for harmonization and the reduction of transaction costs.

Due to divergent state legislation and codes of conduct, normative fragmentation of markets and trade barriers is an identified rationale for international private regulation. International private regulation may be a response to either

⁵³ Cafaggi, *supra* note 12, at 26.

⁵⁴ Communication from the Commission on a renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25th 2011, COM(2011) 681, p. 5, 9, 10, available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf (last visited March 13th 2013). The Commission proposes a multi-stakeholder CSR platform in a number of relevant industrial sectors for enterprises, their workers, and other stakeholders to make public commitments on the CSR issues relevant to each sector and jointly monitor progress. *See id.* at 9.

⁵⁵ *Cf.* KOPPELL, *supra* note 29, at 52, 63; Scott et al., *supra* note 9, at 7. However, this raises the question whether such private regulation violates public regulation on competition. If a level playing field is necessary to enhance the introduction of CSR standards, it is in my opinion helpful to introduce an exemption (on competition rules) because the public good benefits, unlike most company conduct violating competition rules. At this moment (European) competition law does not provide for such an exemption. However, if this exemption is introduced, public supervision might be necessary. As an example of supervision section 25 of the Dutch privacy protection act may serve. This section grants the (public) privacy protection agency the power to take an administrative decision whether a certain code of conduct meets the requirements set forth by the Dutch privacy protection act. In deciding the agency has to use an administrative procedure in which all stakeholders may give their view on the decision and through this on the code of conduct. The competition authorities might use a comparable procedure to assess whether certain international private regulation violates competition rules. In this assessment might, amongst others, be considered whether the exemption is proportional to the goals strived after by the private regulation.

⁵⁶ Cafaggi, *supra* note 12, at 25-30; Cafaggi & Renda, *supra* note 46, at 6. *See also* Eberlein et al., *supra* note 35, at 9 and 10.

multiplication of private regimes or diverging public legislation.⁵⁷

- 2) The weakness of public international law.
- 3) Change of technology.

The effectiveness of state implementation is often questioned. Monitoring at a local level frequently follows the incentives of individual states or litigants in courts, who may not be aligned with international regimes. Monitoring resources may be deployed in favor of domestic interest at the expense of the protection of the global common good. This does not mean, however, that local enforcement is unimportant even where international private regulation is established.⁵⁸

- 4) The weakness of public international law.
- 5) Change of technology.

The Internet has provided an illustration of the role of technology in shifting rulemaking power from national to international and from public to private. The conflict between Google and China highlights new modes of regulation at the global level based on contracts between multi-national firms and states.⁵⁹

- 6) Technical standards.

For example, international public and private regulation regarding safety have adopted a supply chain approach driven by the use of technical standards that are difficult for states to monitor. Standardization bodies have increased their influence on regulatory regimes, moving from product to process standards, and improving the quality of management standards. These standards result in diminishing differences across sectors and the reduction of the distance between public and private regulation. Both public and private bodies refer to the same technical standards.⁶⁰

⁵⁷ Cafaggi, *supra* note 12, at 25; PETER UTTING, REGULATING BUSINESS VIA MULTI-STAKEHOLDER INITIATIVES: A PRELIMINARY ASSESSMENT, UNRISD RESEARCH PROJECT PROMOTING CORPORATE ENVIRONMENTAL AND SOCIAL RESPONSIBILITY IN DEVELOPING COUNTRIES: THE POTENTIAL AND LIMITS OF VOLUNTARY INITIATIVES, 84 (2001). In connection with eco-labels, *see* Gandara, *supra* note 25, at 262-63.

⁵⁸ Cafaggi, *supra* note 12, at 27.

⁵⁹ *Id.* at 28-29. *Cf.* Joost Pauwelyn et al., *Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable*, in *INFORMAL INTERNATIONAL LAWMAKING* 500, 505 (Joost Pauwelyn ed., Oxford University Press 2012).

⁶⁰ Cafaggi, *supra* note 12, at 29.

- 7) Sometimes the capacity for oversight in a certain matter is best developed in private regulation.⁶¹
- 8) Flexibility.

It is contended that private regulation provides the regulator with greater flexibility, both in terms of regulatory design and sanctions, while public hard law is more rigid, but provides higher legal certainty and stability.⁶² In practice, private regulation often operates as a partial substitute for public regulation, because the latter is slower and may be more costly and less effective.⁶³ In some instances, international private regulation precedes public regulation. For example, standards providing the metrics and good practices to the targeted stakeholders are deemed necessary in support of environmental and climate change policies. In such circumstances, public legislation may demand for international private regulation that entails best practices and sets goals and standards delivering the technical and organizational modalities. Such a framework has the flexibility to adapt more rapidly to changing circumstances.⁶⁴

2.4 *Disadvantages of International Private Regulation*

Despite these attractive features of international private regulation as compared to traditional public legislation, international private regulation like other legal instruments, also has disadvantages.

For example, private regulation is deemed ineffective if citizens or industries are unable to stand up for certain interests or if protection of vulnerable assets or people is involved.⁶⁵ This is, however, only partially true. In the area of CSR, for example, the protection of

⁶¹ Scott et al., *supra* note 9, at 4 (Codes of conduct might bridge an information asymmetry between supplier and consumer). See Overmars, *supra* note 7, at 17.

⁶² Edward J. Balleisen & Marc Eisner, *The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Private Governance for Public Purpose*, in *NEW PERSPECTIVES ON REGULATION* 127, 133-34, (D. Moss & J. Cisternino eds., 2009); Cafaggi, *supra* note 12, at 47. Cf. Ogus & Carbonara, *supra* note 10, at 234. As is shown hereinafter in the sociological perspective, it is important for stakeholders to accept the rules. A rapidly changing regulatory environment diminishes acceptance of new rules requiring flexibility from the private rulemaker. See Balleisen & Eisner, *supra* note 62, at 134.

⁶³ Cafaggi, *supra* note 12, at 48.

⁶⁴ Report of the Expert Panel for the Review of the European Standardization System, *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, at 21 (Feb. 2010) available at http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-review/express/index_en.htm.

⁶⁵ Overmars, *supra* note 7, at 26.

human rights is more and more accommodated in international private regulation.

Furthermore, a disadvantage of international private regulation is considered to be its lack of legitimacy because of its detachment from traditional government mechanisms. Besides this, international private regulation has other disadvantages such as: market disruption (due to a restriction of competition), the voluntary nature of international private regulation, and free-riders benefitting from the existence of international private regulation without adopting or implementing it, consumer detriment and insufficient protection against human rights violations, and environmental damage. These disadvantages need to be avoided as much as possible.

3. ASSESSING THE EFFECTIVENESS OF INTERNATIONAL PRIVATE REGULATION

3.1 *The Need for Assessing Effectiveness*

The search for the outline of a methodology to assess the effectiveness of international private regulation as compared to other international private regulation begs the question of whether a need exists for assessing effectiveness. This is unsurprising but not self-evident. International private regulation has many functions, including, for example, a signaling function. Is this type of private regulation, adhering companies on human rights and environmental issues, a bad thing? Apart from the problems this type of regulation might generate in terms of competition, hindering trade, and public procurement issues, progress still must be made in the environmental, human rights, and the rest of the CSR arena. Therefore, initiatives having a signaling function without contributing to any change in these respects might be considered less effective in comparison with initiatives that do contribute to this.

The need for an assessment of effectiveness of international private regulation can be illustrated from different perspectives. Private initiatives may learn from each other which measures or norms are most effective. A multinational enterprise considering the implementation of international private regulation might be interested in assessing whether implementing yet another private initiative is beneficial. If a tool exists to assess the economic effectiveness of specific international private regulation, this also might provide an important incentive for enterprises to implement this regulation. Research has revealed that key factors which led business to support FSC, a CSR-initiative on sustainable wood, “were based on pragmatic evaluations related to the possibility of either increased market access or the protection of market share and not through normative evaluations relat-

ing to participation, transparency, and so on.”⁶⁶ Furthermore, enterprises might be interested in learning which type of private regulation to implement. For example, it might be beneficial to use the contractual model through a supply chain, but also to engage in a multi-stakeholder initiative or to establish an internal code of conduct. An enterprise, or an industry as a whole, might need tools to assess whether the contractual model, the multi-stakeholder initiative, or the code of conduct delivers the best results. Assessing the effectiveness of these options is indispensable when making an educated guess. However, to date, global operating businesses do not seem highly interested in effectiveness assessments, mainly because it considers international private regulation as reflective of the measures it has already taken. Because of this, in its view, international private regulation does not bring about real changes in its daily business. That said, it is important to note that many private regulatory regimes exist in the CSR arena, and it is increasingly difficult for business to choose between these regimes.⁶⁷ Beyond that, effectiveness may vary among the stakeholders involved. Self-regulation may be quite prosperous for the manufacturers or the extracting industry involved, but the contrary is true for their buyers or the local communities that are affected by their manufacturing process or mining activities. Therefore, the assessment of effectiveness of international private regulation calls for scrutinizing the effects on all stakeholders.⁶⁸

Public regulators considering the promulgation of new legislation may also benefit from assessment of the effectiveness of international private regulation. If this assessment achieves their objectives, private regulation might become a viable solution to fulfill public policy goals.⁶⁹ International private regulation may even fulfill national

⁶⁶ Donal Casey & Colin Scott, *The Crystallization of Regulatory Norms*, 38 J.L. & Soc’y 76, 91 (2011). Cf. Eberlein et al., *supra* note 35, at 12 and 13.

⁶⁷ See Gabriela Alvarez & Oliver von Hagen, *When Do Private Standards Work? Literature Review Series on the Impacts of Private Standards; Part IV*, ITC Technical Papers 21 (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184314 (referring to ISEAL research which shows that the respondents indeed experience difficulties). *But see, e.g.*, GIESEN, *supra* note 8, at 93-106 (discerning several ways in which private regulation might be binding: public regulation in which either is referred to private regulation or which entails open norms complemented by private regulation, or an agreement). However, on (international) CSR issues such public legislation is less frequent. Therefore, before private regulation becomes binding on an enterprise on the international level, it often has a choice whether it accepts a specific regime.

⁶⁸ This assessment includes the effects on the final beneficiaries. Cf. Cafaggi, *supra* note 12, at 32.

⁶⁹ Cafaggi & Renda, *supra* note 46, at 26; Greetje Schouten, *Tabling Sustainable Commodities through Private Governance, Processes of Legitimization in the*

public policy objectives beyond the legal sphere of a national state. The public legislator might be interested in the effectiveness of private enforcement of international private regulation to assess whether additional public enforcement is required.⁷⁰

If the assessment reveals that private regulation malfunctions and does not reach the government objectives, this might stimulate the promulgation of public legislation.⁷¹ For example, the legislator may want to assess whether certain eco-labels have a real impact on improving the environment and do not unnecessarily hinder trade.⁷² If no measurable impact is assessed and/or trade is unnecessarily hindered, they can examine which type of public regulation should be promulgated to enhance trade and lessen the environmental impact of the eco-labeled products. In this respect, it is important to notice that eco-labels perform best if the legislative environmental standards are not too high.⁷³ The legislator might consider supporting effective eco-labels too.⁷⁴ This could be achieved through tax relief, subsidies, the

Roundtables on Sustainable Palm Oil and Responsible Soy 68 (2013) (unpublished Ph.D. thesis, University of Wageningen, Utrecht, The Netherlands 2013). Cf. The United Nations Forum on Sustainability Standards (UNFSS) Voluntary Sustainability Standards: *Today's Landscape and Issues & Initiatives to Reach Public Policy Objectives, Part I: Issues*, http://unfss.files.wordpress.com/2012/05/unfss-report-issues-1_draft_lores.pdf (last visited October 23rd 2013); *Part III: Annexes to the Impact Assessment Guidelines*, at 24-7, COM (2009), available at http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf. See also UTTING, *supra* note 57, at 108-09. For them too, it is of importance to achieve the objectives strived after by governmental organizations in order to minimize the risk of public regulation. . See Jodi L. Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 *Annals Am. Acad. Pol. & Soc. Sci.* 22, 24 (2013), available at <http://ann.sagepub.com/content/649/1/22.abstract>. See Schouten, *supra* note 69, at 114-25.

⁷⁰ Balleisen and Eisner even contend that such assessment is necessary to prevent insufficient regulatory oversight which might result from international private regulation. See Balleisen & Eisner, *supra* note 62, at 127.

⁷¹ Overmars, *supra* note 7, at 18. Therefore, Cafaggi and Renda contend that the public regulator should not leave the assessment of international private regulation to private players. See Cafaggi & Renda, *supra* note 46, at 25; see also *Part III: Annexes to the Impact Assessment Guidelines*, *supra* note 69, at 24.

⁷² Eco-labels entail, amongst others, words, symbols, and marks indicating compliance with certain environmental or social standards to which compliance has been certified. See, e.g., Gandara, *supra* note 25, at 22.

⁷³ *Id.* at 127, 348. However, in my view, this should not be an incentive to lower regulatory standards, but to assess whether an eco-label might be able to support or satisfy governmental objectives.

⁷⁴ For example, by remedying the effects of companies using frivolous or false environmental claims and thus jeopardizing the real eco-label market. See, e.g., Gandara, *supra* note 25, at 133-42. However, tax related measures seem unnecessary costly. See *id.* at 158-59. In this respect it is of interest to notice that the

recognition of certified standards in connection with the assessment of whether certain sustainability standards are met, and technical assistance or training.⁷⁵ The public legislator may eventually even require proof of effectiveness of international private regulation in order to refrain from promulgating public legislation. For example, the European Commission calls for clear commitments from all concerned stakeholders in the CSR arena, with (i) performance indicators, (ii) a framework which provides for objective monitoring mechanisms, (iii) performance review, (iv) the possibility of improving commitments as needed, and (v) an effective accountability mechanism for dealing with complaints regarding non-compliance.⁷⁶ If the stakeholders involved are unable to set effective international private regulation in this arena, it is likely the European Commission will use legislative instruments.

Eco-labels could also lead to additional pollution, as paying for an eco-label might alleviate guilt and induce consumers to pollute even more.⁷⁷ However, no systematic monitoring of international private regulation by public regulators exists, not in the least because of the global nature of international private regulation. Monitoring by national or regional governmental bodies is not particularly helpful in such circumstances. Although global scrutiny of international private regulation by international public organizations is preferable, this does not prevent regional or national public bodies from an appraisal of an international private regulatory regime, preferably through public regulatory cooperation.⁷⁸ This appraisal may be connected with the aforementioned issues, but also with the legitimacy of certain international private regulation. The public body might want to assess whether important stakeholders are able to provide their views on the provisioned international private regulation or even be a co-regulator.

Furthermore, the large amount of CSR labels causes difficulties in public procurement.⁷⁹ This might be a complicating factor, as the use of eco-labels in public procurement is considered a driver for

European Commission has developed its own, voluntary eco-label. See *Environment*, EUROPEAN COMMISSION, <http://www.ecolabel.eu> (last visited August 7th 2013).

⁷⁵ See, e.g., *Voluntary Sustainability Standards: Today's Landscape and Issues & Initiatives to Reach Public Policy Objectives*, at 45, UNFSS, http://unfss.files.wordpress.com/2012/05/unfss-report-issues-1_draft_lores.pdf [hereinafter *Voluntary Sustainability Standards*]

⁷⁶ See Communication from the Commission, *supra* note 54, at 10.

⁷⁷ *Voluntary Sustainability Standards*, *supra* note 75, at 27; Gandara, *supra* note 25, at 200.

⁷⁸ Cafaggi, *supra* note 46, at 25.

⁷⁹ See generally, *Voluntary Sustainability Standards*, *supra* note 75, at 34-38; Kolk & van Tulder, *supra* note 22, at 6-7. However, they suggest that companies in general do not experience problems with this. *Id.* at 17.

the uptake of these eco-labels, which the government might favor, in markets.⁸⁰ If a government or an enterprise prescribes a specific CSR label, an applicant might contend that another label it adheres to performs as well as the label prescribed and also meets the requirements of the procurator. Governments and enterprises have few tools to assess this contention.⁸¹ However, the size is not necessarily a problem in the broader context. Different standards may serve a purpose in different fields, issues, regions, or type of companies, such as smallholders and distributors. In these circumstances, they may be complementary.⁸² That said, if certain initiatives entail comparable objectives in comparable arenas, the effectiveness question arises.

This is also true regarding initiatives in different arenas, as they might overlap and interfere with the possible ensuing lack of effectiveness. Furthermore, international private regulation, especially when intended to create a level playing field between competitors, might cause market disruption. To a certain extent, this might be useful to support CSR, but clear lines are needed. International private regulation should therefore effectively meet the CSR policy requirements, but should not unnecessarily disrupt markets or hinder sustainable trade.⁸³ International private regulation might pose a factual trade barrier, which may lead to complaints to the WTO or GATT.⁸⁴ The more ineffective international private regulation exists, the greater the risk of unnecessary market disruption or trade hindrance. Private regulation could have other adverse effects as well. Members of a certain scheme might stick to suboptimal agreements and focal points with no incentive to change (lock-in effects).⁸⁵ Furthermore, covered changes might be induced by the prevalence of some interests over others, and self-indulgence in the evaluation of private regulatory bodies might occur, especially when governance arrangements entail

⁸⁰ Alvarez & von Hagen, *supra* note 67, at 11.

⁸¹ EU regulation prohibits the prescription of a specific label and prescribes the use of certain criteria with which the labels advertise to comply. According to EU regulations the procurer has to determine whether these criteria have been met. In the Netherlands the 'CO₂ Prestatieladder' is developed to assist business (and government) in assessing the carbon footprint of a tendering company. See *CO₂-Prestatieladder* [CO₂-Performance Ladder], SKAO, <http://www.skao.nl> (last visited April 20th 2013).

⁸² *Voluntary Sustainability Standards*, *supra* note 75, at 15-17, 35.

⁸³ Cf. Cafaggi & Renda, *supra* note 46, at 8, 15, 26, 27.

⁸⁴ It might be contended that a protectionist non-tariff barrier to trade is imposed. See UTTING, *supra* note 57, at 97; Gandara, *supra* note 25, at 19, 21, 305-336 (description of the Mexican-US Tuna Conflict); *Agreement on Technical Barriers to Trade*, Annex 3, WORLD TRADE ORG., available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (promulgating best practices for standard-setting).

⁸⁵ Cafaggi & Renda, *supra* note 46, at 17.

self-evaluation.⁸⁶ Notwithstanding this, effective private regulation might favor investments and enhance trade if it is adhered to on a global level.

NGO's could also benefit from assessing the effectiveness of international private regulation. If an NGO assesses whether an enterprise has taken adequate measures to prevent environmental damage, it is relevant whether this enterprise has implemented specific international private regulation. If it has, the enterprise might advertise its pretended adequate measures. However, if the private regulation proves ineffective, the implementation will be a poor indicator of the adequacy of the measures. The implementation of specific private regulation does not support the enterprises' claim, which is obviously of relevance to the NGO. Besides this, NGOs considering setting new international private regulation in a certain arena might benefit from the assessment, whether or not effective private regulation already exists.

Besides the previous issues, private entities that set international private regulation in many instances lack the rule-making experience public regulators have.⁸⁷ The primary cause of this is the absence of restrictions on setting private regulation—anyone may be a rule-maker. This results in too much international private regulation in certain areas. This can also mean poor quality regulation. Poorly drafted private regulation causes legal uncertainty and unnecessary cost.⁸⁸ For example, the need for proper rule setting and best practices is noticed by the ISEAL Alliance, which has set the Code of ISEAL Good Practice. This code codifies best practices for the design and implementation of social and environmental standards initiatives.⁸⁹ Therefore, the effectiveness of international private regulation may not be taken for granted even less so than the effectiveness of public

⁸⁶ *Id.*

⁸⁷ *Cf.* GIESEN, *supra* note 8, at 144 n.147-50 (proposing the establishment of directions on private regulation by governments).

⁸⁸ *See* Louis Kaplow, *General Characteristics of Rules*, in PRODUCTION OF LEGAL RULES, *supra* note 10, at 18, 19.

⁸⁹ *Setting Social and Environmental Standards v5*, ISEAL ALLIANCE (June 4, 2010), available at <http://www.isealalliance.org/online-community/resources/iseal-standard-setting-code> [hereinafter *ISEAL Code of Good Practice*]. It is applicable on environmental and social standards for products or related processes and production methods (section 3.3). *See, e.g.*, Cafaggi & Renda, *supra* note 46, at 20. *Cf. Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, EUROPEAN COMMISSION (Nov. 2, 2013), available at <https://ec.europa.eu/digital-agenda/en/news/principles-better-self-and-co-regulation-and-establishment-community-practice>.

regulation. It is therefore important to assess the effectiveness of international private regulation.⁹⁰

Finally, the number of actors, norms, and rationales in the still growing transnational sphere of CSR may cause multiple public and private regulators to compete for business.⁹¹ In this competition, especially between private regulatory regimes, assessing the effectiveness of international private regulation might prove to be a useful tool to choose certain regimes above others and to dismantle less effective international private regulation.

3.2 *Different Ways to Assess Effectiveness*

As noted in the introduction, the effectiveness of private regulation in the CSR area might be assessed in different ways. It might be assessed through a legal, but also through an economic, sociological, or psychological/behavioral avenue.⁹² The legal avenue focuses on the objectives of the private regulation itself and whether they provide “conflict of law” rules in connection with other private regulation, enforcement of private regulation, and conflict resolution. Therefore, this avenue does not analyze the substantive private norms. Rather, the avenue provides for “meta-rules” on the formation and enforcement of such regulation and the resolution of conflicts in connection with these norms. The economic avenue focuses on the actual impact of private regulation in terms of economic benefits and growth. It also considers social, consumer, and environmental detriment, and possible market disruption or trade hindrance. The sociological approach is connected with acceptance (legitimacy) of private regulation and focuses on the

⁹⁰ This is recognized by the joint ISEAL and FAO initiative. *SAFA Guidelines: Sustainability Assessment of Food and Agriculture Systems*, FAO (2013), available at http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/SAFA_Guidelines_Final_122013.pdf. For information on this initiative, see, e.g., Cafaggi and Renda, *supra* note 46, at 23-25.

⁹¹ Cf. Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. OF INT'L L. 513, 518 (2008). With respect to competition between private and public regulation, see Anne Meuwese & Patricia Popelier, *Legal Implications of Better Regulation: A Special Issue*, EUROPEAN PUBLIC LAW 455, 458 (2011). The competition for members can increase the standards. However, competition might also lead to watered-down standards. In connection with bio fuels, see Schouten, *supra* note 69, at 114-26. However, if several organizations establish regimes, control might emerge from both cooperation and competition. See Scott et al., *supra* note 9, at 15.

⁹² However, other approaches are proposed as well. See, e.g. Cafaggi & Renda, *supra* note 46, at 13 (contending that effectiveness measures ex ante the proportionality between means and ends and ex post the positive or negative impact of the regulatory measure over the different constituencies including regulated parties and beneficiaries).

way private regulation is communicated, the way in which it is implemented, whether proper procedures are used to engage relevant stakeholders, and how the decision making process is shaped. The psychological or behavioral approach analyzes the effects, if any, of private regulation on behavior.

In many instances, the more avenues that are fulfilled, the more likely it is that international private regulation is effective. Moreover, these avenues are intertwined.⁹³ Engaging stakeholders in a regulatory scheme by representation and by organizing accountability might enhance acceptance, as well as legitimacy, which are important aspects of the sociological approach, but might increase the transaction and compliance costs that are important from an economic point of view, and might hinder enforcement, which is an important aspect of the legal approach. Economic impact assessment tends to neglect the sociological incentives to comply with a private regulatory framework and the possibility of effective enforcement.⁹⁴

As I previously stated, research has elucidated that “key factors which led businesses to support the FSC were based on pragmatic [economic] evaluations related to the possibility of either increased market access or the protection of market share” rather than “through normative evaluations relating to participation, transparency and so on.”⁹⁵ Thus, economic effectiveness seems to be a more compelling driver for implementing international private regulation, than mere acceptance of this regulation. That said, effectiveness is scarcely assessed taking a legal, as well as an economic, sociological, and psychological avenue.⁹⁶ An example of this is the MSI-evaluation tool for multi-stakeholder initiatives in the human rights arena, a highly sophisticated evaluation tool with over 400 indicators that analyze effectiveness from a human rights perspective using insights from legal and sociologic disciplines, but not from the economic and psychological avenues.⁹⁷

⁹³ See *id.* at 14.

⁹⁴ Cf. Andrea Renda, *Law and Economics in the RIA World* 97 (Apr. 7, 2011) (Ph.D. thesis, Erasmus University Rotterdam) available at <http://repub.eur.nl/pub/22920> (in connection with public regulation).

⁹⁵ Casey & Scott, *supra* note 66, at 91.

⁹⁶ Cf. Cafaggi & Renda, *supra* note 46, at 14. However, from a methodological perspective it has to be assessed whether insights from other disciplines might be used in a legal context. Hereinafter I indicate in which instances research acquired from other disciplines may be of importance in a legal context.

⁹⁷ The MSI Evaluation Tool is developed by MSIntegrity, IHRC, and the Harvard Law School’s Human Rights Clinic. See *MSI Evaluation Tool*, THE INSTITUTE FOR MULTI-STAKEHOLDER INITIATIVE INTEGRITY, <http://www.msi-integrity.org> (last visited Aug. 7, 2013) [hereinafter *MSI-Evaluation Tool*].

Despite this, all of these disciplines are needed to assess effectiveness of international private regulation. This is supported by the fact that eco-labels that are part of the ISEAL Alliance—which provides meta-rules on international private agricultural standards including elements of the legal, economic, and sociological approach—are best represented in the global markets.⁹⁸ This underlines the importance of scrutinizing international private regulation using the aforementioned approaches. Related to this issue, effectiveness should be assessed by independent bodies, as the private initiatives themselves might overstate their effectiveness.⁹⁹

Effectiveness assessment, in this sense, should be applied to private rule-setting (ex ante approach) as well as to the analysis of the effectiveness of existing international private regulation (ex post approach). In the rule making process, all avenues are of importance: the legal with respect to the clarity of the rules and their objectives, conflict of laws issues, added value, enforcement, and conflict resolution; the sociological with respect to foreseeable acceptance of norms and stakeholder engagement; the macro-economic with respect to possible consumer detriment or environmental impact, labor issues, market disruption, and trade hindrance; and the psychological with respect to behavioral issues in connection with effective behavioral steering. As to the effectiveness of existing international private regulation, the legal avenue is of importance, especially in connection with enforcement and conflict resolution, as well as the economic impact assessment. The sociological avenue operates as a correctional factor in that, if norms are not accepted by relevant stakeholders, enforcement, conflict resolution, and positive impacts of a private regulatory framework may be hampered.

3.3 *Different Effectiveness Indicators?*

International private regulation is quite frequent in the CSR arena and it is questionable whether a single methodology might be established to assess effectiveness. This is because private regulation differs and covers a lot of topics, fields, functions, and types of enterprises and takes different angles, from reporting on, for example, environmental and social impact, as well as on topics connected to possible bribery, to agreements on security, and round tables and involves different stakeholders as well as regions.¹⁰⁰ That said, a single methodology is preferable and also conceivable.

⁹⁸ Gandara, *supra* note 25, at 225, 270.

⁹⁹ *Cf.* Cafaggi & Renda, *supra* note 46, at 17-18.

¹⁰⁰ On the importance of this regional context, see Alvarez & von Hagen, *supra* note 67, at 10.

Although the variation in international private regulation in the CSR arena may seem tremendous, by and large, it all boils down to three types. These are (i) government incentivized/established multi-stakeholder initiatives (OECD guidelines for multinational enterprises, Global Compact, EU eco-label), (ii) privately (NGO or business) established multi-stakeholder initiatives (e.g. round tables in food chains, FSC, and agreements between enterprises on CSR issues), and (iii) initiatives within an enterprise (corporate governance code). It is reasonable to assess the effectiveness of multi-stakeholders initiatives using the same methodology, irrespective of their governmental or private roots. It is helpful to compare the effectiveness of these types, amongst others, to assess whether increased government involvement contributes to effectiveness. Moreover, the effectiveness of the third type should be compared with the other types as well, because this type of private regulation is deemed rather ineffective. This contention might be proven false if a comparison is made with the other types. Therefore, a single methodology, using context-independent indicators and impact assessment, is preferable and should be the starting point for further research.

As previously discussed, enterprises or an industry, as well as governmental bodies have an interest in the assessment of the effectiveness of international private regulation. The question arises whether different effectiveness indicators should be used among governments or governmental bodies and enterprises.¹⁰¹ Preferably, the same indicators and types of assessment would be used. Although governmental bodies and enterprises use the outcomes of effectiveness determination for their own purposes, they still may have a common interest. For example, if a government determines whether or not certain legislation in the CSR arena will be promulgated or determines whether enterprises or industries meet certain CSR requirements, it might be interested in assessing whether existing international private regulation achieves its public policy objectives. It might even ask a certain enterprise or industry to “prove” the effectiveness of the existing international private regulation. If the indicators differ depending on the assessment made by the enterprise or industry and the government, the enterprises have to make different assessments, which is unnecessarily complicated and costly. Additionally, different assessments might lead to different outcomes. From this, lengthy discussions between governments and enterprises or industries should arise about the effectiveness of international private regulation. Besides this, the question arises which of the types of assessment other stakeholders, like NGO’s, should conduct. This complicates the dual

¹⁰¹ Cafaggi and Renda seem to adhere to different indicators. Cafaggi & Renda, *supra* note 46, at 25-28.

effectiveness assessment even further. Obviously, if a methodology for the assessment of effectiveness could be found which demonstrates effectiveness from different points of view, the results thereof would be more viable than the ones generated by two, or even three, different types of assessments that may be less conclusive or even contradictory. Therefore, use of the same type of indicators and assessment is preferable.

3.4 *Assessment Intertwined with Assessments of Public Regulation?*

Assessment of the effectiveness of international private regulation might benefit from insights derived from impact assessment of public regulation, as discussed in Section 4. By and large, insights from the evaluation of public regulation could be helpful in assessing the effectiveness of international private regulation. This does not, however, imply that one should stick to the methodology developed for public regulation. First, several methodologies are developed for the assessment of public regulation, and many of them are contested. Thus, finding the most helpful methodology is not easy. But, more importantly, international private regulation only resembles public regulation to a certain extent, depending on the type of international private regulation at hand.¹⁰² Therefore, several effectiveness issues are specific to international private regulation. For example, the legitimacy of this type of regulation cannot be based on the democratic principles lying behind public regulation. As such, other ways of legitimacy have to be found. Conflict of law rules and added value are salient issues in connection with international private regulation, but are scarcely used in the effectiveness analysis of public regulation. Additionally, the economic effects of public regulation are often only analyzed at the macro level, while international private regulation, as elaborated herein, is often analyzed at the meso and micro level. That said, several insights of the methodology proposed for the assessment of international private regulation are derived from the assessments of the effectiveness of public regulation.

In the following paragraphs, the different approaches—*ex ante* and *ex post*—are examined. This section begins with the rule-setting process and later focuses on the effectiveness of existing international private regulation. These avenues are integrated in the concluding paragraph.¹⁰³

¹⁰² For example, the OECD Guidelines for Multinational Enterprises have a closer resemblance to public regulation than for example supply chain contracts through which a CSR policy is implemented. See OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011), available at <http://mneguidelines.oecd.org/text>.

¹⁰³ International private regulation is deployed in many different areas outside CSR and the effectiveness thereof may vary along these areas. See, e.g., BARBARA

4. THE RULE-SETTING PROCESS (EX ANTE APPROACH)

4.1 *Legal Approach*

From a legal point of view, the ex ante effectiveness of international private regulation is primarily connected with its ability to materialize the objectives this regulation aspires to realize.¹⁰⁴ These objectives may stem from spontaneous private regulation or government policy-induced private regulation.¹⁰⁵ However, unlike public regulation, it is often hard to assess whether these objectives have been achieved because it is unclear which specific and assessable objectives have been set. As to public regulation, this is typically clarified in the explanatory documents supporting the regulation. International private regulation often lacks such explanatory documents. As a result, the objectives of private regulation remain somewhat unclear. If private regulation aims at contributing to a better environment or human rights compatibility in doing business, it may be difficult to assess whether these objectives have been achieved. Which environmental improvement suffices, and to what extent does the human rights situation need to improve? It is important to clarify the specific and assessable objectives international private regulation aims to achieve.¹⁰⁶ Unless such objectives have been expressly articulated, it is rather difficult to assess whether international private regulation is effective in the sense that it achieves the objectives it aspires to realize.¹⁰⁷ In this

BAARSMA ET AL, ZELF DOEN? INVENTARISATIESTUDIE VAN ZELFREGULERINGSINSTRUMENTEN, RAPPORT No. 664 [Do It Yourself? Inventory of the Self-Regulatory Instruments, Report No. 664] (SEO Econ. Research Apr. 2003), available at <http://www.seo.nl/pagina/article/zelf-doen-inventarisatie-van-de-zelfreguleringsinstrumenten> (finding 22 private regulation instruments for many different situations in the Netherlands and offers regulators factsheets to choose whether private regulation suits their purposes).

¹⁰⁴ Cafaggi & Renda, *supra* note 46, at 15. As far as the involvement of government is concerned, the origin of a legal system in a certain country might also be of influence on the CSR performance of corporations. See Hao Liang & Luc Renneboog, *The Foundations of Corporate Social Responsibility* (ECGI Finance, Working Paper No.394, 2013).

¹⁰⁵ Cafaggi & Renda, *supra* note 46, at 12.

¹⁰⁶ Cf. *ISEAL Code of Good Practice*, *supra* note 89, §§ 5.1.1, 6.1.1, 6.2.1. Private regulation should, according to section 6.2.1, create a logical framework entailing principles, criteria, indicators and verifiers. The indicators should not only indicate what they measure, but also how the indicators are measured and where the line is drawn between what is acceptable and what is not (verifiers). See also *MSI Evaluation Tool*, *supra* note 97, at 2. See also *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 1.4.

¹⁰⁷ See Balleisen & Eisner, *supra* note 62, at 136 (contending that such public policy goals should entail roughly measurable benchmarks).

respect, it is important that the private regulation and its supporting documents are publicized and made transparent.¹⁰⁸ Connected to this, it is important to create a transparent norm-setting process and maintain sufficient autonomy of the private rule-maker.¹⁰⁹ For instance, “divergence of interests between the regulators and the regulated” might lead the members of the rule setting body to prefer less desirable “short-term actions [with no clear long term objectives] that maximize their likelihood of being re-appointed.”¹¹⁰

However, this is not always true. If international private regulation is set to achieve specific public policy objectives, it might be possible to assess whether these exogenous objectives have been achieved.¹¹¹ This being the case, the international private regulation itself does not necessarily have to articulate such specific objectives. A legal effectiveness criterion, therefore, is whether international private regulation expresses specific and assessable objectives, which may be exogenous public policy objectives, and if so, whether they have been achieved. In this respect, international private regulation should be consistent with international public regulation or standards.¹¹² However, this does not mean it should be consistent with all national laws, because drawing such international private regulation is virtually impossible for a variety of reasons, including the fact that those national laws may be contradictory.¹¹³

Stemming from this, the private rule-maker has to assess whether effective private regulation in his area exists that achieves the public policy objectives his regulatory framework is aiming at and in what respect it might contribute to the achievement of these objec-

¹⁰⁸ Cf. *ISEAL Code of Good Practice*, *supra* note 89, § 5.10 (providing for publication of the standards and the availability of supporting documents). See also *MSI Evaluation Tool*, *supra* note 97, at 37. In this respect, the question might arise whether the private regulation and its supporting document should be publicized in multiple languages. In my opinion, this is not necessary per se because of problems of interpretation if the norms are translated in different languages and the question arises over which is the authentic language. However, translations might be necessary for proper stakeholder engagement. See *id.* at 3.

¹⁰⁹ Balleisen & Eisner, *supra* note 62, at 131, 134-35.

¹¹⁰ Cafaggi & Renda, *supra* note 46, at 17.

¹¹¹ Cf. DIMITROPOULOS, *supra* note 32, at 244.

¹¹² See also Owen E. Herrstadt, *Are International Framework Agreements a Path to Corporate Social Responsibility*, 10 U.P.A. J. BUS. & EMP. L. (2007) 187, 196-201 (discussing International Framework Agreements on labor standards). Cf. *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 1.5.

¹¹³ In case international private regulation is not consistent with certain national laws, effective alternatives should be implemented regarding such countries. See, e.g., UTTING, *supra* note 57, at 86.

tives.¹¹⁴ If international private regulation exists that effectively achieves the objectives aimed at by its regulatory framework, it should refrain from rulemaking, because this would only unnecessarily complicate the legal framework in its arena. Beside this, an effective private regulatory framework entails “conflict of law” rules regarding cases in which this framework collides with other public or private regulation.¹¹⁵

After the drafting process, the work is not done. It is important that the norms are evaluated and, if necessary, reviewed on a regular basis. This evaluation should make use of past experiences with the norms, challenges of the norms by members or stakeholders, and should take into account grievances from stakeholders.¹¹⁶ This process should be conducted in the same manner as the drafting process.

Furthermore, in the rule-setting process, the rule-makers have to consider whether any possibilities for enforcement exist and whether the regulatory regime provides an effective conflict resolution mechanism. These two elements are elaborated upon in the ex post approach below.¹¹⁷

¹¹⁴ See *MSI-Evaluation Tool*, supra note 97, at 36; cf. *ISEAL Code of Good Practice*, supra note 89, §§ 5.1.1, 6.1.1, 6.2.1. The public regulator might desire to assess whether certain public policy goals are met as well. See Cafaggi and Renda, supra note 46, at 29 (proposing a joint assessment by the public and private regulator).

¹¹⁵ Cf. Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1018 (2004) (discussing the necessity and emergence of a new form of “intersystemic conflict laws”); *ISEAL Code of Good Practice*, supra note 89, § 6.5 (dealing with the situation in which international standards have to be adopted to local standards). Furthermore, section 6.6.1 requires the duty to inform other standard setting organizations that have developed related or similar international standards or a proposal to develop a new standard or revise an existing standard. It should also encourage the participation of this other standard setting organization. These ‘conflict of law’ rules might stem from the private rule-maker, but also from governments.

¹¹⁶ See, e.g., *MSI-Evaluation Tool*, supra note 97, at 5, 39-41 (requiring review of internal governance, overall effectiveness, and awareness of affected population as well); *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, supra note 89, Principals 2.1 & 2.3; *ISEAL Code of Good Practice*, supra note 89, § 5.1.1 (demanding regular—every five year—review and revision of standards to assess whether they meet their stated objectives). For this it is important that the rulemaking body is accessible for external parties and organizes regular meetings with stakeholders (if necessary, on different locations). See *MSI-Evaluation Tool*, supra note 97, at 5-6.

¹¹⁷ However, some of the indicators mentioned hereinafter are derived from the analysis of the means of enforcement, and therefore might be better understood after reading. See *infra* Part 4.1.

Additionally, more precise commands generally result in better behavior.¹¹⁸ Because of this, the degree of precision has to be optimized.¹¹⁹ It is important whether the international private regulation (i) entails clear norms/standards¹²⁰ that are interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), and (iv) refers to applicable international norms and treaties (e.g. in the area of human rights or the environment).¹²¹ Further, the specificity relates to the topics the international private regulation is intended to cover and addresses whether it entails specific rules on all of these topics, such as international treaties on human rights, the environment, or in national regulation.¹²² In order to achieve specificity, the existence of sufficient bureaucratic capacity and legal knowledge on the part of the regulator is required.¹²³ Effective international private regulation requires sufficient bureaucratic capacity and legal knowledge of the private rule-maker. If the private rule-maker does not have this capacity or knowledge, or is not willing to invest in it, he should refrain from participating.

The foregoing issues are largely addressed by the traditional criteria applied to public legislation, which might be helpful if a certain scheme is comparable to public regulation, such as the OECD-guidelines, but less so to supply chain arrangements.¹²⁴ Among others,

¹¹⁸ See Kaplow, *supra* note 88, at 19, 20; Kolk & van Tulder, *supra* note 22, at 9; Barbara Luppi & Francesco Parisi, *Rules Versus Standards*, in Production of Legal Rules, *supra* note 10, at 43; Overmars, *supra* note 7, at 17 (regarding codes of conduct); *ISEAL Code of Good Practice*, *supra* note 89, § 6.3.1.

¹¹⁹ See Kaplow, *supra* note 88, at 19; Luppi & Parisi, *supra* note 118, at 43, 46-52 (arguing that the frequency of application of a law is a crucial determinant of the optimal level of specificity).

¹²⁰ Certain norms and standards might need to be adapted to local conditions. See Alvarez & von Hagen, *supra* note 67, at 21-22.

¹²¹ Cf. Kolk & van Tulder, *supra* note 22, at 13, 17 (regarding codes of conduct in the area of CSR on child labor). However, regarding criterion iv., some international norms only aim at governments and not at companies. Referral to these norms might complicate the enforceability of codes of conduct vis-à-vis companies. Furthermore, referral only to the norms of the home country of a company is less effective than referral to international norms and preferably, if applicable, also to norms of host countries. See *id.* Cf. *MSI-Evaluation Tool*, *supra* note 97, at 3, 23-25.

¹²² Cf. Kolk & van Tulder, *supra* note 22, at 14.

¹²³ Balleisen & Eisner, *supra* note 62, at 131, 134-35; see Alvarez & von Hagen, *supra* note 67, at 17, 18 (discussing sufficient capacity in general). Cf. *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 2.5.

¹²⁴ Cf. Cafaggi & Renda, *supra* note 46, at 13.

these criteria include necessity, proportionality, subsidiarity, transparency, accountability,¹²⁵ accessibility, and simplicity.¹²⁶ The SAFA guidelines translate these criteria in connection with private standards into relevance, simplicity, cost efficiency,¹²⁷ goal orientation, performance orientation, and transparency.¹²⁸

The ex ante effectiveness of international private regulation depends on its ability to reach the goals, whether it entails conflict of law rules, on its enforceability, and on effective dispute resolution.¹²⁹ The effectiveness of international private regulation may depend on the following indicators, which have been derived from the aforementioned research:¹³⁰

- (i) Whether international private regulation entails specific and assessable objectives and does not aim at objectives which are effectively achieved by other public or private regulation,
- (ii) Whether it entails “conflict of law” rules,
- (iii) Whether it entails regular evaluation of the regulation and its functioning (and if necessary) review of the regulation,
- (iv) The existence of an supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of the supervisory body to pass judgment and to impose sanctions on non-complying parties,¹³¹
- (v) The existence of a supervisory body which controls access to scarce resources,¹³²

¹²⁵ This criterion has not been mentioned in the foregoing and will be addressed in the sociological approach.

¹²⁶ Cafaggi & Renda, *supra* note 46, at 24.

¹²⁷ This criterion will be discussed in the economic approach.

¹²⁸ See, e.g., Cafaggi & Renda, *supra* note 46, at 24.

¹²⁹ Cf. GIESEN, *supra* note 8, at 106 n.137-141.

¹³⁰ These indicators are not exhaustive. More detailed research may reveal others.

¹³¹ However, Kolk and van Tulder argue that the likelihood of compliance is higher when company codes of conduct are involved than for example codes of conduct set forward by business associations, international organizations or NGOs. See Kolk & van Tulder, *supra* note 22, at 11. This especially stems from the codes of conduct promulgated by business organizations or international organizations being less specific and abstaining from the possibility of imposing sanctions.

¹³² Cf. KOPPELL, *supra* note 29, at 62; Mirjan Oude Vrielink, *Wanneer is Zelfregulering een Effectieve Aanvulling op Overheidsregulering?*, in RECHT VAN ONDEROP: ANTWOORDEN UIT DE RECHTSSOCIOLOGIE (Marc Hertogh ed., Wolf Legal Publishers, Nijmegen, the Netherlands, 2011) 70-73; Scott et al., *supra* note 9, at 7. Beside these indicators the existence of smaller groups with comparable views is considered to be of importance as well as a high organizational level. This how-

- (vi) Sufficient bureaucratic capacity and (legal) knowledge of the private rule maker,
- (vii) The existence of (a) serious (threat of) contractual enforcement or other means of enforcement if necessary through state legislation and/or (effective) enforcement by states,
- (viii) The specificity of the rules/standards set forward by the international private regulation,
- (ix) Whether the initiative entails an effective complaint and dispute management mechanism to prevent and deal with non-compliance,¹³³ and
- (x) The possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful.

The aforementioned indicators may be helpful to set effective international private regulation.

4.2 *Economic Approach*

From an economic point of view it is of interest whether international private regulation potentially contributes to the economic welfare of (affected) communities and society at large as well as to the profitability of (multinational) enterprises. This research encompasses different points of view. The assessment of the potential increase or decrease in economic welfare differs along the international private regulation under consideration.¹³⁴ It makes a difference whether in-

ever, in my view, refers to the sociological perspective which is going to be discussed hereinafter. Nonetheless enforcement may be easier to realize in such circumstances.

¹³³ Regarding CSR compare the communication of the European Commission of October 25th 2011, COM(2011) 681, *supra* note 54, at 10. As to CSR in an international context non-judicial mechanisms for conflict management seem to be more effective. Furthermore the prevention of conflicts become more important. Regarding dispute management compare GIESEN, *supra* note 8, at 138, 139. Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, entails an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework (some) information could be retrieved whether (effective) grievance mechanisms are in place.

¹³⁴ From the classical economic approach of Coase and the Chicago School of Law and Economics this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well informed parties without regulation. For this approach see, e.g. Michael Faure, *Law and Economics: Belang Voor het Privaatrecht*, 6912 Weekblad voor Privaatrecht en Notarieel Recht (2011), at 1057. To date the necessity of research of the economic

ternational private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities, or (iii) technical standardization as to sustainability is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. It is also relevant whether the economic analysis is conducted on a micro or macro level.

Assessing the existing and future economic welfare of certain stakeholders calls for a different approach than the one needed for measuring the potential increase or decrease of the economic welfare of society at large. The first assessment calls for a “bottom up” approach assessing the possible increase or decrease of welfare of certain relevant stakeholders. The second assessment, the ‘top down’ approach, necessitates an evaluation of a possible increase or decrease of welfare at the level of society at large. This second assessment seems especially necessary if international private regulation might have more than negligible impact on society at large. If international private regulation might only affect certain stakeholders in a certain industry, and hence the micro level is relevant, the *ex ante* approach seems less helpful. It is not easy to assess the impact of future international private regulation on a certain stakeholder. Therefore, the micro level analysis is especially fit for the *ex post* assessment. The future economic effects of international private regulation might be analyzed best through a macro-economic approach.

As the macro level analysis is concerned, insights derived from a (*ex ante*) economic analysis of government regulation might be helpful to analyze the economic effects of international private regulation. Economic analysis of government regulation has become quite common in the last decade. The European Commission, for example, has established the Better Regulation Framework to analyze (among others) the economic effects of EU-regulation.¹³⁵ This framework advances an Integrated Impact Assessment Model, an *ex-ante* tool for improving the quality and coherence of the policy development process of the European Commission (which entails an integrated approach

effects of rules has been recognized. *See id.* at 1057, 1058. In this approach private regulation is an appropriate solution where bargaining, at low cost, can occur between risk-creators and those affected. *See* Ogus and Carbonara, *supra* note 10, at 231.

¹³⁵ This framework goes back to 2002. *See, e.g.*, Renda, *supra* note 94, at 46; Alberto Alemanno, *A Meeting of Minds on Impact Assessment*, 17 EUR. PUB. L. 485 (2011); Claire A. Dunlop, *Commentary on MacRae Regulatory Impact Assessment: a Panacea to Over-regulation?*, 14 J. OF RISK RES. 947, 949 (2011); Fabrizio De Francesco et al., *Implementing Regulatory Innovations in Europe: the Case of Impact Assessment*, 19 J. OF EUR. PUB. POL'Y 491, 455 (2012) (discussing the legal implications and the enforceability of this framework (i.e. through courts)).

covering the economic, social, and environmental dimensions comprehensively).¹³⁶

The analysis reviews the economic impact of the selected option, mostly in terms of (i) economic growth and competitiveness, (ii) changes in compliance costs and implementation costs for public authorities, (iii) impact on the potential for innovation and technological development, (iv) changes in investment, market shares and trade patterns as well as (v) in- or decreases in consumer prices.¹³⁷ The social impact includes the impact of the proposal on (a) human capital, (b) human rights, (c) prospective changes in employment levels or job quality, (d) changes affecting gender equality, social exclusion and poverty, (e) impacts on health, safety, consumer rights, social capital, security, education, training and culture as well as effects on (f) the income of particular sectors, groups of consumers or workers.¹³⁸ The environmental dimension concerns positive and negative impacts associated with the changing status of the environment such as climate change, air, water and soil pollution, land-use change, bio-diversity loss and changes in public health.¹³⁹ However, the impact assessment initially focused, as the US and UK do, on business compliance costs analysis of regulation without preliminary identification of alternative regulatory options.¹⁴⁰

As exact economic calculations were considered not to be the most important contributors to regulatory quality, the framework, became a tool which did not focus on a (sound) economic analysis but

¹³⁶ See the Impact Assessment Guidelines, SEC(2009)92 of the European Commission from 15 januari 2009, <http://EUR-LEX.europa.eu> (last visited Jan. 22nd 2014).

¹³⁷ Renda, *supra* note 94, at 56. For information on best practices for regulatory impact assessment (and how to implement it in the decision making process) see BUILDING AN INSTITUTIONAL FRAMEWORK FOR REGULATORY IMPACT ANALYSIS, OECD (2008), available at <http://www.oecd.org/gov/regulatory-policy/buildinganinstitutionalframeworkforregulatoryimpactanalysisriaguidanceforpolicymakers.htm>.

¹³⁸ Renda, *supra* note 94, at 56 and 57.

¹³⁹ *Id.* at 57.

¹⁴⁰ *Id.* at 47, 49-54. It was suggested that a two stage impact assessment should be conducted, a preliminary one devoted to the analysis of alternative regulatory options and an extended impact assessment in which the detailed assessment of the benefits and costs of the preferred regulatory option is made. *See id.* at 54. This was implemented in the new impact assessment model of 2002. *See id.* at 55. See also CLAUDIO M. RADAELLI ET AL., HOW TO LEARN FROM THE INTERNATIONAL EXPERIENCE: IMPACT ASSESSMENT IN THE NETHERLANDS 39, 40-61 (Center for European Governance, University of Exeter, 2010), available at <http://centres.exeter.ac.uk/ceg/research/ALREG/documents/Lerningfromtheinternationalexperience.pdf> (discussing impact assessment in other countries, including the United States).

merely summarized the interests of stakeholders and tried to find a compromise between political and policy stances advanced by different stakeholders having an interest in the rules at hand.¹⁴¹ The 2002 impact assessment as described above constituted a very complex exercise, which aspired to predict all possible consequences of the endorsement of new regulation and has been costly, burdensome, highly discretionary, and time-consuming.¹⁴² Research on these extended impact assessments revealed several methodological shortcomings, entailing unclear descriptions of the problem, obscure ranking of objectives, a narrow range of policy options, an unbalanced coverage of different types of impact (economic, social, and environmental) and inadequate arrangements for external consultation.¹⁴³ This resulted in a paradigm shift from sustainable development to competitiveness and from integrated impact assessment to an economic assessment in 2005, however not being a mere compliance cost assessment.¹⁴⁴ The guidelines still insist on a multi-criteria assessment by keeping the three pillars (economic, social, and environmental) separate.¹⁴⁵ OECD reports have pointed at the necessity of linking impact assessment to an oversight body as a key enabler of the success of regulatory impact analysis models.¹⁴⁶ Following these reports, the Impact Assessment board was created within the Secretariat General.¹⁴⁷ In 2010, the need to improve the methodology and soundness of the economic analysis was felt, as well as the efficient use of resources devoted to impact assessment and ex post evaluation in the Commission.¹⁴⁸ The assessment of alternatives has become more systematic.¹⁴⁹

However, the impact assessment is not considered to be very important because it is an assessment of the European Commission which rapidly becomes obsolete when the legislation is amended during the European co-decision procedure.¹⁵⁰ Often the final legislation only partly reflects the assessment conducted on the original proposal

¹⁴¹ Renda, *supra* note 94, at 48, 52.

¹⁴² *See id.* at 57.

¹⁴³ *Id.* at 69.

¹⁴⁴ *Id.* at 58-60. At this point the dual stage system was abandoned. *Id.* at 58.

¹⁴⁵ *Id.* at 63.

¹⁴⁶ Cf. Oliver Fritsch et al., *Regulatory Quality in the European Commission and the UK: Old Questions and New Findings 1* (Ctr. European Policy Studies, Working Document No. 362, 2012) available at <http://www.ceps.eu/book/regulatory-quality-european-commission-and-uk-old-questions-and-new-findings>.

¹⁴⁷ Renda, *supra* note 94, at 64-67. However some feel the need for independent oversight bodies at EU level. *See id.* at 66; Fritsch et al., *supra* note 146, at 1.

¹⁴⁸ Renda, *supra* note 94, at 67.

¹⁴⁹ *Id.* at 78.

¹⁵⁰ Renda revealed that the vast majority of impacts assessments relate to non-binding communications and policy initiatives. *See Id.* at 72-73.

of the European Commission.¹⁵¹ The other EU institutions such as the European parliament and the Council still abstain from impact assessments.¹⁵² Besides this a clear focus lacks, it is unclear whether the impact assessment should abide by any specific methodology or need for quantification.¹⁵³ Many impact assessment documents do not adopt a clearly recognizable viewpoint, for example a quantitative cost-benefit analysis.¹⁵⁴ Another disadvantage is the confidential nature of the impact assessments: only the final versions are published.¹⁵⁵ Nonetheless, the Commission managed to improve the quality of its impact assessments, although a lot seems to depend on the proposal at stake, bearing in mind that to date no other EU member states, excluding the UK, use such an instrument.¹⁵⁶ At the same time instruments seem to be gradually shifting towards other tools and in particular towards the Standard Cost Model for the measurement and reduction of administrative burdens as well as fitness checks covering entire policy domains.¹⁵⁷ The recently developed Impact Assessment Guidelines of the European Commission stem from this and are used by many EU and non EU-countries.¹⁵⁸ However, no conclu-

¹⁵¹ *Id.* at 47.

¹⁵² *Id.* at 80.

¹⁵³ *Id.* at 81. *Cf.* Dunlop, *supra* note 135, at 949; Fritsch et al., *supra* note 146, at 3.

¹⁵⁴ Renda, *supra* note 94, at 81. However, the cost-benefit analysis has also been criticized in the recent years because it, just like economics in general, neglects human behavior. See *id.* at 102, 112, and 130-135. Nonetheless this approach has increased success in the US and in other impact assessments. See *id.*, at 140; RADAELLI ET AL., *supra* note 140, at 40-61. The critique in Europe might be invoked by the impact assessments on non-binding regulation and therefore on a much broader set of proposals, which may lead to casting doubts on the usefulness of cost-benefit analysis. The US have adopted a confined, invariable (in terms of depth and criteria) system to select proposals that should undergo an impact assessment. However, this assessment only covers secondary regulation. See Renda, *supra* note 94, at 147-148; RADAELLI ET AL., *supra* note 140, at 40-61.

¹⁵⁵ Fritsch et al., *supra* note 146, at 1-2; Renda, *supra* note 94, at 48.

¹⁵⁶ Renda, *supra* note 94, at 48. However, comparable instruments are used in other EU countries. See, e.g., RADAELLI ET AL., *supra* note 140, at 107-126 and 146-177.

¹⁵⁷ Renda, *supra* note 94, at 48 and 82. *Cf.* Dunlop, *supra* note 135, at 949.

¹⁵⁸ *Smart Regulation in the European Union*, COM (2010) 543 final (Aug. 8, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>. *Cf.* A "Competitiveness Proofing" Toolkit for Use in Impact Assessments, SEC (2012) 91 (Jan. 27, 2012), available at http://ec.europa.eu/smart-regulation/impact/key_docs/docs/sec_2012_0091_en.pdf. See also Cafaggi and Renda, *supra* note 46, at 1.

sive evidence exists that countries that use the impact assessment grow faster than countries which do not.¹⁵⁹

That said, the Impact Assessment Guidelines of the European Commission might provide some guidance as to the effects of international private regulation.¹⁶⁰ This seems to be taken as a starting point by ISEAL which launched a code for assessing the impacts of Social and Environmental Standards. This code in part resembles the impact analysis of public policy makers.¹⁶¹ The Standard Cost Model might also be appropriate and, because it is less sophisticated, it might be easier to implement.¹⁶² This Standard Cost Model is used in other countries too, like the UK and US, and measures the (reduction of) administrative burdens.

This Standard Cost Model might provide useful insights on economic effects of international private regulation.¹⁶³ In that respect it should be noted that international private regulation may lead to a cost transfer from states to private actors, such as enterprises.¹⁶⁴ Ob-

¹⁵⁹ Renda, *supra* note 94, at 93.

¹⁶⁰ The former Impact Assessment tool of the European Commission seems less adequate, because of its complexity as well as its expensiveness, sometimes inconclusive and confidential nature. *See id.* at 48, 52. *Cf.* Cafaggi and Renda, *supra* note 46, at 2.

¹⁶¹ *See Assessing the Impacts of Social and Environmental Standards Systems v1.0*, ISEAL ALLIANCE (NOV. 2010) www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice. *See. e.g.*, Cafaggi and Renda, *supra* note 46, at 20-23. Impact assessment is also an indicator in the MSI-evaluation tool. *See MSI-Evaluation Tool*, *supra* note 97, at 37, 38.

¹⁶² *Cf.* Renda, *supra* note 94, at 48, 82. However, this method is criticized too because it tends to neglect human behavior. *See id.* at 102, 112 and 130-35. Beside this, this method neglects that regulation might generate benefits outside the reduction of administrative burdens.

¹⁶³ However, the question arises whether the cost of compliance with private regulation that entails a code of conduct can be monetized. Compliance with a code of conduct is often considered to be intertwined with the day-by-day business and the costs thereof are not measured separately. *See, e.g.*, Oude Vrielink, *supra* note 132, at 69.

¹⁶⁴ Cafaggi, *supra* note 12, at 30. For example, the GlobalGAP framework (on good agricultural practice) assumingly imposes disproportionate costs on farmers in developing countries. *See Communication from the Commission on Agricultural Product Quality Policy*, COM (2009) 234 final (May 28, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0234:FIN:EN:PDF>. The greater the degree of precision of the norms, the greater will be the costs of formulating legal commands and applying them in adjudication and of parties interpreting them for purposes of deciding how to conform behavior to such rules. Therefore the greater the degree of precision, the greater will be the cost transfer. On the other hand, as has been elaborated before, more precise commands will generally result in better behavior.

viously, the process of establishing private regulation is more costly to industry than government legislation.¹⁶⁵ The threat of public regulation (setting new or higher standards than previously adopted by the public legislator) and relatively small (marginal) cost of private regulation induce business to engage in international private regulatory regimes.¹⁶⁶ Reporting requirements entailed in the private regulatory frameworks might increase the cost of business as well. This problem partly might be tackled by a shift in the nature of the norms of a private regulatory framework. Instead of focusing on substantive rules only, a regime might entail rules on the way stakeholders could build a (long term) relationship amongst each other.¹⁶⁷ Private regulation might have network effects. The costs of participating in an international private regulatory framework decrease with the number of participants.¹⁶⁸ Such costs are likely to be rather high in the early stages of the formation of a new regulatory framework.¹⁶⁹ Enforcement of private regulation is costly too, although necessary. Without enforcement, free-riding, where participants enjoy the benefits of the regulatory framework but disobey the rules, is possibly very frequent.

The costs of enforcement might discourage new members to join the network.¹⁷⁰ From the outset of the regime the (future) costs of enforcement are borne by the regulatees (or the overarching body).¹⁷¹ However, these costs might be reduced if an overarching body, as referred to in the foregoing paragraph, exists and if these costs are shared by many participants.¹⁷² Hence, if a private regulatory framework is set, it is efficient to aim at involving a higher number of participants in order to reduce the enforcement costs to be paid by the

¹⁶⁵ Cf. Overmars, *supra* note 7, at 20. Furthermore, it is contended that delegation of public rulemaking power to private regulatory framework can lead to adverse welfare effects, especially if monopoly power is granted to one regulatory framework. See Ogus & Carbonara, *supra* note 10, at 241, 242.

¹⁶⁶ Ogus and Carbonara, *supra* note 10, at 236. Cf. Kolk & van Tulder, *supra* note 22, at 4.

¹⁶⁷ However, a regime might not be confined to the latter rules. This might especially jeopardize the public interest if the interests of the stakeholders do not coincide with it.

¹⁶⁸ *Id.* at 243. See Gandara, *supra* note 25, at 224 in connection with eco-labels.

¹⁶⁹ Cf. Ogus and Carbonara, *supra* note 10, at 231. Hence, it could be considered not to promulgate yet another private regulatory framework, but to build on and improve existing frameworks. Cf. *id.* at 232.

¹⁷⁰ *Id.* at 232, 237.

¹⁷¹ *Id.* at 237.

¹⁷² *Id.* at 233, 237 (contending that the information costs for the formulation and interpretation of the standards are lower and such bodies will emerge if monitoring costs for such a body are low). Compare, in connection with eco-labels, Gandara, *supra* note 25, at 112.

individual participants.¹⁷³ In that respect the scope of the private regime is of importance: the more global in scope, the higher the number of potential participants.¹⁷⁴ International private regulation has an international impact and may lead to a cost transfer from Western developed economies to southern developing economies.¹⁷⁵ This may contribute to the welfare of (Western) society at large, but might have adverse effects on developing economies.

That said, the Standard Cost Model might be the predominant indicator in the ex ante economic avenue which could be applied in practice, although some other indicators (such as the potential number of participants in a regulatory regime and other impact assessments tools) might be relevant as well.¹⁷⁶

4.3 Sociological Approach

The (ex ante) effectiveness of international private regulation might be described from a sociological point of view too.¹⁷⁷ Important in this respect is how and when private regulation will be accepted by a certain group and why. Acceptance within a certain group might enhance compliance with regulation and thus might render private regulation (more) effective.

There is however no single answer to the question of how various norms crystallize (and thus might produce binding effects upon actors to whom they are addressed). They may be accepted through a variety of mechanisms.¹⁷⁸ The following factors, which relate to the institutionalization of regulatory norms, might provide some guidance.

¹⁷³ Although research has revealed that it is very tempting to engage a whole industry in a private regulatory framework, even if adequate enforcement is implemented. Cf. Ogun and Carbonara, *supra* note 10, at 237 (contending that the framework has to provide economic incentives for free riders to participate).

¹⁷⁴ Kolk & van Tulder, *supra* note 22, at 10. This might be true for a code of conduct within a company if this is spread at a global level through its subsidiaries in other countries or through supply chains. The size of the company is of importance in that respect. Cf. *id.* at 21, 22.

¹⁷⁵ Cafaggi, *supra* note 12, at 30.

¹⁷⁶ However, one should realize that public regulation also might have consequences, for example if highly influential stakeholders manage to make politicians set rules which (are beneficial to these stakeholders but) have consequences for the competition on a certain market, which is of course inefficient from an economic point of view. It might well be that international private regulation is susceptible to such influence too, and maybe even more so than government regulation.

¹⁷⁷ See also Oude Vrielink, *supra* note 132, at 61-78.

¹⁷⁸ Casey & Scott, *supra* note 66, at 82; KOPPELL, *supra* note 29, at 41-44; Jan Eijbouts, Corporate Responsibility, Beyond Voluntarism 17-22 (Maastricht University, Oct. 20 2011) (discussing anti-bribery norms).

However, these parameters do not establish a very clear distinction (which might be assessed in an empirical way) between norms which have been accepted and those which have not. Relevant factors are (i) the extent to and the way in which a norm has been distributed and is applied, (ii) the degree of acceptance of a norm, and (iii) the mode of transmission.¹⁷⁹ In connection with the degree of acceptance of a norm, the inclusiveness (of the norm setting process) vis-à-vis stakeholders is of essence. This will be elaborated as a separate issue under (iv).

Analysis of (i) distribution relates to the extent to and the way in which a norm is known and applied. Knowledge is not only a product of its promulgation. Training and education for those involved in applying the norm and sometimes information campaigns and notices also play a role in such knowledge building.¹⁸⁰ Mass media also plays a pivotal role in this process. Governments are particularly cognizant of this dimension of making norms effective.¹⁸¹ However, it is of importance that not only the norm itself, but also the background endorsing it, as well as the objectives aimed at, are explained in such campaigns. Purchasers, for example, need to be convinced that the standard not only enhances efficiency but also achieves the objective it pursues.¹⁸² It is even argued that social norms by their nature imply that what ought to be done is known by the community in which norms operate.¹⁸³ Traditional (public) legislation has the disadvantage that it does not always reach the actors it is meant for.¹⁸⁴ As a result, the Dutch government has searched for alternative ways, such as in “Bruikbare rechtsorde” and “Vertrouwen in wetgeving.”¹⁸⁵

Acceptance (ii) of a norm may involve consideration of both the process through which it emerges, its content, and its likely effects. Crystallization of norms is therefore heavily reliant upon the instruments which can transmit information which educates actors about not only the substantive content of rules, but also the objectives which

¹⁷⁹ Casey & Scott, *supra* note 66, at 78 n.82 (referring to the typology of Morris).

¹⁸⁰ *Id.* at 82. Cf. Alvarez & von Hagen, *supra* note 67, at 24; RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 54-55, (Yale University Press, 2008). See for example on International Framework Agreements on labor standards Herrstadt, *supra* note 112, at 201, 202. Therefore, the MSI-evaluation tool demands for a continuous learning program for relevant stakeholders. See *MSI-Evaluation Tool*, *supra* note 97, at 21, 22, 25-27, 32 and 33.

¹⁸¹ Casey & Scott, *supra* note 66, at 84.

¹⁸² Compare, on guarantees of product safety, *id.* at 91-92.

¹⁸³ *Id.* at 82.

¹⁸⁴ Overmars, *supra* note 7, at 16.

¹⁸⁵ Documents of The Dutch Parliament Second Chamber 2003/04, 29 279, 9; 2008/09, 31 731, 1 and 2, <http://www.overheid.nl> (last visited Jan 22nd 2014). See also Overmars, *supra* note 7, at 17.

underlie norms, the substantive regulatory process, and methods by which norms can be complied with.¹⁸⁶ Trust in obedience by other members and social incentives to comply are needed.¹⁸⁷ The acceptance of private regulation might increase if regulation is established by an industry instead of being promulgated by the government.¹⁸⁸ In this respect a stable group of participants and a slow changing environment are helpful.¹⁸⁹ A tradition of and experience with private rulemaking might enhance acceptance of a new private regulatory regime.¹⁹⁰ Therefore, private regulation may be successfully established only if the stakeholders are willing to collaborate and to address relevant issues in an industry.¹⁹¹

Beside this, it is helpful if an industry has a shared vision on and responsibility towards societal issues.¹⁹² In this respect the relevance of norms is deemed to be important for the acceptance thereof.¹⁹³ In terms of commitment, it is important whether the private regulation fits within the strategic choices and dilemmas faced by the companies and their managers, partly determined by norms that emerge within markets.¹⁹⁴ These norms are classically set through the interaction of many buyers and sellers.¹⁹⁵ The success of a standard is largely determined by its take-up within a particular market through, for instance, its (voluntary) adoption both in production processes and

¹⁸⁶ Jacco Bomhoff & Anne Meuwese, *The Meta-regulation of Transnational Private Regulation*, 38 J. OF L. & Soc'y. 138, 159; Casey & Scott, *supra* note 66, at 82.

¹⁸⁷ Overmars, *supra* note 7, at 21. For compliance, an independent body might be helpful. *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ Alvarez & von Hagen, *supra* note 67, at 27; Oude Vrielink, *supra* note 132, at 72.

¹⁹⁰ Oude Vrielink, *supra* note 132, at 72. *Cf.* Alvarez & von Hagen, *supra* note 67, at IX.

¹⁹¹ Oude Vrielink, *supra* note 132, at 72; Overmars, *supra* note 7, at 20; *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 3 (adding that participants have to commit real effort to success).

¹⁹² Oude Vrielink, *supra* note 132, at 72. See also Overmars, *supra* note 7, at 20, 26 (arguing for an intermediate organization to assist in this and contends that such an organization is lacking regarding the Dutch corporate governance code).

¹⁹³ *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 9, 19, 21, 29 and 32.

¹⁹⁴ *See* Oude Vrielink, *supra* note 132, at 72. *See also* Kolk & van Tulder, *supra* note 22, at 20.

¹⁹⁵ For example, the rating mechanism of eBay incentivizes compliance and permits sellers who build up strong ratings to sell successfully. *See* Casey & Scott, *supra* note 66, at 81.

the specification within supply chains.¹⁹⁶ Beside this, entities are more willing to accept norms if they are in their own interest.¹⁹⁷

Acceptance of a norm is intertwined with the legitimacy of those norms.¹⁹⁸ Linkage to electoral politics is a central mechanism of legitimating *public* regulation.¹⁹⁹ Legitimacy of public regulation is assessed by reference to certain predetermined standards and criteria.²⁰⁰ These criteria include assessing whether the regulatory norms are (i) constitutional (for example fair procedures, due process, consistency, coherence, proportionality, and the existence of oversight from constitutionally established bodies such as national courts, legislatures, or executives and international organizations) and (ii) democratic (the extent and effectiveness of participation, transparency, accountability, and deliberation in the norm-formation process).²⁰¹

Criteria for assessing legitimacy are also found in (iii) functionality and being performance based (degree of expert involvement and effectiveness and efficiency of the norm in achieving the objectives which they pursue) and (iv) being value and objectives-based (fair trade, good agricultural practices, market efficiencies, and sustainable development).²⁰² Obviously, *international private regulation* does not meet these requirements of legitimacy in the traditional sense. It rarely takes the form of formal and informal delegation of rule-making by public entities. It uses a broad range of regulatory devices that may be of a rather soft legal nature, such as codes, but also of a hard legal nature, such as contracts.²⁰³ However, private regulation may operate as a complement to public rules to specify and tailor them to specific markets.²⁰⁴ In this respect (public) legislation lends legitimacy (in the

¹⁹⁶ *Id.* at 81; Overmars, *supra* note 7, at 19 (on prevention of child labor in the garment and toys industry). Corporate governance systems in different countries play a role as to willingness of companies to implement codes of conduct (in the CSR area) too. See Kolk & van Tulder, *supra* note 22, at 8, 9. This might, for example, also result in closer relationships between buyers and sellers in a supply chain. See Alvarez & von Hagen, *supra* note 67, at 26, 27.

¹⁹⁷ Oude Vrielink, *supra* note 132, at 72; Schouten, *supra* note 69, at 71.

¹⁹⁸ Casey & Scott, *supra* note 66, at 86; Schouten, *supra* note 69, at 61. *Cf.* Alvarez & von Hagen, *supra* note 67, at IX, 19, and 20. Sometimes this kind of legitimacy is referred to as authority as an opposite of legitimacy (of governments) in the legal sense. See, e.g., KOPPELL, *supra* note 29, at 56.

¹⁹⁹ *Cf.* Casey & Scott, *supra* note 66, at 86.

²⁰⁰ *Id.* at 87. On legitimacy see also KOPPELL, *supra* note 29, at 45-48.

²⁰¹ See, e.g. Casey & Scott, *supra* note 66, at 87.

²⁰² *Id.*

²⁰³ Curtin & Senden, *supra* note 11, at 164.

²⁰⁴ Cafaggi, *supra* note 12, at 42, 43. Compare on this (sometimes complicated) interaction in connection with bio fuels, Schouten, *supra* note 69, at 106, 107, and 112-125. For example, in countries with weak governance structures or corruption issues international private regulation might enhance compliance. *Cf. id.* at 139.

traditional sense) to international private regulation.²⁰⁵ Therefore, criteria (i) and (ii) might be complied with where private regulation consolidates in combination with strong public institutions operating with public regulation.²⁰⁶ It is also possible that private regulation precedes the creation of public regimes if, in order to bridge regulatory gaps, private organizations design new markets and new institutions to be later supplanted by hybrid regimes.²⁰⁷ Furthermore, it is argued a wide range of activities which might once have been thought of as private should be regarded as public in character and therefore amenable to (future) public-law controls either at the domestic or global level.²⁰⁸ This also provides some (future) legitimacy in the traditional sense.

Obviously, legitimacy of international private regulation beyond domestic legislation, or in the absence of such domestic regulation, is not derived from state legislation.²⁰⁹ However, the linkage to electoral politics is quite distant on a global level if an international body like the UN is reviewed. Its decision-making process is quite diffuse and solely based on a rather indirect linkage to electoral politics. Therefore, it is difficult to adopt global regulation/legislation which has legitimacy in the traditional sense.²¹⁰ Beside this, international private regulation is not always comparable with public legislation as has been elaborated hereinabove. Private regulation might have less impact than public legislation and on smaller groups, for example, as it is deployed in supply chains.²¹¹

Does this mean that legitimacy is of no importance as international private regulation is concerned? Scott, Caffagi, and Senden con-

²⁰⁵ Cafaggi, *supra* note 12, at 42, 47. However, *cf.* Schouten, *supra* note 69, at 125, 126, 136, and 137 (contending that public regulation might also water down private standards in connection with bio fuels). Furthermore, international private regulation may contribute to the strengthening of the legitimacy of public regimes as well. For example national governments make use of transnational corporate capacity by enrolling airlines in immigration control and banks and (legal) practitioners in monitoring and reporting money laundering. See Cafaggi, *supra* note 12, at 41; Scott et al., *supra* note 9, at 18. *Cf.* Overmars, *supra* note 7, at 29.

²⁰⁶ *Cf.* Cafaggi, *supra* note 12, at 24, 47, and 48; Schouten, *supra* note 69, at 60, 81.

²⁰⁷ Cafaggi, *supra* note 12, at 24.

²⁰⁸ Scott et al., *supra* note 9, at 15.

²⁰⁹ However, international private regulation might have some electoral elements that partly resemble legitimation of public norms. Within private regulation regulatees may choose their regulators. For example, consumers may have choices as to which self-regulatory regime they want to be protected by. *See id.* at 17.

²¹⁰ Exempt from global treaties which are binding in all states. However, the number of treaties meeting this requirement is very limited.

²¹¹ In such smaller communities other forms of legitimation are conceivable. *Cf.* LORD LLOYD OF HAMPSTEAD & MICHAEL D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 411 (Stevens & Sons, London 1985).

tend a more pluralist conception of constitutionalism which gives greater recognition to the diversity of institutional structures should be adopted.²¹² The alternative forms of legitimacy better reflect the current social situation in which social media gains importance in the policy making of multinational enterprises. Hence, other mechanisms may be considered to bridge the legitimacy-gap as private regulation is proposed, including drafting proper procedures and potentially judicial accountability.²¹³ Regardless, support for international private regulation from governments might enhance acceptance, although (inhabitants of) non-western countries might consider support from western countries to be a protectionist measure in some instances.²¹⁴

Striving after alternative forms of legitimacy is tempting in supply chain regulatory regimes such as, for example, those tied to CSR. In supply chains a purchaser requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.²¹⁵ Bilateral contracts within supply chains present significant problems for the management of legitimacy in terms of both substantive norms/processes and identifying the level at which such issues are managed.²¹⁶ In a worst case scenario, the suppliers are likely to coercively experience the international private regulation adopted in a supply chain contract. This is especially true if multinational enterprises prescribe the norms vis-à-vis smaller and medium corporations. International human rights and environmental principles might in other (non-western) countries be suspected as part of alleged protectionist measures concerning its own national industry. Third party monitoring increases complexity and diffuses the responsibility for legitimacy. However, third parties may be part of a legitimation strategy not only regarding suppliers but also in respect of the ultimate consumers. To the extent that issues of consumer confidence are significant, there may be strong incentives to make use of third party assurance.²¹⁷

It is not unreasonable to assume that the combination of direct participation of market actors and the inclusion of both NGOs and governments has the potential to combine advantages for acceptance as

²¹² Scott et al., *supra* note 9, at 2. Cf. Cafaggi, *supra* note 12, at 43; Pauwelyn et al., *supra* note 59, at 511-519; Schouten, *supra* note 69, at 57 and 109.

²¹³ Scott et al., *supra* note 9, at 1; Schouten, *supra* note 69, at 82, 83, 106-110, 128-132, and 134-137.

²¹⁴ Compare, on the role of governments, Alvarez & von Hagen, *supra* note 67, at 17 and 18. Compare, in connection with global agri-food chains, Schouten, *supra* note 69, at 67, 68.

²¹⁵ Casey & Scott, *supra* note 66, at 93.

²¹⁶ *Id.* at 93.

²¹⁷ *Id.* at 94.

compared with inter-governmental regimes.²¹⁸ In fact, government support might enhance acceptance.²¹⁹ From the importance of acceptance of private international regulation one could infer that an initiative is more effective as the level of acceptance increases and that the lack of legitimacy of international private regulation in the traditional sense might be partially compensated for by acceptance (in a sociological sense). If regulates and other stakeholders accept the norms, this acceptance proves at least a slight degree of legitimacy.²²⁰

As to (iii) the mode of transmission of norms, some modes are more effective to induce acceptance than others. Supply chain contracts are often used to import norms developed in other contexts which are less than fully institutionalized.²²¹ The standards set by the FSC were adopted by major retailers in their supply chain contracts because of market pressure to show strong environmental performance.²²² This is transparent to the parties and has been subject to well-developed mechanisms of monitoring and enforcement.²²³ In such circumstances knowledge and acceptance of a norm is part of the process of entering into a contract.²²⁴ The dimension of socialization and reinforcement then occurs largely through market processes.²²⁵ Hence, if a private regulatory regime applies more effective modes of transmission this indicates more effectiveness from a sociological point of view.

As to (iv) the inclusiveness of the norm setting process (which is closely tied to acceptance), it is of importance that the relevant stakeholders are involved in the production of the rules of the private regulatory framework. In this respect, rules on stakeholder engagement in public legislation might be helpful. Dutch law provides an interesting example. Section 25 of the Dutch Privacy Act grants the Dutch Privacy Authority the power to take an administrative decision on the compatibility with the Privacy Act of a certain code of conduct

²¹⁸ Scott et al., *supra* note 9, at 19.

²¹⁹ Compare, in connection with global agri-food chains, Schouten, *supra* note 69, at 67 and 68.

²²⁰ Cf. HAMPSTEAD AND FREEMAN, *supra* note 211, at 411.

²²¹ Casey & Scott, *supra* note 66, at 85. Cf. Oude Vrielink, *supra* note 132, at 72.

²²² Casey & Scott, *supra* note 66, at 85.

²²³ This for example takes place through third party certification. *See id.* at 85. These mechanisms often encompass a high degree of institutionalization. *See id.*

²²⁴ *Id.* The more vertically (one entity controls multiple processes along the chain) and horizontally (fewer entities at each stage) integrated a chain is, the more effective the transmission appears to be. Compare, in connection with global agri-food chains Schouten, *supra* note 69, at 46 and 47.

²²⁵ Casey & Scott, *supra* note 66, at 86.

(on privacy) set forth by a certain industry.²²⁶ Section 25 of the Dutch Privacy Act requires the Privacy Authority to enable relevant stakeholders to comment on this code of conduct before it reaches its decision.²²⁷ This procedure enhances the acceptance of the code of conduct. Stakeholders have the opportunity to comment on intended secondary regulation in the United States. These proceedings might enhance acceptance as well. If such stakeholder engagement measures are put in place, this might be effective in terms of acceptance of certain international private regulation.²²⁸ By and large, international private regulation is more effective in sociological terms if relevant stakeholders are involved in the rule making process in such a manner that they may contribute effectively to the norm setting process.²²⁹

This is shown by a survey carried out by ISEAL in 2007 which has shown that inclusiveness, participation, and fair representation is pivotal in connection with the credibility of standards.²³⁰ Non-inclusiveness might induce (not included) stakeholders to (strongly) oppose

²²⁶ Which according to section 25 subsection 3 of the Dutch Privacy Act has to demonstrate its representativeness.

²²⁷ In connection with standardization in the EU see Council Regulation 12/1025, § 4 subsection 3, 2012 O.J. (L316) (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> (requiring a notice and comment procedure regarding draft standards).

²²⁸ However, Scott et al., contend that the legitimacy of monitoring and enforcing functions is amenable to being addressed not only through participation, but also through institutionalization both of process and norms for scrutiny. See Scott et al., *supra* note 9, at 15.

²²⁹ See *MSI-Evaluation Tool*, *supra* note 97, at 8-11; Schouten, *supra* note 69, at 84 and 85. Cf. *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 9, 19, 21, 29, and 32. See also Council Directive 98/34, 1998 O.J. (204) 37 (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:EN:PDF>. In the report is proposed to change directive 98/34/EC in line with the provisions of the Service Directive 2006/123/EC. See the report, at 32. In this respect the report (at 9 and 23) also refers to the ISO code of ethics (to ensure impartiality) and the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards. In (technical) standardization the regulator is supposed to be independent from the industry and its legitimacy is based on expertise. See Cafaggi, *supra* note 12, at 35. Moreover, independency from members of an initiative seems important for this in general. This poses amongst others limits to funding by members to an initiative and allocation of resources. See, e.g. *MSI-Evaluation Tool*, *supra* note 97, at 6 and 7.

²³⁰ Casey & Scott, *supra* note 66, at 89. Compare, regarding round table initiatives in global agri-food chains Schouten, *supra* note 69, at 36-38. This might be a specific risk in long supply chains with multiple actors. Cf. Alvarez & von Hagen, *supra* note 67, at 11.

international private regulation.²³¹ Inclusiveness regarding relevant stakeholders provides insight in the preferences of others, the varieties of perspectives on the problem the regime addresses, and provides potential for rethinking not only the rules and instruments of the regime but also its objectives.²³² If only one group of stakeholder(s) is represented in the governing body, this decreases the acceptance of such mechanism for others.²³³ Therefore, the multi-stakeholder model seems more effective because it aspires to engage the relevant stakeholders in the rulemaking process and is therefore able to embody all interests.²³⁴ This might, however, not be true in all circumstances. For example, market failures associated with the excessive depletion of natural resources or climate change may be effectively addressed through action by the same market actors whose conduct caused the problem.²³⁵

As to the way in which relevant stakeholders should be involved, four features of rule-making might be of importance: (i) formality (how precisely is the rule-making process stipulated in organization documents, either formal or informal), (ii) decision calculus (what is the nature of deliberations regarding proposed rules, either technical or political), (iii) decision rule (how is the decision to approve a new rule made: majoritarian, supermajoritarian, special powers, consensus), and (iv) inclusiveness (how open is the rule-making process to participation by nonmembers, either self-contained or participatory).²³⁶

²³¹ See, in connection with global agri-food chains, Schouten, *supra* note 69, at 43-45.

²³² Scott et al., *supra* note 9, at 18.

²³³ Cf. UTTING, *supra* note 57, at 103.

²³⁴ Cf. KOPPELL, *supra* note 29, at 57; Overmars, *supra* note 7, at 20; Scott et al., *supra* note 9, at 6; Pauwelyn et al., *supra* note 59, at 521-526; UTTING, *supra* note 57, at 103. On International Framework Agreements on labor standards see Herrnstadt, *supra* note 112, at 187. This is also common in respect of traditional rule-making.

²³⁵ Scott et al., *supra* note 9, at 7; Kolk & van Tulder, *supra* note 22, at 23.

²³⁶ KOPPELL, *supra* note 29, at 145. See also *MSI-Evaluation Tool*, *supra* note 97, at 11-13; section 5.2 of the Iseal Code of Good Practice, *supra* note 89, which demands for providing public information on the decision-making procedures of standard setting processes. Section 5.5.1 prescribes that participation in the standards consultation as a principle should be open to all interested parties and that the decision making reflects a balance of interests among interested parties. Cf. also *MSI-Evaluation Tool*, *supra* note 97, at 37. Section 5.5.3 of the ISEAL code of good practice prescribes that if decision-making is limited to members the membership criteria and application procedures shall be transparent and non-discriminatory. *ISEAL Code of Good Practice*, *supra* note 89, §5.5.3. Section 5.9 aims at consensus but provides for alternative decision-making procedures if this is not possible. It prescribes that decision-making procedures should be established and documented

That said, engaging relevant stakeholders is rather complicated.²³⁷ For example, in the global setting it is troublesome to find the relevant stakeholders because the relevant community is ambiguous and contested.²³⁸ (Global) administrative procedural requirements might be included (which might even be assessed by third parties).²³⁹ This is especially true in assessing the relevant stakeholders and engaging them,²⁴⁰ assessing the (different) interests of these stakeholders, and providing these stakeholders with adequate information in a timely fashion and in such a manner that they are able to understand it. For example, inviting (representatives of) indigenous people from a country in Latin America to attend a rule setting conference of multinational corporations at a venue in the United States which is difficult to reach, and providing them a day in advance with extensive information through a web portal which they have no access to (because they do not have Internet access), and in English, a language they may not understand, is rather ineffective.

Effective stakeholder engagement entails (i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule setting process (with sufficient resources), preferably through (with administrative procedures comparable) engagement rules, (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it, and (iv) sufficient documentation

which make it impossible for one group to dominate or to be dominated in the decision-making process. *Id.* § 5.8. Compare, regarding (practical difficulties in) global agri-food chains Schouten, *supra* note 69, at 64-67 and 85-87, who refers to a methodology to assess the quality of deliberation (Discourse Quality Index).

²³⁷ See, e.g., Cafaggi, *supra* note 12, at 38; Cafaggi & Renda, *supra* note 46, at 6; UTTING, *supra* note 57, at 62, 63, 103-105. *Cf. also* Scott et al., *supra* note 9, at 10.

²³⁸ Alvarez & von Hagen, *supra* note 67, at 20; KOPPELL, *supra* note 29, at 69. The Iseal Code of Good Practice provides for an opportunity for interested parties to comment on the public summary for a proposed standard and its terms of reference in section 5.2.2. *ISEAL Code of Good Practice*, *supra* note 89, § 5.2.2.

²³⁹ Benedict Kingsbury et al., 68 *LAW & CONTEMP. PROBS.* 15, 16, 17, and 58 (2004-2005); Curtin & Senden, *supra* note 11, at 179. On these procedural requirements see Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 *LAW & CONTEMP. PROBS.* 109, 133 (2004-2005). It might be feasible to start with a smaller group of stakeholders to build trust and to expand this group afterwards. See in connection with global agri-food chains. Schouten, *supra* note 69, at 46.

²⁴⁰ It might be conceivable to introduce threshold criteria in terms of being affected. See Tim Corthaut et al., *Operationalizing Accountability of IN-LAW Mechanisms*, in *INFORMAL INTERNATIONAL LAWMAKING* 310, 316 (Joost Pauwelyn ed., Oxford University Press, 2012).

of the process and reporting to the stakeholders.²⁴¹ NGOs might play a role in capacity building of local communities especially in non-western countries.²⁴² These communities should not feel bound by decisions made by (western) outsiders (only). As to criterion (i) diversity (in terms of gender and background), for example, has to be safeguarded and no relevant stakeholder should be marginalized.²⁴³ Furthermore, if the stakeholders are quite diverse, several selection processes and different bodies of engagement for different stakeholders might be necessary. Beside this, the degree of participation might be variable.²⁴⁴ There is no need to put too much emphasis on membership.²⁴⁵

Several examples show the importance of stakeholder engagement in connection with the effectiveness of international private regulation. For example the Marine Stewardship Council (“MSC”), established by the World Wildlife Fund and Unilever in 1996, was initially criticized due to perceived industry capture and lack of transparency and participation in its standard-setting procedures. The MSC became a fully independent non-profit organization in 1998 and undertook a comprehensive governance reform to enhance participa-

²⁴¹ Cf. *ISEAL Code of Good Practice*, supra note 89, §§ 5.2, 5.3, 5.5, 5.6 and 5.7. Sections 5.2 and 5.3 entail a stakeholder mapping exercise which includes defining which interest sectors are relevant and why and what means of communications will best reach them. Furthermore key stakeholders should proactively be approached and the standard setting body should establish participation goals. According to section 5.5.2 relevant stakeholders are those who have an expertise relevant to the subject matter of the standard, those who are affected by the standard and those that could influence the standard. Materially affected stakeholders should make up a meaningful segment of the participants. Furthermore, section 5.6 prescribes a public consultation phase of 60 days in two rounds (if new standards are set or existing standards are substantially modified). Section 5.7 prescribes that interested parties shall be provided with meaningful opportunities to contribute and if a balanced group of stakeholders participate all interested parties should have an equal opportunity to be part of that group. Furthermore, the standard setting organization should identify parties who will be directly affected and not adequately represented and proactively seek their contributions (section 5.7.2). If necessary, funding or other means to facilitate participation (especially for disadvantaged groups directly affected by the standards) should be provided by the standard setting body (section 5.7.3). Cf. *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, supra note 89, Principals 1.2 & 2.5.

²⁴² UTTING, supra note 57, at 105-07.

²⁴³ See, e.g. *MSI-Evaluation Tool*, supra note 97, at 8-11.

²⁴⁴ Cassese et al., supra note 239, at 17.

²⁴⁵ Imelda Maher, *Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary*, 38 J. L. & Soc’y 119, 135 (2011).

tion, representation, and transparency.²⁴⁶ The Forest Stewardship Council (“FSC”) has been one of the most active private regulation regimes in the institutionalization of processes aspiring to increase its legitimacy relating to responsible forest management.²⁴⁷ It institutionalized an elaborate governance structure which is based upon participation, democracy, and equality. It established a tripartite governance structure composed of social, environmental, and economic chambers which have equal voting rights. In each chamber there are north and south sub chambers with equal voting rights regardless of the number of members. In order for a decision to be made there is a requirement of a two-thirds vote, which necessitates agreement not only between social, environmental, and economic interests, but also between northern and southern interests.²⁴⁸

Concluding this section, one might argue that the more relevant stakeholders are effectively engaged in the rulemaking process, the more effective an initiative deems to be. From the above, one might infer, from a sociological perspective, that the effectiveness of international private regulation is intertwined with:

- (i) The degree of knowledge and application,
- (ii) Acceptance thereof, which, inter alia, depends on:
 - a. A stable group of stakeholders,
 - b. A willingness to collaborate and to address relevant issues,
 - c. A shared vision on relevant issues,
 - d. The degree to which the actions of a governing body, if any, are aligned with this shared vision,
 - e. A tradition of and experience with private rulemaking,
 - f. The way the regulation fits within the strategic choices and dilemmas faced by the regulatees,
 - g. The existence of an own interest in the regulation,
 - h. A slow changing environment,
 - i. Support from governments,
- (iii) The mode of transmission, and
- (iv) Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement.²⁴⁹

²⁴⁶ Casey & Scott, *supra* note 66, at 90.

²⁴⁷ *Id.*

²⁴⁸ *Id.*; Schouten, *supra* note 69, at 65. Sometimes outside the CSR area, for example in GLOBALGAP, a private regulation regime in the sphere of food safety and quality, processes are initiated to enhance participation in its standards setting by notice and comment procedures, but the board is still composed of retailer and producer representatives. See Casey & Scott, *supra* note 66, at 90.

²⁴⁹ This indicator refers to the legitimacy of the process, elaborated in para 2.4 *supra*, as well.

The social perspective could be used *ex ante* to predict whether a favorable environment exists for a private regulatory framework to be accepted. Obviously, acceptance itself cannot be assessed *ex ante*. It is also relevant to include the most effective ways of communication and transmission of the framework in the rule setting process and the promulgation of the framework. The same goes for the inclusiveness of the rule setting process *vis-à-vis* relevant stakeholders.

4.4 Behavioral Approach

The psychological approach aspires to assess (*ex ante*) whether envisioned international private regulation influences human behavior effectively.²⁵⁰ However, legal (either private or public) rules are not the predominant steering mechanisms which guide an actor's behavior in many situations. For example, social norms which emanate from communities govern much human behavior too.²⁵¹ If a range of (either private or public) norms is designed to govern an actor's conduct, this does not automatically mean these norms actually govern that actor's behavior.²⁵² Empirical research has shown that in particular contexts, both contractual and regulatory, legal rules are not relied upon to steer the conduct of a social actor, despite the fact these legal rules are applicable to a specific action of a certain social actor, for instance through contractual agreements or legislation.²⁵³ For example, contracting parties frequently do not rely on the law or lawyers in resolving disputes over breaches.²⁵⁴ In such cases, social norms may guide the specific conduct of the actor.²⁵⁵ Therefore, it is of importance to enhance, as much as possible, the crystallization of international private regulation in such a manner it actually governs behavior.

Another problem is that research has raised serious questions about the rationality of many judgments and decisions that people make.²⁵⁶ For example, people tend to overestimate the predictability of

²⁵⁰ In this respect especially, insights derived from cognitive psychology (which deals with the human decision making process) are relevant and those derived from social psychology (the interaction between people and the way this influences decision making) are less relevant. The psychological approach is also concerned with the issue whether decision-making may as well be influenced by other (proper) measures than regulation.

²⁵¹ Casey & Scott, *supra* note 66, at 79.

²⁵² *Id.* at 81.

²⁵³ *Id.*

²⁵⁴ *Id.* at 86.

²⁵⁵ *Id.* at 82.

²⁵⁶ THALER & SUNSTEIN, *supra* note 180, at 7.

past events (the “hindsight bias”).²⁵⁷ Furthermore, people tend to go along with the status quo or default option.²⁵⁸ Therefore, if public officials think that one policy produces better outcomes, they can influence the outcome by choosing it as a default.²⁵⁹ Following the default option might stem from a choice/information overload. Research suggests that past a certain point, if provided with more choice and information, humans either walk away from markets, choose the default option, or choose randomly.²⁶⁰ For example, in connection with eco-labels, consumers might attempt to simplify rather (complex) environmental information and aggregate other people’s opinions.²⁶¹ They might expect eco-labeled foods to taste better because the environmental benefit is not observable.²⁶² Furthermore, a consumer tends to accept information which is in line with previous knowledge.²⁶³ Consumers might also overestimate the environmental improvement of an eco-labeled product or consider brands or companies which engage in eco-labels as entirely green.²⁶⁴ Even their expectations about a product’s (environmental) quality makes a product better or worse. If their impression is positive, negative information will be ignored.²⁶⁵

A higher price enhances the credibility of the product too.²⁶⁶ Because eco-labels are oriented towards providing (certain) environmental information, consumers might tend to overestimate the effects of these environmental problems in favor of less exposed environmental problems.²⁶⁷ Beside this, a problem has to be individualized or separated into smaller manageable parts: if it becomes too broad, such as climate change, an individual contribution is rather small. Therefore,

²⁵⁷ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 24 (2007-2008); Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 Judicature 44, 47 (2002-2003).

²⁵⁸ THALER & SUNSTEIN, *supra* note 180, at 8, 34.

²⁵⁹ Eric J. Johnson & Daniel G. Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338 (2003); THALER & SUNSTEIN, *supra* note 180, at 8, 86. For example, countries in which people have to object to providing organs have a higher rate of donors compared to countries in which people have to consent.

²⁶⁰ Renda, *supra* note 94, at 110. See Gandara, *supra* note 25, at 190 -192. This might explain the popularity of websites which assist people in making choices (for example in the area of (health-care) insurance, consumer goods and financial products).

²⁶¹ Gandara, *supra* note 25, at 129, 193-94.

²⁶² *Id.* at 129.

²⁶³ *See id.* at 194.

²⁶⁴ *Id.* at 129, 162, and 205. Obviously, this conclusion is false. If a company adheres to a carbon reduction label it does not necessarily follow that the company performs well in other areas such as water and waste management. *See id.* at 207.

²⁶⁵ Gandara, *supra* note 25, at 130-31.

²⁶⁶ *Id.* at 132.

²⁶⁷ *Id.* at 181.

people are likely to neglect it emotionally.²⁶⁸ If an informational deficit results in neglecting the information altogether, international private regulation might not function. For example, eco-labels are informational tools aiming at nudging consumers to buy environmentally friendly products. Hence, neglecting the information provided by them (as well as distrusting such information or being unaware of it) renders them ineffective.²⁶⁹ Eco-labels should preserve a good reputation and avoid negative emotions (of consumers) in order to attract attention.²⁷⁰ In this respect competition between (too many) eco-labels might result in confusion, especially if false eco-labels or frivolous environmental claims exist as well.²⁷¹

Additionally, losing something makes people twice as miserable as gaining the same thing makes them happy. We, therefore, are loss averse.²⁷² Thus the personal severity, the perceived severity of negative consequence or outcome which could result from assuming no behavioral action and the salience of a certain topic to an individual, influences decision making.²⁷³ Beside this, inconsistency between attitudes (preferences, beliefs, or norms) may result in an uncomfortable state (cognitive dissonance) which an individual tries to resolve.²⁷⁴ Eco-labels might assist in this because they enable an individual to change his behavior (through buying an eco-labeled product) and align it with his moral (environmental) preferences.²⁷⁵

From the above, it becomes clear that individuals exhibit bounded rationality, which means that their mental resources are limited and depart from the expected utility theory. People make choices sometimes which are not in their long-term (financial) interest or are even harmful to them.²⁷⁶ These biases might also lead to shifting focus towards measurable and immediate benefits, rather than long-term social welfare.²⁷⁷ Therefore, in designing private regulation, one

²⁶⁸ *Id. at* 183.

²⁶⁹ *Id. at* 200-02.

²⁷⁰ Gandara, *supra* note 25, at 203. In this respect they should also review their supply chain. The eco friendlier it is (if made public), the better their reputation. *See id. at* 208-09.

²⁷¹ *Id. at* 205, 206, 209, 268 and 269.

²⁷² *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, *supra* note 257, at 46-47; THALER & SUNSTEIN, *supra* note 180, at 33; Sanne B. Pape, *Warnings and Product Liability* (Ph.D. Thesis Rotterdam (The Netherlands 2011), 173.

²⁷³ Pape, *supra* note 272, at 104.

²⁷⁴ Gandara, *supra* note 25, at 198.

²⁷⁵ *Id. at* 199.

²⁷⁶ *See, e.g.* THALER & SUNSTEIN, *supra* note 180, at 8 and 34; Renda, *supra* note 94, at 112.

²⁷⁷ Cafaggi and Renda, *supra* note 46, at 17.

should take into account that human decision making is not impeccable.²⁷⁸ One could toy with designing regulation which entails no choice. However, sometimes the most equitable system is where a choice is required.²⁷⁹ Many (more or less) open norms contain an element of choice.

But, as discussed above, this may not be a good idea or it might not even be feasible with highly complex choices.²⁸⁰ Good private regulation also helps people to select options that will make them better off, by providing information for example.²⁸¹ One way of doing this is to make the information about various options more comprehensible.²⁸² As choices become more numerous and/or vary on more dimensions, people are more likely to adopt simplifying strategies.²⁸³ Then the choice architecture has to provide structure.²⁸⁴ It should provide feedback too.²⁸⁵ Incentives might be used, but it is important to put the right incentives on the right people and make them notice the incentive.²⁸⁶ Many people will take whatever option requires the least effort or the path of least resistance.²⁸⁷ Therefore, a rule is required that determines what happens to the decision maker if he does nothing.²⁸⁸

The question arises whether these insights also pertain to decision making by companies, for example on market regulation or environmental protection.²⁸⁹ Obviously, individuals within a company might be hampered by the biases described above, for example if international private regulation prescribes a risk assessment. In making such an assessment, this individual within the company might be hampered by the hindsight bias or the fact that humans tend to be risk

²⁷⁸ THALER & SUNSTEIN, *supra* note 180, at 87.

²⁷⁹ *Id.* at 86.

²⁸⁰ *Id.* at 87.

²⁸¹ *Cf.* Renda, *supra* note 94, at 158 and 159; THALER & SUNSTEIN, *supra* note 180, at 92.

²⁸² THALER & SUNSTEIN, *supra* note 180, at 92.

²⁸³ *Id.* at 95.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 90. See, e.g., on feedback with eBay, which provides a judgment system of sellers Vincent Buskens, *Between Hobbes' Leviathan and Smith's Invisible Hand* 29-34 (Inaugural lecture Rotterdam, Eleven, Den Haag (The Netherlands) 2011).

²⁸⁶ THALER & SUNSTEIN, *supra* note 180, at 97-98.

²⁸⁷ *Id.* at 83.

²⁸⁸ Renda, *supra* note 94, at 158; THALER & SUNSTEIN, *supra* note 180, at 83. However, choosing a default option might in itself pose (for example ethical) questions and might raise legitimacy issues. Notwithstanding this, the private regulator has to consider what happens if no choice is made.

²⁸⁹ Renda, *supra* note 94, at 160.

averse.²⁹⁰ However, this conclusion does not answer the question whether the organizational design of a company influences decision making. A shift of perspective is necessary in order to answer that question. The focus shifts from individual decision making to group behavior.²⁹¹

Research has revealed that organizational design of enterprises does indeed influence group behavior. Different types of organizations make different types of decisions and errors. A variety of different organizational structures may be classified into hierarchies and polyarchies for the purposes of modeling, taking a decision-making rule as a criterion. Under the hierarchy, a project to be passed should first be accepted by one level of managers and after their positive evaluation it should get an approval of the other level of managers. So it requires the approval of all the managers. In contrast, a polyarchy allows a project to be passed if it is accepted by at least one manager. A polyarchy accepts a larger number of projects because managers can accept them independently from each other. Assuming that different projects are divided into good and bad ones, Sah and Stiglitz showed that hierarchies and polyarchies are prone to different kinds of errors. Hierarchies reject good projects more often than polyarchies, while polyarchies accept more bad projects than hierarchies.²⁹² Alternatively, a model may be based on the comparison of different organizational structures, similar to the structures used in the models of Franckx and De Vries²⁹³ or Besanko, Regibeau, and Rockett.²⁹⁴ Their models are used to analyze the product-based organizational structure and the functional one in relation to accident prevention.

This approach may, however, be useful to analyze decision making incentivized by international private regulation too. Private international regulation should fit to market conditions in a certain

²⁹⁰ Despite this risk might be missed as well. See, for a clear example, Balleisen & Eisner, *supra* note 62, at 128.

²⁹¹ In this respect especially, insights derived from social psychology (the interaction between people and the way this influences decision making) are important, whereas cognitive psychology, which has been discussed hereinabove, is concerned with individual decision making.

²⁹² Raaj Kumar Sah & Joseph E. Stiglitz, *Human Fallibility and Economic Organization*, 75 AM. ECON. REV. (Papers & Proceedings), 293 (1985); Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV., 108 (2006).

²⁹³ Laurent Franckx & Frans P. de Vries, *Environmental Liability and Organizational Structure* 1 (Energy, Transport and Environment Working Papers (Series) 04-01 2004).

²⁹⁴ David Besanko et al., *A Multi-Task Principal-Agent Approach to Organizational Form*, 53(4) J. Indust. Econ., 437 (2005).

industry or country. The way the majority of enterprises are organized, for example, may influence the market conditions. The product-based organizational structure implies that a division of an organization into departments is made along the lines of the products manufactured. Thus, the first department is responsible for all functions related to the product A, the second department of the product B, and so on. By contrast, the functional organizational structure is based on a type of activity. The typical activities include production, marketing, research and development, human resources, and internal audit. This division principle encourages the managers of the product-based structure to practice a complex approach to their broad tasks and assumes more autonomy at a department level, whereas the functional structure makes the managers rather narrow professionals in their specific functional field and more centralized guiding is provided across different product lines. Therefore, effective international private regulation has to take into account the (prevailing) organizational model of the regulated organizations.

In designing international private regulation, the aforementioned insights should be taken into account.²⁹⁵ From an *ex ante* psychological perspective, international private regulation has the best chance to be effective if:

- (i) It takes into account that human decision making is not flawless and expects failures,
- (ii) Structures complex choices, amongst others by:
 - a. Restricting the number of choices,
 - b. Providing information which assists people in making proper decisions, and
 - c. Demanding transparency as to the consequences of a choice,
- (iii) Entails a default option which is beneficial to the majority of regulatees,
- (iv) If business is involved, takes into account the organizational model of the regulatees,
- (v) It enhances crystallization so as to govern behavior.

Instead of promulgating new private regulation, policymakers might consider establishing nudges that direct people in the desired direction. A nudge is a choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. Regulation might not be the right instrument to change behavior, for example because it is necessarily not tailor made, because of the distance between a regulator and an indi-

²⁹⁵ Thaler and Sunstein promulgate that the aforementioned features can easily be enlisted by private and public nudgers. See THALER & SUNSTEIN, *supra* note 180, at 71.

vidual and because the help of intermediaries (for example companies) is necessary to influence behavior. In such circumstances a nudge might be more effective, provided that this intervention is easy and cheap to avoid.²⁹⁶ Especially rare, difficult choices with delayed effects are good candidates for nudges according to Thaler and Sunstein, for example in situations lacking direct feedback or where feedback did not work.²⁹⁷

The psychological avenue might thus provide an ex ante tool to assess the effectiveness of international private regulation, next to the legal, economic and sociological avenues.

5. COMPARING EFFECTIVENESS OF EXISTING INTERNATIONAL PRIVATE REGULATION (EX POST APPROACH)

5.1 *Legal Approach*

After discussing the ex ante indicators which are helpful in the rule setting process, I will turn to the effectiveness of existing international private regulation. In this respect, the legal and economic avenues are especially important, combined with a more limited role for the sociological avenue. From a legal point of view, the effectiveness of existing international private regulation is, amongst others, questioned because it is deemed to be less enforceable than public regulation. This is supposedly caused by the lack of public instruments to enforce private regulation. Furthermore, as elucidated above, other indicators are important to assess the effectiveness of existing international private regulation, such as an effective conflict resolution mechanism.

However, research has not confirmed the assumption that private enforcement is less effective in the Netherlands. Research has been conducted in connection with effectiveness of private and public enforcement regarding regulation on consumer protection against unfair trade practices (the sections 6:193a-j of the Dutch Civil Code).²⁹⁸ For example, misleading product information is considered an unfair trade practice (section 6:193c subsection 1 under b and section 6:193d subsection 3 Dutch Civil Code).²⁹⁹ These rules in the Dutch Civil Code are enforced by public instruments, such as fines. This public enforcement was evaluated in 2007 and 2008, but the evaluation did not confirm public enforcement being more effective than private

²⁹⁶ *Id.* at 6.

²⁹⁷ *Id.* at 75.

²⁹⁸ See, e.g., Burgerlijk Wetboek [BW] [Civil Code] art. 6:193b-j (Neth.) (listing various different practices considered misleading by the Dutch government), available at <http://dutchcivillaw.com/legislation/dctitle6633.htm#sec0633a>.

²⁹⁹ *Id.*

enforcement.³⁰⁰ That said, enforcement by states is deemed to be necessary if violations of norms have a low probability of detection. Then more severe public sanctions are needed in order to compensate for this low probability. Furthermore, a public entity may have an informational advantage over private supervisors. However, this does not mean that enforcement should be a prerogative of states. The capacity to steer transnational actors may arguably be even greater for inter-governmental actors than it is for national governments.³⁰¹ This is mainly caused by the fact that no global overarching (public) supervisor (with instruments to enforce) exists. Therefore, alternative mechanisms to enforce international private regulation have to be considered.

According to Casey and Scott, “[a]nalysis of enforcement of a private norm is concerned with the rewards and punishment associated with following the norm, the mechanisms and extent of enforcement, the source of authority, and the degree of internalization.”³⁰² Research has not demonstrated the frequent use of enforcement processes connected to international private regulation involving the stringent application of regulatory rules. Casey and Scott also point out that “a wide range of approaches, often involving education and advice to those found in breach, are utilized ahead of more stringent approaches—warnings, civil or criminal penalties, and license revocations.”³⁰³ Studies have even been conducted combining the empirical evidence of the practice of escalating sanctions with game-theory arguments as to how and when such escalation should occur.³⁰⁴ The application of the enforcement pyramid is intended to ensure that regulatees who are fundamentally oriented towards legal compliance receive appropriate advice to enable them to achieve this objective.³⁰⁵

On the other hand, the credible threat of escalation encourages the subjects who only comply when this is consistent with financial incentives to comply at the lowest level of the pyramid, because non-compliance would be more costly.³⁰⁶ When social norms are persistently breached there is the potential for an escalating set of sanctions

³⁰⁰ See E.L.M. Mout-Vos, *Het duale stelsel van handhaving van de Wet handhaving consumentenbescherming (Whc), een tussenstand*, Tijdschrift voor Consumentenrecht en handelspraktijken 258, 265 (2010). However, the author contends public enforcement cannot be missed in order to impose punitive sanctions.

³⁰¹ Scott et al., *supra* note 9, at 8.

³⁰² Casey & Scott, *supra* note 66, at 83.

³⁰³ *Id.* at 83.

³⁰⁴ *Id.*

³⁰⁵ Nevertheless, imposing sanctions is not necessary in many instances. Business disputes are often settled without the use of judicial enforcement mechanisms.

³⁰⁶ Casey & Scott, *supra* note 66, at 83. Nonetheless, especially regarding punitive sanctions, public legislation is deemed to be essential. A need for such enforcement

against the deviant, (starting with social sanctions such as negative gossip), and which eventually may reach a formal legal claim.³⁰⁷ Social norms likely underpin the operation of parties to a private regulatory regime, however, often because of the possibility or threat of reinforcement through market sanctions and/or the possibility of legal sanctions for significant or harmful deviation from such norms.³⁰⁸ If the threat of effective enforcement exists, it may not be necessary to make use of the whole pyramid. Beside this, it must be noted that enforcement is not only tied to sanctions and the accompanying costs, but also to other means, such as providing information on the regime and education.

International private regulation is often associated with a high sense of freedom to opt in or out of a certain sphere.³⁰⁹ Parties who wish to join the regulatory bodies participating in the regime are free to do so. Therefore, private enforcement is considered less effective. However, this is not necessarily so. Once entities have implemented a private regulatory regime, they are legally bound by it and violation of the rules might subject them to legal sanctions imposed by an overarching body or arising from contractual provisions.³¹⁰ The more severe the threat of possible sanctions, the more effective the private regime is.³¹¹

Furthermore, incentives may exist to participate. Participation in a private regime and compliance with its standards might be a condition for access to this or other regimes which provide market opportunities for the regulated entities. Some standards are even *de facto* compulsory for market actors, whether promulgated by individual actors (for example Microsoft or ICANN³¹²) or by standardization bodies (like ISO).³¹³ The foregoing standards promulgated by individual ac-

mechanisms may exist if the possibilities for the detection of violations of the private regime are limited.

³⁰⁷ *Id.* at 84.

³⁰⁸ *Id.*; Overmars, *supra* note 7, at 17. *But cf.* Hernstadt, *supra* note 112, at 202–07 (on International Framework Agreements for labor standards).

³⁰⁹ Balleisen & Eisner, *supra* note 62, at 131; Curtin & Senden, *supra* note 11, at 168.

³¹⁰ *See, e.g.*, GIESEN, *supra* note 8, at 93–106, who discerns three grounds for the binding nature of private regulatory regimes. These are national legislation, agreement, and open norms in national legislation. *See, e.g.*, *MSI-evaluation tool*, *supra* note 97, at 33–36 (on sanctions by an overarching body).

³¹¹ *Cf.* Kolk & van Tulder, *supra* note 22, at 10–11. They contend that codes promulgated by business associations perform weakly in the CSR area amongst others in this respect.

³¹² KOPPELL, *supra* note 29, at 52.

³¹³ *But cf.* Maher, *supra* note 245, at 135. However, this raises the question whether such a regime violates public regulation on competition. If companies cre-

tors, either individual companies or overarching bodies, both provide access to scarce resources. This enhances the possibilities of setting forth private regimes and enforcing these regimes.³¹⁴ Another example is connected with the IFC guidelines. If a company does not comply with these standards, it is much more difficult to raise capital.³¹⁵

The enforceability of international private regulation is connected with its specificity, which has been elucidated above. More precise commands will generally result in better behavior.³¹⁶ Market incentives may exist to develop and follow standards, too, while the market punishes those who do not follow them.³¹⁷ Pressure to comply with private norms may be exerted by consumers, NGOs, investors, or stock markets.³¹⁸ Incentives might also exist within a company. For example, a company listed on a stock exchange might increase the bonuses of its board members if it raises its position in the sustainability index. That said, it is important that an overarching body exists which has the power to inform the public about the implementation of and

ate a level playing field amongst each other in order to enhance CSR-compliance, one might favor such a regime because it contributes to social welfare, unlike most actions which restrict competition. Unfortunately, to date European competition law does not seem to provide an exemption for such regimes. If such an exemption is deemed feasible, public supervision might be desirable to assess whether these regimes restrict competition in a proportional manner. Reference could be made to section 25 of the Dutch Data Protection Law, which creates the power of the Dutch Data Protection Agency to decide whether codes of conduct on data protection meet the requirements set forth by the Data Protection Law. Competition authorities might be attributed a comparable power to assess whether private regulation on CSR does not restrict competition unnecessarily. Compare in this respect the proposed section 2 of the policy of the Dutch Department of Economic Affairs which provides for guidelines to the Competition Authority as to which cases an exemption to section 6 subsection 3 of the Dutch Competition Act (which prohibits acts which hamper competition) should be granted in connection with sustainable business.

³¹⁴ *But cf.* KOPPELL, *supra* note 29, at 62; Vrieling, *supra* note 132, at 70–73; Scott et al., *supra* note 9, at 7.

³¹⁵ *See* KOPPELL, *supra* note 29, at 63 (showing outside the CSR area on the accounting standards of the ISAB).

³¹⁶ *See* Kaplow, *supra* note 88, at 19–20. *Cf.* Kolk & van Tulder, *supra* note 22, at 9; Luppi & Parisi, *supra* note 118, at 43; Overmars, *supra* note 7, at 17 (regarding codes of conduct); UTTING, *supra* note 57, at 82; *ISEAL Code of Good Practice*, *supra* note 89, at § 6.3.1.

³¹⁷ Scott et al., *supra* note 9, at 7.

³¹⁸ *Id.* at 10; Kolk & van Tulder, *supra* note 22, at 21; KOPPELL, *supra* note 29, at 61; UTTING, *supra* note 57, at 90, 111–12. Koppell gives some examples of NGOs being quite successful in such private enforcement.

compliance with the transnational private regulation by its members.³¹⁹

Sometimes private regulation addresses reputational issues³²⁰ because of the ease of access to information on the internet or in newspapers, for example, on the violation of CSR standards or codes of conduct.³²¹ This seems necessary in such cases because the problem of enforcing CSR standards appears to function so that unless strong pressure is exercised by consumers, some significantly sized retailers might not have sufficient incentives to monitor and enforce violations.³²² Without being pressured, companies with weak records might gravitate toward undemanding programs to enhance their reputation without changing their practices. This might drive companies seeking to make credible efforts out of these non-demanding regimes. On the other hand, demanding (and, consequently, more effective) initiatives tend to attract companies with stronger performance records, but might not be implemented by weaker companies.³²³ In some sectors, this problem is partially solved by NGOs, which find ways to address these problems, regarding human rights or the environment, for example.³²⁴

If market incentives drive compliance, the norms of a private regime often are reflected in contractual arrangements and reinforced through participation in markets.³²⁵ Contractual arrangements might

³¹⁹ See, e.g., *MSI-Evaluation Tool*, *supra* note 97, at 20–21.

³²⁰ *But cf.* Balleisen & Eisner, *supra* note 62, at 131–33; Ogus & Carbonara, *supra* note 10, at 244–45; Scott *et al.*, *supra* note 9, at 7. Reputational damage raises the cost of non-compliance with the private regulatory framework. Ogus & Carbonara, *supra* note 10, at 244–45. In the Netherlands, naming and shaming is considered to be one of the possibilities regarding repeated or severe violations of the corporate governance code. See Letter from the Minister of Economic Affairs to The Second Chamber (Jan. 30, 2012) at 5.

³²¹ *But cf.* Liesbeth F.H. Enneking, *Foreign Direct Liability and Beyond* 398–401, 439 (Ph.D. thesis, Utrecht, Eleven Publ. 2012) (elaborating on the possibility of codes of conduct becoming trade practice too).

³²² Cafaggi, *supra* note 12, at 38.

³²³ Balleisen & Eisner, *supra* note 62, at 132–33.

³²⁴ Scott *et al.*, *supra* note 9, at 8.

³²⁵ Casey & Scott, *supra* note 66, at 83. For example the Equator-principles, which have been adopted by the Equator-principles Financial Institutions, are relied upon in project financing and advisory activities (if the total project capital costs exceed US\$ 10 million). These principles, among others, require the use of the social screening criteria and environmental, health, and safety guidelines of the International Finance Corporation (IFC) and prescribe a risk assessment by the borrower, a grievance mechanism as well as independent monitoring and reporting. THE EQUATOR PRINCIPLES, Principals 1, 2, 6, and 9, June 2013, http://www.equator-principles.com/resources/equator_principles_III.pdf. The principles also entail an annual reporting requirement of the financing entity regarding the im-

even be used to enforce international private regulation without the existence of market incentives. Nonetheless, many enterprises comply with CSR standards voluntarily and do not need such incentives. This is important because the more enterprises accept this regulation and comply voluntarily, the less enforcement is necessary. Conflict, and thus the need for enforcement, is most likely when (i) the distribution of interests among the stakeholders to be governed is heterogeneous,³²⁶ (ii) a governing body does not have coercive tools at its disposal, and (iii) a governing body lacks control over a valuable resource.³²⁷

Furthermore, certification or monitoring by a third party is a common tool to assess whether entities act in compliance with a certain international standard.³²⁸ Certification is partly connected to reporting requirements. It generally entails (i) establishment of standards, (ii) certification assessment for compliance with the standards, (iii) a certification seal or label, (iv) accreditation of the certifier by the certification body, and (v) compliance monitoring.³²⁹ If a private regulatory regime entails reporting requirements, it is easier for third parties to determine whether regulatees comply with this regulatory framework.³³⁰

plementing process and its experiences. *Id.* at Principal 10. In such instances, the crystallization of social norms within particular professional or commercial groupings is often involved. A shared responsibility towards societal issues is needed. For this, an intermediate organization may be necessary, which the IFC regards as its Sustainability Framework. *See generally*, Overmars, *supra* note 7, at 20. Next to this, smaller groups of companies and a high organizational rate seem to be beneficial. However, in my view, the latter requirements are more closely connected with acceptance from a sociological point of view, which I elaborate later on in this contribution. Nonetheless, if these requirements are met, enforcement of a private regime might improve.

³²⁶ *But cf.* Ogus & Carbonara, *supra* note 10, at 234.

³²⁷ KOPPELL, *supra* note 29, at 62.

³²⁸ *But cf.* Balleisen & Eisner, *supra* note 62, at 136; Ogus & Carbonara, *supra* note 10, at 245; Gandara, *supra* note 25, at 152. *Cf.* Schouten, *supra* note 69, at 41–43 (in connection with standards in global agri-food chains).

³²⁹ *See*, Gandara, *supra* note 25, at 51–52 (in connection with eco-labels). *See, e.g.*, DIMITROPOULOS, *supra* note 32, at 224 (on certification in general). Dimitropoulos contends international certificates should be recognized throughout the world and national governments should supervise the certification process. *Id.* at 237, 241, and 246.

³³⁰ *But cf.* United Nations Forum on Sustainability Standards (UNFSS), *Today's Landscape and Issues & Initiatives to Reach Public Policy Objectives*, at 52–54, available at <http://unfss.org/documentation/general-documentation> (in connection with traceability of products through a supply chain in order to assess conformity with a standard) [hereafter UNFSS Landscape Report].

Certification seems a very useful instrument to enforce compliance with standards.³³¹ It is frequently used in connection with eco-labels.³³² Eco-labels have different appearances, such as: words, logos, and brand names. They are used for communicating certain environmental and social claims. These claims may be used only if those environmental or social standards have been complied with, and compliance with them has been certified.³³³ However, the effectiveness of certification may be a little disappointing in practice. In many countries, severe competition exists between certification bodies, thus putting pressure on the reliability of the certification process.³³⁴ Furthermore, the certification bodies fund their own supervising authority in the certification process, therefore it is not as independent as it could be.³³⁵ Beside this, certification is costly, and procedural aspects (such as, the review of documentation) might prevail over assessing actual improvement of quality in an organization or changes in

³³¹ See extensively on advantages and disadvantages in connection with certification regarding environmental and social aspects Resolv, *Toward Sustainability, The Roles and Limitations of Certification*, available at www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf. It might become even more effective if certification is used to prove that requirements set by public regulation are met. *But cf.* Schouten, *supra* note 69, at 116-17 (in connection with bio fuels). Certification might also be incorporated in supply chains contracts or might be connected to them. See Cafaggi, *supra* note 10, at 1561, 1566, 1580, 1601-11. The indicators used in certification might even be more detailed and specific than the ones used by courts to assess compliance with public regulation. See *id.* at 1607.

³³² See Gandara, *supra* note 25, at 22. Some of these labels not only include environmental issues but social matters as well. Certification (in connection with eco-labels) provides the proof consumers need about a product/service's environmental attributes. This is necessary because eco-labels are credence goods which do not reflect the product's physical or other identifiable characteristics. *Id.* at 260-61.

³³³ Many eco-labels have an overarching body (being the "owner" of the eco-label in which stakeholders might be represented) as well as authorized or subordinated certification bodies. See, e.g., Gandara, *supra* note 25, at 25. Eco-labels by and large are (or should be) certification marks and have three purposes (i) to achieve operational improvements in social and environmental arenas, (ii) to provide credible assurance around sustainability to consumers and (iii) to increase the demand by modifying purchasing decisions and behavior by communicating sustainability performance to consumers at the point of purchase. *Id.* at 26, 61, 106-12 .

³³⁴ See, e.g., Dimitropoulos, *supra* note 32, at 224 (on certification). He contends international certificates should be recognized throughout the world. *Id.* at 237, 246. He also contends that national governments should supervise the certification process. *Id.* 241; see Gandara, *supra* note 25, at 224 (in connection with eco labels).

³³⁵ See Council Regulation 765/08, 2008 O.J. (L 218/30) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF> (concerning norms for these supervising authorities in the EU).

environmental impact.³³⁶ Furthermore, employees of certifying bodies might lack sufficient knowledge, and certification criteria might be unspecified or unclear.³³⁷ Research has revealed that certification works best if buyers are willing to pay for quality, better environment or social performance, and certification bodies compete with each other amongst others by referring to the quality of their assessments.³³⁸

Other forms of third party monitoring are conceivable too.³³⁹ To be effective, this monitoring should preferably be carried out by skilled and independent third parties.³⁴⁰ Such monitoring should also connect with accountability of enterprises which have adopted certain international private regulation to an overarching body.³⁴¹ Accountability in general may be defined as “a relationship between an actor and a forum (i) in which the actor has an obligation (ii) to explain and justify (iii) his or her conduct (iv), the forum can pose questions (v) and pass judgment (vi) and the actor may face consequences (vii).”³⁴² The forum can be an individual (ex. minister, journalist) or an agency (par-

³³⁶ *But cf.* UTTING, *supra* note 57, at 93 (concerning the cost of certification). It should be noted that certification is not provided for in connection with the ISO-standard on CSR, the ISO 26000 standard. *See* Schouten, *supra* note 69, at 132–33 (concerning the effectiveness of certification in connection with global agri-food standards).

³³⁷ Alvarez & von Hagen, *supra* note 67, at 25–26.

³³⁸ *Cf.* Timothy D. Lytton, *Kosher: Private Regulation in the Age of Industrial Food* 28–29 (Harvard University Press 2013).

³³⁹ Kolk and van Tulder discern between second party (e.g. trade associations) and third party (external professionals paid by the company) assessment. They argue that second party assessment is less effective than third party assessment. *See* Kolk & van Tulder, *supra* note 22, at 10. In my opinion, this is not necessarily the case depending on the way these assessments are designed. *See* Herrstadt, *supra* note 112, at 202–04 (concerning internal and external monitoring of International Framework Agreements on labor standards). Apart from this type of monitoring, monitoring of the transnational regime itself (by an independent evaluator) is conceivable. *See* MSI Evaluation Tool, *supra* note 97.

³⁴⁰ *See* MSI Evaluation Tool, *supra* note 97, at 15–18. However, retrieving the relevant information is tempting, for example, because business might not want to share certain information. *See, e.g.*, UTTING, *supra* note 57, at 63. Effectiveness of international private regulation therefore might gain relevance if it entails transparency obligations. *See, e.g.*, MSI Evaluation Tool, *supra* note 97, at 19–20.

³⁴¹ *Cf.* Balleisen & Eisner, *supra* note 62, at 131, 137 (contending such body should be a public entity with vigorous enforcement programs).

³⁴² Curtin & Senden, *supra* note 11, at 181. In connection with international private regulation, *see* Balleisen & Eisner, *supra* note 62, at 142; Curtin & Senden, *supra* note 11, at 185. Balleisen and Eisner contend that the level of accountability should equal the level of accountability public regulation imposes. *See* Balleisen & Eisner, *supra* note 62, at 145–46. *See generally*, Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, 13 Eur. L. J. 447 (2007) (concerning accountability).

liament, court, audit office and NGO).³⁴³ Regarding international private regulation, the identification of the accountability relationship is difficult because of the many actors and different backgrounds and interests.³⁴⁴ This problem is especially salient in the transnational context with regulatory regimes of a diffuse, hybrid public-private nature which include many different (public and private), often-organizationally-disconnected, actors at various moments in time.³⁴⁵ Another example is a supply chain contract.³⁴⁶ Furthermore, the question might be to whom an actor should be accountable: a government, an overarching private body, or another type of NGO.³⁴⁷ Many effective private regulatory regimes therefore have multiple accountability relationships.³⁴⁸ However, sometimes actors focus their accountability on one set of stakeholders at the expense of others.³⁴⁹ Consequently, a need exists for balanced accountability, not only towards the powerful stakeholders.³⁵⁰

If independent third parties are involved in assessing compliance (and preferably impose sanctions in cases of non-compliance), this indicates more effectiveness vis-à-vis private regulatory regimes which lack such third party assessment.³⁵¹ In this respect, it is important that the third parties are allowed to share information about the actors with the (overarching) body to which the actors are accountable in order to pass judgment on the behavior of the actors.

³⁴³ Curtin & Senden, *supra* note 11, at 182. (discussing that the relationship between the actor and the forum does not necessarily need to have a principal-agent character).

³⁴⁴ *Id.*; cf. Corthaut et al., *supra* note 240, at 314.

³⁴⁵ Cf. Corthaut et al., *supra* note 240, at 313–22.

³⁴⁶ Curtin & Senden, *supra* note 11, at 182; UTTING, *supra* note 57, at 83. In connection with traceability of products through a supply chain in order to assess conformity, see UNFSS Landscape Report, *supra* note 330, at 52–54; Alvarez & von Hagen, *supra* note 67, at 11–12.

³⁴⁷ Balleisen & Eisner, *supra* note 62, at 137; Curtin & Senden, *supra* note 11, at 183.

³⁴⁸ Curtin & Senden, *supra* note 11, at 183. This type of accountability is not deemed effective by Balleisen & Eisner, *supra* note 62, at 137. Furthermore, obligations to account are not comparable to political accountability, but they exist in private regulatory regimes, sometimes however only of a voluntary or moral nature. See Curtin & Senden, *supra* note 11, at 184.

³⁴⁹ Curtin & Senden, *supra* note 11, at 187.

³⁵⁰ *Id.*

³⁵¹ Cf. ISEAL Code of Good Practice, *supra* note 89, at §6.2.2; *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 3.2; Cf. also Balleisen & Eisner, *supra* note 62, at 131; Kolk & van Tulder, *supra* note 22, at 10; Herrnsstadt, *supra* note 112, at 202–04; UTTING, *supra* note 57, at 82–88.

Public intervention might change the regime from voluntary to compulsory.³⁵² Public intervention is, amongst others, deemed to be necessary to address the free-rider issue. Free-riders benefit from international private regulation without adopting or implementing it. One of the ways in which they might benefit is the enforcement of international private regulation in a certain market against entities which have adopted this regulation but violate it.³⁵³ Because of the existence of the international private regulation which is enforced (publicly), consumers, for example, might (erroneously) trust all market participants to have adopted this regulation.

Public intervention has many faces. International private regulation could be adopted as international “soft law” initially, but redeployed by international organizations and implemented through “hard law” at the continental (e.g., EU) or state level, through contract, tort and/or company law.³⁵⁴ If the private regulation is implemented through contract and/or tort law, domestic courts recognize privately produced standards as part of customary public or private international law.³⁵⁵ Contractual mechanisms for example are deployed in supply chains (possibly through purchase or license-agreements) or in financial arrangements in which a purchaser or financial entity requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.³⁵⁶ Furthermore, legislation on unfair trade

³⁵² Cafaggi, *supra* note 12, at 22. On the necessity of public intervention, see Alvarez & von Hagen, *supra* note 67, at 16–17. Cf. DIMITROPOULOS, *supra* note 32, at 227, 229–32 (contending that international policy objectives might be realized through national recognition of certificates). Public intervention might also take more ‘soft’ modes as support for private regulation e.g. through incentivizing companies to engage in it. This might enhance effectiveness as well. See Lily Hsueh & Aseem Prakash, *Incentivizing Self-Regulation: Federal vs. State-Level Voluntary Programs in US Climate Change Policies*, 6 Reg. & Governance 445, 445 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2012.01140.x/full>.

³⁵³ Ogus & Carbonara, *supra* note 10, at 231.

³⁵⁴ Curtin & Senden, *supra* note 11, at 168. In connection with foreign direct liability see generally Enneking, *supra* note 321, at 439, 474, 506–12, 519–21, 560; Cf. Casey & Scott, *supra* note 66, at 85; See also the example of the ISAB in Europe. In the Netherlands, Article 2:8 of the Civil Code, which deals with good faith and fair dealing in company law, is applied to incorporate the corporate governance code into norms which are enforceable through national courts. See Pauwelyn et al., *supra* note 59, at 509.

³⁵⁵ Cafaggi, *supra* note 12, at 22; Enneking, *supra* note 321, at 439, 474, 506–12, 519–21, 560.

³⁵⁶ Casey & Scott, *supra* note 66, at 93. On initiatives in supply chains, see, e.g., IDH SUSTAINABLE TRADE INITIATIVE, <http://www.idhsustainabletrade.com> (last visited Feb. 23, 2014); and on labor standards, see ETHICAL TRADING INITIATIVE

practices or unsupported claims may play a role in this. For example, if a company advertises a certain product referring to an eco-label while it in fact does not meet the requirements of that label, this could be considered an unfair trade practice.³⁵⁷ The US, UK, New Zealand, and Australia have endorsed public guidelines on environmental claims, enforced by the public trade or environmental authorities.³⁵⁸ If an environmental claim is made based on an eco-label, the public authority might ask for sufficient documentary evidence to support this claim.³⁵⁹ In specific cases, legislation on misrepresentation might also be of use to redress false environmental claims made by eco-labels.³⁶⁰ Other forms of public supervision are conceivable as well.³⁶¹ Additionally, legislation might impose a due diligence obligation on a supply chain.³⁶²

However, contractual enforcement through national courts is often costly. Litigation in national courts might depend on the willingness of domestic citizens to take action, courts to recognize such ac-

(ETI), <http://www.ethicaltrade.org> (last visited Feb. 23, 2014). On International Framework Agreements on labor standards, see Herrnstadt, *supra* note 112, at 194–96. On supply chain initiatives and their problems, see generally Cafaggi & Renda, *supra* note 46, at 18–20. However, if an overarching entity exists, membership with it might also be determined as a contractual relationship, although of a different nature than investment, lending, or supply chain contracts. See Cafaggi, *supra* note 10, at 1564. In case of investments (or lending agreements), third party rating agencies are engaged by investors to assess whether these privately set rules are implemented and adhered to by entities invested in (or lenders). These rating agencies make this assessment irrespective of the public or private nature of the regulation. Furthermore, there are contractual remedies in these supply chain contracts, which are by and large aimed at enhancing compliance (or ultimately possibly termination) in connection with CSR issues instead of damages and in which reputational sanctions might perform a role. *Id.* at 1614–15, 1617.

³⁵⁷ See, e.g., BW § 6:193g (Neth.) (based on the European unfair trade practices directive, which considers such an advertisement to be an unfair trade practice).

³⁵⁸ Gandara, *supra* note 25, at 215–16. The guidelines resemble the ISO 14021 standard on environmental claims. See *id.* at 214–15. Absolute or wide range claims such as ‘environmentally friendly’ or ‘100% recyclable’ are considered to be deceptive per se. *Id.* at 216.

³⁵⁹ *Id.* at 216–338. However, Gandara contends that the current regulation is insufficient to deter greenwashing. *Id.* at 343, 348.

³⁶⁰ *Id.* at 226.

³⁶¹ For example, the Dutch Financial Markets Authority supervises whether the annual reports of companies listed at the Dutch stock exchange entail the main elements of CSR issues that are relevant to the company. See Dutch Corporate Governance Code, Principle II.1.2.d, available at <http://commissiecorporategovernance.nl/download/?id=606>.

³⁶² See, e.g., Council Regulation 995/2010, Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, art. 4, 2010 O.J. (L295) 23, 27 (aiming for the global prevention of illegal deforestation).

tions and governments to set a framework which enables such actions.³⁶³ Because of the international nature of litigation in national courts tied to international private regulation, these trials might result in time-consuming and costly proceedings in many different jurisdictions, bringing about the risk of multiple (and even contradicting) decisions. Furthermore, the question may be raised whether national courts are equipped to deal with difficult international matters in the CSR arena.³⁶⁴ Enforcement is rather complicated too in such circumstances. Coordination among national courts enforcing the same regime is required in order to avoid too much differentiation.³⁶⁵ This could be established by applying a duty of loyal cooperation which exists in the domain of public institutions, but such a system is obviously difficult to enforce.³⁶⁶

Other forms of public intervention exist as well, including both governmental and non-state actors, and also multi-level actors, *i.e.*, national, European, and international levels.³⁶⁷ In these systems, engagement of stakeholders in the promulgation of self-regulatory codes is encouraged, and member states of the EU are required to penalize businesses' abuse of self-regulatory codes through legislation.³⁶⁸

National corporate law regimes embody some of the CSR requirements.³⁶⁹ Oversight and enforcement is, however, left to the companies themselves.³⁷⁰ Ethical committees, independent from the management, have been put in place and shareholders can also help steer companies towards compliance with key corporate governance norms. The increasing importance of private regulation has promoted important changes in the corporate governance structure of multinational enterprises to promote responsiveness towards stakeholders affected by the activity of the corporation.³⁷¹ Also, governments have increasingly sought to assert at least limited enforcement capacity over companies' compliance with privately promulgated corporate governance norms. Such rules might however give rise to a "tick the box" mentality. Some enterprises tend to follow the rules in a rather formal

³⁶³ See, *e.g.*, Enneking, *supra* note 321, at 487, 490–504, 510, 574, 595. On eco-labels, see Gandara, *supra* note 25, at 300.

³⁶⁴ Enneking, *supra* note 321, at 620, 642 (proposing future solutions).

³⁶⁵ Cafaggi, *supra* note 12, at 49.

³⁶⁶ *Id.*

³⁶⁷ Scott et al., *supra* note 9, at 8.

³⁶⁸ Enneking, *supra* note 321, at 455–59; Scott et al., *supra* note 9, at 8–9. See, *e.g.*, Council Regulation 2005/29, Unfair Trade Practices Directive, art. 6(2)(b), 2005 O.J. (L 149) 22 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>.

³⁶⁹ Scott et al., *supra* note 9, at 9.

³⁷⁰ *Id.* at 10.

³⁷¹ *Id.*

way instead of internalizing them. Furthermore, it could be beneficial for individual suppliers to make use of the increase of trust in the industry but not comply with underwriting the code.³⁷² Beside this, a code of conduct may create a false impression with consumers that the government monitors the industry and enforces the code.³⁷³

Another hybrid system is connected to trademark law. Especially in some Anglo-American countries, like the UK and Australia, certification marks might be registered. For example, some eco-labels have been registered as such.³⁷⁴ The proprietor of a certification mark is an overarching, standard-setting body.³⁷⁵ The mark has to be granted to every applicant who meets the standards of the eco-label and is certified.³⁷⁶ The proprietor is not allowed to use the mark for its own goods or services and an environmental supervisory governmental body assesses whether the implemented standards contribute to environmental improvements (unlike collective marks and geographical indications).³⁷⁷ If a company advertises a product referring to such an eco-label while it is not granted permission to use the certification mark, all usual means to redress the infringement of a trademark might be invoked by the proprietor of the certification mark. The same applies if a company is granted the use of the certification mark but fails to meet its standards or is no longer certified, while the permission to use the mark may then be revoked.

The aforementioned hybrid regimes typically comprise both hard and soft law instruments where a public dimension to corporate activities is recognized.³⁷⁸ Conventional private law devices have been transformed to perform regulatory functions at the global level.³⁷⁹ This model has been extended in ways which are promising for hybrid governance regimes to recognize the potential for third party enforcement. Businesses, trade associations, and NGOs become involved in enforcing by using powers delegated by legislative bodies or rights assigned to them under contracts.³⁸⁰ This is limited, however, because businesses tend to adopt standards voluntarily, and they are in a sense judged by the market in terms of their compliance. Nevertheless, many regimes recognize the importance of checking for compliance,

³⁷² Overmars, *supra* note 7, at 18.

³⁷³ *Id.*

³⁷⁴ Gandara, *supra* note 25, at 230.

³⁷⁵ *See, e.g., id.* at 82.

³⁷⁶ *See, e.g., id.* at 253.

³⁷⁷ *Id.* at 82.

³⁷⁸ *See* Scott et al., *supra* note 9, at 292.

³⁷⁹ *Id.* at 10.

³⁸⁰ *Id.* at 11.

and it is not unusual to find contractual requirements that businesses engage third parties to certify compliance.³⁸¹

However, if governments are engaged in enforcement of international private regulation because of the existence of hybrid systems, this does not necessarily indicate greater effectiveness of private regulation. For example, because of elections, government officials might have a short-term perspective instead of a long-term vision required for effective sustainable solutions. Furthermore, corruption might hamper effective enforcement by a government.

Beside these issues of a more practical nature, if both private and public sanctions might be imposed at the same time, the accumulation of sanctions becomes an issue.³⁸² It is questionable whether both these ways of enforcement may be used at the same time. It stands to reason that they could reinforce each other, but this may not be desirable in all circumstances. Unlike public sanctions which are imposed at the same time, where public bodies are often legally bound to coordinate their actions and accumulation is governed by law, coordination between private and public enforcement is more troubling, not only because the supervising public and private bodies may not be aware of the actions taken by the other body, but also because legal barriers to the exchange of information might exist.

Another aspect of effectiveness is an effective complaint mechanism and effective resolution of disputes if they arise.³⁸³ If disputes cannot be solved effectively, adequate enforcement is difficult, if not impossible.³⁸⁴ Moreover, defective conflict resolution might result in unnecessary cost.³⁸⁵ Effective dispute resolution is not confined to judicial mechanisms, such as litigation in national courts or arbitration,

³⁸¹ *Id.* at 12. More conventional bilateral monitoring and enforcement may also apply, but this is usually carried out on a national or sub-national level.

³⁸² See also GIESEN, *supra* note 8, at 141.

³⁸³ This is true for the international private regime itself as well as for its members. The private regime should require them to have their own grievance mechanism. Cf. *MSI-Evaluation Tool*, *supra* note 97, at 27–31; *ISEAL Code of Good Practice*, *supra* note 89, §4.4 (regarding the standard setting process itself); *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principle 2.4.

³⁸⁴ See, e.g., UTTING, *supra* note 57, at 113–15. It is important to notice that the aforementioned certification marks may only be registered if they have a dispute settlement procedure regarding the certification of the goods and/or services. See Gandara, *supra* note 25, at 248; see also Herrstadt, *supra* note 112, at 204–07 (concerning International Framework Agreements on labor standards);

³⁸⁵ Cf. Rachel Davis & Daniel M. Franks, *The Cost of Conflict with Local Communities in the Extractive Industry*, Shift, First International Seminar on Social Responsibility in Mining, 1, 2 (2011), available at http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf.

on the contrary. A growing interest in non-judicial conflict management mechanisms exists in the CSR arena. In other areas, governments are engaged in improving their conflict resolution mechanisms by making use of non-judicial mechanisms too. As to conflict resolution in the human rights arena, Ruggie emphasized the need to improve the patchwork of current non-judicial mechanisms in the third pillar of his framework.³⁸⁶ He and others have speculated that litigation might be rather ineffective because applicable (legal) norms are unclear, because of jurisdictional issues, and because it might encompass parallel litigation in many jurisdictions.³⁸⁷ Litigation in many national courts has adverse effects: it is slow, costly, not always predictable, and it might cause legal uncertainty. Apart from jurisdictional issues, it might entail litigation and enforcement in several countries, the difficult process of assessing applicable norms (if possible at all) and difficulties in gathering sufficient evidence. Furthermore, enforcement of awards or settlements stemming from litigation is difficult.

Human rights may not be the only area where litigation in national courts is unproductive: this might also be true in other CSR areas such as in connection with the environment. Different environmental challenges exist in different countries: public rules differ, different stakeholders are involved in different industries, and no global public supervisor exists. Hence, enterprises might have to be geared towards non-judicial dispute resolution and prevention mechanisms to resolve CSR issues, for example regarding the compliance with international private regulation in this arena, instead of instigating or engaging in (parallel) litigation in several jurisdictions. Of importance in this respect is to assist enterprises, (representatives of) local communities, NGO's, and other international bodies, like the World Bank, to find their way through the existing non-judicial mechanisms. Currently many stakeholders experience difficulty in finding the proper and effective mechanisms. However, the necessity of non-judicial mechanisms does not unravel the effectiveness thereof. Beside this, in some instances the need for judicial mechanisms still is felt, for

³⁸⁶ Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, at 24, UN Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf [hereinafter *Protect, Respect, and Remedy*].

³⁸⁷ David Kovick & Caroline Rees, *International Support for Effective Dispute Resolution Between Companies and Their Stakeholders: Assessing Needs, Interests, and Models* 3-4 (Corp. Social Responsibility Initiative, Working Paper No. 63, 2011), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_63_rees%20kovick_june%202011.pdf.

example to enforce governmental regulation (either entailing open norms or of another nature) which entails or refers to private regulation in the CSR arena, if some stakeholders are not willing to engage in non-judicial mechanisms and in connection with gross human right violations. However, by and large such judicial mechanisms cannot be implemented in international private regulation as they are, apart from arbitration,³⁸⁸ government prerogatives.

As to the effectiveness of judicial mechanisms, the notion of effective remedy is a well-known and reasonably developed concept in connection with international human rights law, which is included in many regional and international human rights treaties (such as art. 2(3) ICCPR³⁸⁹ and art. 13 ECHR³⁹⁰). This might apply more generally in the CSR arena. Broadly speaking, it entails access to an impartial decision-maker or mechanism with the power to hear and investigate complaints and, where appropriate, to provide reparation. In this respect, it is important to distinguish between the procedural aspects involving “access to justice” (which refers to the effectiveness of the remedial mechanisms in place and whether victims have both the opportunity and ability to access them), and the substantive “reparation,” which means the type or quantum of relief afforded.

Other aspects of the right to a remedy have evolved out of international humanitarian law requirements regarding, for instance, the recording and passing on of information about the wounded, sick, and the dead. In addition, human rights cases concerning amongst other things enforced disappearances have stressed the importance of the victim’s right to information about the violation, particularly where the claimant is not the direct victim but another affected individual closely linked to them, for example, a member of their family.³⁹¹ Similar views have been expressed by a number of global and regional human rights treaty bodies. With respect to the United Nations treaty

³⁸⁸ And other possibilities for third (non-government related) parties to pass judgment. An arbitral clause might be entailed (included/implemented by) in a model or supply chain agreement. Therefore, judicial mechanisms might be set forth by international private regulation in such circumstances.

³⁸⁹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966 (entered into force Mar. 23, 1976), *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁹⁰ European Convention on Human Rights, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf

³⁹¹ Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 29, UN Doc. A/HRC/11/13/Add.1 (May 15, 2009) (by John Ruggie) [hereinafter Addendum to the Ruggie Framework].

bodies, some common strands can be identified in their approach to State obligations to provide access to remedy for human rights abuses, whether committed by public or private actors.³⁹² They have emphasized the importance of both procedural elements: (i) conducting prompt, thorough, and fair investigations, (ii) providing access to prompt, effective, and independent remedial mechanisms, established through judicial, administrative, legislative, and other appropriate means.³⁹³ Furthermore, outcome-oriented elements are deemed to be important such as (iii) imposing appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes, (iv) providing a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation, and changes in relevant laws.³⁹⁴ The concept of effective remedy has been strongly influenced by the law of state responsibility and, as a general rule, follows its emphasis on compensatory justice, which means putting the victim back in (or as close to) the position it would have been in but for the violation.³⁹⁵ Thus, appropriate reparation in each case will turn on the right at issue and nature of the violation.

The obvious question is whether this concept of effective remedy might be transposed wholesale to *non-judicial* grievance mechanisms (either related to human rights violations or to other CSR disputes) without further consideration. A number of considerations suggest not. Judicial mechanisms within any jurisdiction will offer similar processes, or at least processes that are highly aligned with each other. With regard to human rights violations, they are intended to provide reparation for victims insofar as the human rights in question are reflected in applicable law; to create a level of deterrence to others who may commit similar violations; and—at least in the case of criminal proceedings—to provide wider justice and protections for society. This reflects the broader role of judicial mechanisms in ensuring the rule of law.

Non-judicial mechanisms can vary widely in their location, form, and process, including:³⁹⁶

³⁹² *Id.* at 2.

³⁹³ *Id.* at 2-3.

³⁹⁴ *Id.* at 3.

³⁹⁵ *Id.* at 2.

³⁹⁶ *See, e.g.*, Caroline Rees & David Vermijs, Mapping Grievance Mechanisms in the Business and Human Rights Arena (Corporate Social Responsibility Initiative, Harvard University, January 2008).

- (i) Mechanisms at the company or project-level to which impacted individuals and groups (for example, workers, communities, etc.) can bring complaints;³⁹⁷
- (ii) Mechanisms linked to industry and multi-stakeholder initiatives (for example, the Fair Labor Association, Ethical Trading Initiative, Social Accountability International, International Council of Toy Industries, Voluntary Principles on Security and Human Rights, Global Framework Agreements);
- (iii) National mechanisms based in government (for example, National Contact Points of OECD Member States, consumer complaints bodies);
- (iv) National mechanisms that are state-supported but independent of government (for example, ombudsman offices, labor dispute resolution offices, national human rights institutions); and
- (v) Regional and international mechanisms (for example, ILO-based mechanisms, the Compliance Advisor/Ombudsman (CAO) of the World Bank Group).

As this reflects, although some non-judicial grievance mechanisms lack any state involvement, the state or a state agency administer and others—to the extent they are effective—contribute to the implementation of the state duty to protect against human rights abuses. In addition, some non-judicial mechanisms, both state-based and non-state-based, entail investigatory and quasi-adjudicative processes that involve reaching findings or conclusions and recommendations. These mechanisms come closer to resembling judicial mechanisms through this quasi-adjudicative function, than do those mechanisms that are premised primarily on seeking dialogue-based solutions.³⁹⁸

This suggests that some of the criteria or definitions for effective remedy in relation to judicial mechanisms may be applicable in the case of non-judicial mechanisms. Others would clearly not be, such as criminal punishment or sanctions. Moreover, the necessity of enforcement of the outcomes of judicial mechanisms does not exist in connection with all non-judicial grievance mechanisms and enforceability is sometimes not even strived after. Furthermore, some state-based non-judicial mechanisms are voluntary in the sense that stakeholders

³⁹⁷ For an extensive analysis of these mechanisms, see Emma Wilson & Emma Blackmore, *Dispute or Dialogue? Community Perspectives on Company-led Grievance Mechanisms* (2013), available at <http://pubs.iied.org/16529IIED.html>.

³⁹⁸ However, it should be noted that some of the mechanisms might perform both functions, i.e. dialogue based and quasi-adjudicative (e.g. the CAO/World Bank ombudsman and the NCPs).

cannot be forced to take use or take part in the mechanism or to be bound by its outcomes without their consent, unlike judicial mechanisms which by their nature might provide redress against the will of a perpetrator.³⁹⁹

As to the effectiveness of non-judicial mechanisms, we might consider two approaches: the effectiveness of the mechanisms themselves (or their procedure) or the effectiveness of their outcomes. As to the effectiveness of non-judicial mechanisms themselves (and their procedure), extensive research has been conducted.⁴⁰⁰ Guiding principle 31 of the Ruggie framework deals with this topic and states:

In order to ensure their effectiveness, both State-based and non-State-based non-judicial grievance mechanisms should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

³⁹⁹ However, some non-judicial mechanisms also resemble judicial mechanisms, like those of national human rights institutions, or mechanisms relevant to some industries that are run by parts of government and might provide redress which resembles judicial mechanisms.

⁴⁰⁰ See generally Caroline Rees, *Grievance Mechanisms for Business and Human Rights* (Corp. Social Responsibility Initiative, Working Paper No. 4, 2008); Caroline Rees, *Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms* (Corp. Social Responsibility Initiative, Report No. 32, 2008); and Martijn Scheltema, *Does CSR Need More (Effective) Private Regulation in the Future?*, in *The Law of the Future and the Future of Law II* 389 (Sam Muller et al. eds., 2012).

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.⁴⁰¹

The commentary to this principle elucidates that a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it, and are able to use it. The aforementioned criteria provide a benchmark for designing, revising, or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process. This is also true regarding other non-judicial mechanisms in the CSR arena. If these requirements are met, some proof of effectiveness of the mechanism itself is provided. However, assessing whether these requirements have been met is complex. For example, should the requirement of transparency entail the publication of documents relied upon in the non-judicial process? Obviously, these documents should be made available to the parties in the non-judicial process, but not necessarily to other stakeholders. Furthermore, effectiveness of non-judicial dispute prevention and resolution mechanisms is connected with ongoing dispute resolution if new complaints or disputes arise.⁴⁰²

As to the effectiveness of the outcome of non-judicial mechanisms, the question that arises is whether it is possible to determine overarching, common elements of effectiveness of non-judicial mechanisms or only for certain types of mechanisms. In this respect, one should bear in mind that a large variety of different possible remedy outcomes of non-judicial mechanisms are conceivable. The outcomes might, for example, range from a final statement of an NCP, to strengthening of the human rights policy and due diligence process of a company, continuous dialogue between a company and a local com-

⁴⁰¹ *Protect, Respect and Remedy*, *supra* note 386, at 26.

⁴⁰² This ongoing dispute resolution might entail judicial mechanisms like arbitration.

munity, a Stop Order from the government, improvements in care and income generating projects to support alternative livelihood, monetary redress, and a general memorandum of understanding.⁴⁰³ Non-judicial remedial outcomes need to have certain features in order to qualify as effective. Therefore, it becomes necessary to describe what these features are, including whether they are necessarily objective (for example alignment with national law), necessarily subjective (for example based on the perspective of those impacted), or may be a mixture of both. In my opinion, elements or indicators of effectiveness are:

- (i) The consistency of an outcome with national and international human rights laws and regulations,
- (ii) The rights-compatibility of an outcome (see Guiding principle 31(f)),
- (iii) Whether an outcome falls within a certain predefined range of options (such as compensation, restitution, guarantees of non-repetition and providing relevant information),
- (iv) Whether business and/or local communities (and/or their representatives) involved in a case perceive a certain outcome or set of outcomes as effective,
- (v) Whether states classify certain outcomes as effective or support them as outcomes of a non-judicial grievance mechanism,
- (vi) Whether companies increase their efforts to respect human rights because of the existence of such mechanisms,
- (vii) Whether the outcome of a certain mechanism restores a particular individual to the enjoyment of their human rights,
- (viii) Whether the outcome of a certain mechanism improves the human rights, environmental or social situation and whether it helps prevent or reduce future grievances and harms,
- (ix) Whether the outcomes of a certain mechanism are implemented in practice and are enforceable (the enforcement of the outcome of non-judicial mechanisms might be realized through state mechanisms (for example through enforcing an agreement which has resulted from a non-

⁴⁰³ For an extensive case analysis of company based non-judicial mechanisms, see WILSON & BLACKMORE, *supra* note 397.

- judicial mechanism)⁴⁰⁴ or through arbitration after an agreement has been reached (if agreed upon)⁴⁰⁵, and
- (x) Whether the outcome of a certain mechanism is aligned with the (possible) outcomes of other non-judicial and judicial mechanisms which stakeholders are engaged in and/or can contribute to effective remedy in combination with the outcomes of other processes.

This list of elements that might define the effectiveness of outcomes reflects a mix of objective and subjective considerations. Arguably, the more of them that are fulfilled, the more likely it is that the remedial outcome will be generally deemed to be effective.

The foregoing has shown that the ex post effectiveness of international private regulation amongst others, such as the indicators mentioned in para 3.1, depends on its enforceability and on effective dispute resolution.⁴⁰⁶ Effectiveness of international private regulation may depend on the following indicators, which have been derived from the abovementioned research:⁴⁰⁷

- (i) Whether international private regulation entails specific and assessable objectives (and if so, whether they have been achieved) and does not aim at objectives which are effectively achieved by other public or private regulation,
- (ii) Whether it entails 'conflict of law' rules,
- (iii) The regular evaluation of the regulation and its functioning (and if necessary) review of the regulation,
- (iv) The existence of a supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of

⁴⁰⁴ For example, the Mediation Directive has been promulgated in the European Union. See Directive 2008/52/EU, 2008 O.J. (L 136/3) (EC), available at <http://Eur-Lex.europa.eu>. This directive is applicable to cross border conflicts (as mentioned in section 2), in which at least one party (in human rights related conflicts, this is by and large a company) has its seat in the EU. Section 6 subsection 1 is especially of importance. It imposes a duty on EU-member states to render agreements resulting from mediation/facilitation enforceable if parties consent to this and so long as/provided that the result is not contradictory to national law.

⁴⁰⁵ Because of Article V of the *New York Convention* (which many developing countries also have adopted), the enforcement of arbitral awards is easier than foreign judgments in member states because that article prevents member states from imposing other barriers on enforcement than those adopted for national arbitral awards. United Nations Conference on International Commercial Arbitration, N.Y., May 20 – June 10, 1958, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V, 330 U.N.T.S. 3 (June 7, 1959).

⁴⁰⁶ Cf. GIESEN, *supra* note 8, at 106, 137–41.

⁴⁰⁷ These indicators are not exhaustive. More detailed research may reveal others.

- the supervisory body to pass judgment and to impose sanctions on non-complying parties,⁴⁰⁸
- (v) The existence of a supervisory body which controls access to scarce resources,⁴⁰⁹
 - (vi) The existence of a serious threat of contractual enforcement or other means of enforcement or endorsement of the private regulation if necessary through state legislation and/or (effective) enforcement by states,⁴¹⁰
 - (vii) The specificity of the rules/standards set forward by the international private regulation,
 - (viii) The existence of an effective complaint and dispute management mechanism to prevent and deal with non-compliance,⁴¹¹
 - (ix) The possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful, and susceptibility of a certain business to negative (social) media attention and active NGOs or other organizations

⁴⁰⁸ However, Kolk and van Tulder argue that the likelihood of compliance is higher where company codes of conduct are involved than those set forward by business associations, international organizations, or NGOs. *See*, Kolk & van Tulder, *supra* note 22, at 11. This especially stems from the fact that codes of conduct promulgated by business organizations or international organizations are less specific and abstain from the possibility of imposing sanctions.

⁴⁰⁹ *Cf.* Scott et al., *supra* note 9, at 7. Beside these indicators, the existence of smaller groups with comparable views is considered to be of importance as well as a high organizational level. This however, in my view, refers to the sociological perspective which is going to be discussed hereinafter. Nonetheless, enforcement may be easier to realize in such circumstances.

⁴¹⁰ However, public enforcement as a fall back option in connection with certification is only effective if certain requirements are met. *See* Paul Verbruggen, *Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation*, 7 *Reg. & Governance* 512, 514-15 (2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/rego.12026/abstract>.

⁴¹¹ As to CSR in an international context, non-judicial mechanisms for conflict management seem to be more effective. Furthermore, the prevention of conflicts becomes more important. *Cf.* GIESEN, *supra* note 8, at 138-39 (regarding dispute management). Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, entails an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework, some information could be retrieved as to whether effective grievance mechanisms are in place.

monitoring this business if at least a moderate chance of detection exists.⁴¹²

These are the predominant indicators. However, in the ex post approach the clarity of the rules and a “conflict of laws” provision as well as the answer to the question whether the international private regulation is able to reach its objectives might be of importance.

5.2 *Economic Approach (Impact Assessment)*

From an economic point of view, it is of interest to learn whether existing international private regulation contributes to the economic welfare of affected communities, and society at large as well as to the profitability of multinational enterprises.⁴¹³ This economic assessment is also referred to as impact assessment. This research encompasses different points of view. The assessment of the increase or decrease in economic welfare differs along the international private regulation under consideration.⁴¹⁴ It makes a difference whether international private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities, or (iii) technical standardization regarding environmental issues is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. Furthermore it is, as explained above, relevant whether the economic analysis is on a macro or micro level.

On the macro level one may, for example, consider the economic effects of international private regulation on economic growth. This kind of research regards private standard setting or standardization in France, the UK and Germany.⁴¹⁵ However, international pri-

⁴¹² For example, with many (single issue) eco-labels, this chance of detection of non-compliance is deemed low. See Gandara, *supra* note 25, at 37. Conversely, companies with strong brands seem more susceptible to negative media attention.

⁴¹³ See Faure, *supra* note 134, at 1056–64.

⁴¹⁴ From the classical economic approach of Coase and the Chicago School of Law and Economics this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well informed parties without regulation. See Faure, *supra* note 134, at 1057. To date, the necessity of research of the economic effects of rules has been recognized. See *id.* at 1057–58. In this approach, private regulation is an appropriate solution where bargaining, at low cost, can occur between risk-creators and those affected. See Ogus & Carbonara, *supra* note 10, at 231.

⁴¹⁵ Elizabeth Gasiorowski-Denis, *Standards: Economic and Social Impact*, ISO Focus, June 2010, at 17, available at <http://digital.iso.org/Olive/ODE/ISO-Focus-Plus-Org/?href=ISOFP/2010/06/01>. However, the main source of growth in France is technological improvement. See *id.* at 18. On the U.K. and Germany, see *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 29.

vate regulation might not be beneficial to consumers.⁴¹⁶ If the quality imposed by an overarching body exceeds consumers' preferences, consumers bear the excessive cost.⁴¹⁷ However, externalities might legitimize an increase in price paid by consumers.⁴¹⁸ For example, an increase in the price of products with an eco-label arguably attracts more producers (who comply with the certified standards and presumably makes consumers who favor the environment more willing to buy such products) and thus might benefit the environment.⁴¹⁹

Other types of consumer detriment are conceivable as well. Privately set standards might, particularly if the standard setting industry has bargaining power, induce more lenient public regulation, which, if adopted, might have external consequences for consumers.⁴²⁰ Furthermore, if sanctions are publicly imposed on a regulatee, this might lead consumers to update their beliefs on the behavior of all regulatees, reducing the perceived quality of the goods provided by them (especially if credence goods are involved), which might induce the group of regulatees (or the overarching body) to refrain from punishment.⁴²¹ This might be detrimental to consumers as well.

Therefore, it is important to assess consumer detriment because private regulation tends to optimize the benefits of the regulatees, but to lose track of the consumer detriment (and other external consequences) resulting from it. However, to date, no one has researched the (detrimental) effects of international private regulation on consumers. Notwithstanding this, insights may derive from research instigated by the European Commission on consumer detriment arising from (intended) European legislation.⁴²² The main indicators for measuring consumer detriment (relevant in connection with international private regulation) are: (i) market power indicators,

⁴¹⁶ Cf. Ogus & Carbonara, *supra* note 10, at 233–34.

⁴¹⁷ *Id.* at 234, 242.

⁴¹⁸ *But cf. id.*

⁴¹⁹ Gandara, *supra* note 25, at 25, 112–33. *See also* UNFSS Landscape Report, *supra* note 330, at 30–33 (Concerning the relation between price increase and environmental benefits). Price-premiums might vary over time. *See* Alvarez & von Hagen, *supra* note 67, at 11.

⁴²⁰ Ogus & Carbonara, *supra* note 10, at 235–36.

⁴²¹ *Id.* at 238 (contending that an effective overarching body might counter this problem).

⁴²² EUROPE ECONOMICS, AN ANALYSIS OF THE ISSUE OF CONSUMER DETRIMENT AND THE MOST APPROPRIATE METHODOLOGIES TO ESTIMATE IT 351 (July 2007), http://ec.europa.eu/consumers/strategy/docs/study_consumer_detriment.pdf [hereinafter Consumer Detriment]

(ii) information deficit indicators,⁴²³ and (iii) consumer complaint indicators.⁴²⁴

Market power indicators (i) are likely to be sensitive to the definition of the market to which they are applied.⁴²⁵ Carrying out a robust market definition exercise can be a resource-intensive and time-consuming process.⁴²⁶ In competition cases, where market definition is an important first stage of analysis, substantial resources are sometimes devoted to this issue.⁴²⁷ If available, such indicators may point at consumer detriment.

As to information deficit indicators (ii), the occurrence of certain market conditions may result in consumer detriment. These market conditions are: (a) high search costs, (b) “focal” competition, (c) bundled goods or after-markets, (d) complex products, (e) infrequent purchases, (f) credence goods, and (g) commission payments to salespeople.⁴²⁸ This information deficit for example exists in connection with

⁴²³ For example, in the area of CSR, the European Commission has found misleading marketing related to the environmental impacts of products (so-called ‘green-washing’) in the context of the report on the application of the Unfair Commercial Practices Directive foreseen for 2012, and considers the need for possible specific measures on this issue. See Communication from the Commission on a Renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25, 2011, *supra* note 54, at 9.

⁴²⁴ See Consumer Detriment, *supra* note 422, at 568. However the research reveals that measuring consumer detriment is very complicated and may involve many different techniques such as consumer surveys, mystery shopping, complaints with adjustments, various market models, evidence from awards in court cases. See *id.* at 223. However, none of the individual methods can be applied sufficiently widely to be useful as a simple generic tool to assess the impact of policy on consumers because all methods can only deal with certain specific sources of detriment and/or are only applicable under certain limited conditions. *Id.* at 225–26. It is furthermore difficult to assess consumer detriment because differences between countries exists in terms of pricing, market power, information problems, and trade barriers. See *id.* at 231–34. Beside these issues there are practical problems. For example, should wholesale or retail prices be compared; should these prices include taxes, and if prices differ between customer groups within a country, which customer group should be considered? See *id.* at 234–35. Furthermore some indicators should be accorded greater weight than others, depending on: (a) the priority placed on the type of problem market which the indicator is designed to identify; (b) the extent to which the indicator reliably identifies a particular type of problem market; (c) the extent to which the available data is a good proxy for what the indicator is meant to measure. The study presents results using an illustrative weighting scheme. See *id.* at 301–02, 307. See *id.* at 385, 387 (describing the possible impact of certain directive measures using these factors).

⁴²⁵ Consumer Detriment, *supra* note 422, at 351.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See also, Gandara, *supra* note 25, at 64–77.

environmental information. Eco-labels play a role in bridging this gap and lower the cost of information gathering.⁴²⁹ However, eco-labels by and large use pricing to distinguish themselves from other products. This might have adverse effects because the consumers might perceive a higher price as a sign of higher (environmental) quality and overall prices might be higher in a market with an eco-label segment.⁴³⁰ Separating and clarifying the nature of the increase in price might counter this problem.⁴³¹

As to the consumer complaint indicators (iii), consumer surveys may assess consumer detriment.⁴³² For example, this method is used in the INRA/Deloitte methodology for measuring consumer satisfaction.⁴³³ The core questionnaire consists of seven different “blocks” of questions.⁴³⁴ Another survey has been carried out by Taylor Nelson Sofres (TNS) and involved a sample of 2,220 UK adults.⁴³⁵ The questionnaire consisted of 45 questions, of which 31 relate to consumer experiences involving some kind of detriment, and 14 relate to demographic factors.⁴³⁶ The 31 questions relating to detriment divide into different sub-headings.⁴³⁷

Both of these surveys in essence are posing comparable questions, but it is hard to infer economic detriment from the aggregate answers if one looks beyond the level of an individual consumer. However, if the aggregate answers show a low consumer satisfaction, this may serve as an indication of consumer detriment.⁴³⁸ Therefore, anal-

⁴²⁹ See Gandara, *supra* note 25, at 73–77, 121, 128–33, 337.

⁴³⁰ *Id.* at 116, 124.

⁴³¹ *Id.* at 118.

⁴³² See Consumer Detriment, *supra* note 422, at 240–41.

⁴³³ *Id.* at 241.

⁴³⁴ *Id.* It covered the following variables:(a) overall satisfaction,(b) evaluation of quality, (c) evaluation of price, (d) image perception, (e) market and personal factors, (f) consumer commitment, and (g) complaint behavior.

⁴³⁵ *Id.* at 245.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 245–46. These were : (a) have you had a problem with goods or services in the last 12 months, (b) what products or services gave rise to problems, (c) how many problems in each category of goods and services, (d) when did it/they start, (e) who has to deal with the problem(s), (f) who is/was affected, (g) what type of problem was it (e.g. safety, unreliability, late delivery), (h) how long did the problem take to be resolved (or how long has it been going on if unresolved), (i) how much money was involved in the initial purchase, (j) what action did you take to deal with the problem, (k) how much time and money did you spent to resolve the problem (or how much so far), (l) actions taken by the supplier, (m) interviewee’s criticisms of the supplier, (n) compensation received or expected, and (o) interviewee’s propensity to complain.

⁴³⁸ However, the problem is that a small number of consumers reported very large financial losses. Therefore, one should increase the statistical robustness of esti-

ysis of consumer complaint data provides significant value. In particular, where sufficiently detailed data is available, it can provide indications of:

- (a) the sectors where consumers are experiencing detriment,
- (b) the nature of that detriment,
- (c) how detriment breaks down between different methods of purchase, and
- (d) the potential scope for financial detriment associated with different complaints (based on the value of the transaction).⁴³⁹

Indicators (i)-(iii)(market power, information deficit and consumer complaint) may assess whether international private regulation is detrimental to consumers, provided they are a stakeholder in connection with certain international private regulation. If private international regulation, for example, causes a shift in market power to the consumers' detriment, private regulation may be less efficient. Information deficit is an important issue regarding international private regulation too, but in a slightly different way. Often consumers are not directly involved in the rule-making process and it is even harder for them to assess which rules apply and whether others comply with the rules than for the governing body or other stakeholders. This may be economically detrimental to consumers. Hence, as elaborated before, transparency (also to consumers) is important. Consumer complaints may also indicate consumer detriment caused by international private regulation. However, not all of these indicators are fit to assess the detriment to consumers.

Quantifying detriment seems possible regarding adversarial market power, because this may, for example, cause an increase in pricing. Also, information deficits may cause consumers to pay too high a price for certain products/services, buy products/services they do not need, or suffer loss because of unclear products/services. However, as to consumer complaints, not all of the factors mentioned above

mates of financial detriment. In order to do this, the survey needs to pick up more cases of large financial detriment and verify that the data is correct when respondents report very high figures for financial costs. Achieving statistically robust results could be established by: (a) Increasing the overall sample size used in the survey, as suggested by the OFT (but a large enough sample would be prohibitively expensive); (b) splitting the sample, and asking (for instance) half of the respondents about the most recent problem and half about the worst problem; (c) using filter questions inserted into an Omnibus survey to build up a database of consumers who have experienced problems which gave rise to large financial costs, and then including them within a separate full-scale quantitative survey; and (d) side-stepping the problem by focusing on other types of data or analysis. *See id.* at 272–76.

⁴³⁹ *Id.* at 408–09.

under (iii) are available. From the Taylor Nelson Sofres survey, the abovementioned factors (k), (l), and (n) may be used. The factors derived from the IRNA/Deloitte research are hard to quantify and thus less suited for the purpose of quantification. Therefore detriment to consumers may be defined as:

$$dC = \pi M, I, C$$

Whereby the abbreviations mean:

- dC: aggregate detriment to consumers
- π : is depending on
- M: aggregate consumer detriment caused by market power created by international private regulation
- I: aggregate consumer detriment caused by informational deficits created by international private regulation
- C: aggregate consumer detriment caused by unsolved complaints caused by international private regulation

Furthermore, international private regulation might have a detrimental impact on competitiveness, innovation, trade, or markets.⁴⁴⁰ For example, contracts between competitors on CSR in order to create a level playing field or eco-labels might disrupt competition.⁴⁴¹ For example, if certification in connection with eco-labeling brings about high costs,⁴⁴² small companies might not have the means to engage in such eco-labels or remain certified, although this might be profitable to other (larger) companies.⁴⁴³

Moreover, international private regulation, especially if it is adopted in supply chains, might put undue pressure on smaller and medium suppliers vis-à-vis multinational enterprises imposing this

⁴⁴⁰ See WTO, Agreement on Technical Barriers to Trade, annex 3, http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (entailing the best practices for standard setting in order to counter trade barriers) (last visited Mar. 17 2014). This annex amongst others entails the obligation to consult WTO-members on draft standards. See also UNFSS Landscape Report, *supra* note 330, part 1, at 18–25 (connecting with sustainability standards and trade barriers). Cf. ISEAL Code of Good Practice, *supra* note 89, §§ 6.1.2, 6.3.1–6.3.2; European Commission, *Annexes to the Impact Assessment Guidelines of the European Commission of 2009*, 24 (Jan/ 15, 2009), http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf. See also, The Communication of the European Commission on the applicability of section 101 TFEU on horizontal agreements O.J. 2011 C 11/55–64, <http://www.Eur-Lex.europa.eu> (dealing with agreements between competitors in the EU).

⁴⁴¹ See Gandara, *supra* note 25, at 92–96, 105–06.

⁴⁴² It by and large does. See *id.* at 164, 268.

⁴⁴³ *Id.* at 120. See generally, UTTING, *supra* note 57, at 98; UNFSS Landscape Report, *supra* note 330, at 27–28; Alvarez & von Hagen, *supra* note 67, at 12, 14, 22–23.

regulation and turning it into a competitive advantage for larger companies.⁴⁴⁴ Furthermore, because of the informational failures regarding the environmental attributes of a certain product, free-riders might reap benefits of the environmental market created by eco-labels without incurring any of the costs by using terms with no clear meaning like “all natural” or “eco-friendly.”⁴⁴⁵ This results in unfair competition between free-riders and the companies investing in certified eco-labels and might jeopardize eco-labels because they lose their advantage on the environmental market.⁴⁴⁶ International private regulation might also exclude or complicate access to a certain market.⁴⁴⁷ For example, certain standards might favor producers in developed countries because they use production methods which are close to or compliant with these standards, whereas these methods are less common in developing countries.⁴⁴⁸ Innovation might be hampered if certain international private regulation (for example in supply chains or in an eco-label) demands the application of certain (non-innovative) techniques, which some consider beneficial to the environment.⁴⁴⁹

Besides economic effects on stakeholders, such as consumers and companies, one should also take into account the economic consequences of international private regulation to the public interest, such as the environment or labor conditions. Certain international private regulation may prove beneficial to its stakeholders, for example businesses and consumers, but may have adverse effects on the environment or workers.⁴⁵⁰ Environmental damage as well as bad labor conditions obviously should be prevented as much as possible. In addi-

⁴⁴⁴ UTTING, *supra* note 57, at 107.

⁴⁴⁵ Gandara, *supra* note 25, at 133–42, 269, 271–74. (referring to this phenomena as ‘greenwashing’.) Other types of greenwashing exist, for example using false labels; making claims of environmental performance, which has been proscribed by law; and false environmental claims. Whether greenwashing takes place might depend on the type of purchasers in the supply chain and whether alignment with other initiatives is established. *See* Alvarez & von Hagen, *supra* note 67, at 23–25.

⁴⁴⁶ *See, e.g.*, UNFSS Landscape Report, *supra* note 330, at 30–33, (on different types of price premiums which do not always increase profit depending on the position of the entity in e.g. a supply chain).

⁴⁴⁷ *See, e.g.*, Gandara, *supra* note 25, at 159.

⁴⁴⁸ *See* Alvarez & von Hagen, *supra* note 67, at 13–14.

⁴⁴⁹ This might also disrupt competition. *See* Gandara, *supra* note 25, at 105.

⁴⁵⁰ *See* Renda, *supra* note 94, at 132 (providing some indicators to assess such detriment). These however do not consider improvement of the environment also for future generations and portions of the territory that are not regularly inhabited, and therefore are not considered to be good indicators. *See id.* at 132–33. More useful is the cheapest cost provider model, which requires four discrete steps: (i) identifying the possible actors who can influence the outcome (polluters, pollutees or the government), (ii) identifying alternative ways in which the outcome can be altered, (iii) assessing the minimum costs of the various methods fig-

tion, governments might have to make costs to monitor the industry at an arms' length.⁴⁵¹ Therefore the damage to the public interest or to labor conditions has to be assessed too.

However, the public interest might also benefit from international private regulation. It may benefit because a standard contributes to sustainability. For example, eco-labels might benefit the environment. However, the actual impact of private standards, such as entailed in eco-labels, on the environment is not easy to assess.⁴⁵² Different, intertwined factors generally cause environmental problems.⁴⁵³ To assess the effectiveness of a standard, we must assess these factors. Furthermore, if private standards and other policy instruments compete, it might be difficult to assess the influence of each individual label or instrument.⁴⁵⁴ It is contended that the quality of the standards or criteria (of the eco-label) and its credibility might function as a proxy indicator of actual (beneficial) environmental impact.⁴⁵⁵ Important aspects are whether (i) the environmental issue has not been addressed more efficiently through government regulation (in which case the standards are superfluous), (ii) they address more than a single environmental issue (because single issue labels tend to lose sight of other environmental detriment generated by a product), (iii) they use a lifecycle analysis of a product instead of the impact of the production only, (iv) they are performance based (as opposed to process based because changes to the processes (of the producer) do not necessarily generate an improved environmental performance), (v) the standards are raised regularly (so that they meet the newest environmental requirements and insights), (vi) they entail specific standards for specific

ured out and (iv) identifying the least cost method and the actor connected to it, who is the cheapest cost avoider. *See id.* at 151.

⁴⁵¹ Overmars, *supra* note 7, at 22. However, some economic models (e.g. the standard cost model) assume 100% compliance. In such models, the cost of enforcement is not considered. *See, e.g.,* Renda, *supra* note 94, at 132.

⁴⁵² Therefore, the actual impact on the environment of an eco-label is hardly ever assessed. *See* Gandara, *supra* note 25, at 266–67. *Cf.* UNFSS Landscape Report, *supra* note 330, at 27.

⁴⁵³ *Id.* at 28.

⁴⁵⁴ *See id.* Eco-labeling entities might not be interested in this type of research, unless coerced to conduct it, because if the research elucidates no actual impact, potential users might not invest in this label. *See id.* at 28, 45. However, eco-labels should assess the actual impact. *Id.* at 28.

⁴⁵⁵ *Id.* at 32. The quality of eco-labels is addressed by the ISO-14020 Environmental labels and declarations – General Principles and ISO-14021 and ISO-14025 standards too. *See, e.g., id.* at 16. However, few eco-labels actually meet these standards. *See id.*

industries, products or environmental issues, and (vii) whether they are regularly certified.⁴⁵⁶

Furthermore, a pro-environmental community has to exist in order for eco-labels to perform and the producers need to have possibilities to increase prices and make their environmental performance public (by showing that their environmental performance is higher than prescribed by law).⁴⁵⁷ By and large, this possibility does not exist if the eco-label is endorsed by the public regulator because the regulatory nature of it tends to monopolize the market.⁴⁵⁸ Therefore, international private regulations are needed in this respect. However, if the impact of a private standard, such as an eco-label, remains unclear and poses high cost to an industry and consumers, the question is whether the unclear contribution to the public good outweighs the cost of participation by an industry and the detriment to consumers.⁴⁵⁹ In many instances the answer to this question seems rhetorical. However, even if an eco-label is successful in the aforementioned sense, an over-demand might result in eco-labels emerging on the market with lower standards and being less advantageous to the environment.⁴⁶⁰ Furthermore, if too many eco-labels exist the (necessarily higher)⁴⁶¹ prices are not sustainable.⁴⁶²

The advantage to the public interest might comprise the prevention of legislation, flexibility, and diminished enforcement effort too.⁴⁶³ Furthermore, independent supervisory bodies might decrease the use of the government funded judicial systems.⁴⁶⁴ Beside this, the industry might have specific knowledge not available to the govern-

⁴⁵⁶ *Id.* at 15-16 (identifying different kinds of voluntary sustainability standards). However, regarding issue (vii) verification instead of certification (especially in business to business environment) is deemed effective too. *See id.* at 51.

⁴⁵⁷ Gandara, *supra* note 25, at 160. However, the focus on making the environmental performance public might hamper useful pro-environmental behavior. *See id.* at 170.

⁴⁵⁸ *Id.* at 223. In this respect, the eco-label developed by the European Commission might be disadvantageous. *See* THE EU ECOLABEL, <http://www.ecolabel.eu> (last visited Mar. 16, 2014); *see, e.g.*, UNFSS Landscape Report, *supra* note 330, at 32 (providing a legal and economic analysis and showing that the increase of price is not always useful, and other informational tools are necessary).

⁴⁵⁹ *Cf.* Gasiorowski-Denis, *supra* note 411, at 33 (analyzing this point in connection with ISO-standards).

⁴⁶⁰ *See* Gandara, *supra* note 25, at 125 (discussing the FSC and sustainable wood).

⁴⁶¹ *Id.* at 127-28 (pointing out that eco-labels work best if the environmental legislative standards are not too high).

⁴⁶² *See, e.g., id.* at 126.

⁴⁶³ Overmars, *supra* note 7, at 18.

⁴⁶⁴ *Id.* at 21.

ment, and might be able to set standards at lower cost than the government. Private regulation thus benefits to the public good.

From the above, it could be inferred that several indicators might be applied to measure the ex post economic effects of international private regulation at a macro level. Obviously such a measurement is not without hurdles, as has been illustrated hereinabove, and especially if the international private regulation at stake more or less resembles public regulation in terms of the number of regulatees and the content of the rules. The following indicators, mentioned above, might be used to make such an assessment:

- (i) the Standard Cost Model for the measurement and reduction of (administrative) burdens of international private regulation to regulatees;⁴⁶⁵
- (ii) changes in the growth of gross domestic product caused by international private regulation;
- (iii) consumer benefit or detriment;
- (iv) competitiveness and trade;
- (v) impact on the potential for innovation and technological development;
- (iv) improvement of labor conditions and social welfare;
- (iv) benefit or detriment to the public interest.

That said, it should be noted that international private regulation might not have effects on all these indicators. One should only assess these indicators on which the regulation might have an impact. For example, regulation on equal pay among men and women is more likely to have gender effects rather than impact on climate change and the environment.⁴⁶⁶

However, this kind of macro-economic research is rather costly and the outcome is to a certain extent speculative because of the extensive use of assumptions.⁴⁶⁷ Beside this, international private regulation often does not resemble public regulation at all.⁴⁶⁸ The nature of private regulation might be rather different from public regulation in terms of the number of regulatees and the content of the rules.⁴⁶⁹ This is true regarding, for example, codes of conduct, international private regulation entailing principles, and regulation through contractual provisions in supply chains. A macro analysis seems less fit regarding such international private regulation. Furthermore, this research at a

⁴⁶⁵ This model has been elaborated in the ex-ante economic avenue. *See supra* note 176 and accompanying text.

⁴⁶⁶ *See, e.g.,* Fritsch et al, *supra* note 146, at 4.

⁴⁶⁷ *See* UNFSS Landscape Report, *supra* note 330, at 19.

⁴⁶⁸ *See, e.g., id.* at 16.

⁴⁶⁹ *See, e.g., id.*

macro level does not provide any grip on the economic effects/benefits of international private regulation on/for individual companies.

To make a proper assessment of these effects a “bottom up” (micro-economic) approach is required. This approach is partially reflected by the policy of the European Commission on CSR, which calls for maximizing the shared value for the owners/shareholders of an enterprise as well as for its other stakeholders and society at large.⁴⁷⁰ As enterprises are concerned, research has elucidated that private regulation such as standardization may contribute to the profitability of enterprises. The same is true in connection with sustainable entrepreneurship.⁴⁷¹ An increase of profitability (for example resulting from an increase of market access) is an important indicator to assess the economic effects of international private regulation, as the willingness of industry to establish and/or adhere to private regulation is increased (or even driven) by expected benefit.⁴⁷²

However, although continuity and profitability are important (long term) aims, business is increasingly inclined to live up to its responsibility in the CSR field—also if governments are unable to set (national or international) standards—by including other interests (of external stakeholders) into their (CSR) policy and by reporting on those non-financial topics.⁴⁷³ Furthermore, customers and investors (as well as society⁴⁷⁴) increasingly require a (sound) CSR policy. Therefore, the dissemination of international private CSR regulation is not only driven by an increase in profits caused by this type of regulation, but also entails a delicate process of (enhanced) assured non-financial reporting and of meeting the (CSR) requirements of customers, investors, and society at large.

As to the micro-economic effects of international private regulation, research has been conducted on the economic effects of stand-

⁴⁷⁰ Communication from the Commission, *supra* note 54, at 6.

⁴⁷¹ See, e.g., Robert G. Eccles et al., *The Impact of Corporate Culture of Sustainability on Organizational Processes and Performance* 21 (Harvard Bus. Sch., Working Paper No. 12-035, 2013), available at www.hbs.edu/research/pdf/12-035.pdf; see also Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, *Harv. Bus. Rev.*, Jan.-Feb. 2011, at 5, available at http://www.waterhealth.com/sites/default/files/Harvard_Business_Review_Shared_Value.pdf (advertising the concept of “shared value”). Furthermore, this is beneficial to investors too because the return on investment increases as well. See, e.g., *id.* at 9.

⁴⁷² Overmars, *supra* note 7, at 20; cf. Alvarez & von Hagen, *supra* note 67, at 11; Casey & Scott, *supra* note 66, at 91; Ogus & Carbonara, *supra* note 10, at 244.

⁴⁷³ Cf. Ogus & Carbonara, *supra* note 10, at 244. Part of this non-financial reporting is liaising with external stakeholders. *Id.*

⁴⁷⁴ Such demands might be expressed through legislation, but also through other means, such as social media, the Internet, or civic voice organizations (e.g. NGO's).

ardization.⁴⁷⁵ Standardization is used in the CSR arena too, for example with environmental issues.⁴⁷⁶ However, this research entails technical standards only and not relevant (management) standards in the CSR arena. Therefore, the usage of this method to assess the economic impact of standardization or, more generally, of international private regulation in the CSR arena, is not axiomatic.⁴⁷⁷ Technical processes within a company are quite distinct and have less external impact as such. In this respect, standardization has to be discerned from CSR.⁴⁷⁸

A company CSR policy (based on private regulation) might be profitable to the company, but might have external consequences for consumers, local communities, or the environment.⁴⁷⁹ Besides this, the process from extracting raw materials to the delivery of a certain product to a consumer might take rather long.⁴⁸⁰ This process regularly involves a (long) chain of activities of several enterprises.⁴⁸¹ Furthermore, the implementation of certain international private CSR regulations throughout the mentioned supply chain is time consuming, and the economic effects thereof are less clear.⁴⁸² This assessment is further complicated because the profit of an enterprise depends on many factors, especially in the long run.⁴⁸³ Besides this, negative media, because of violations of international private CSR regulation, might be more threatening to a company's profit than non-compliance with international technical standards.⁴⁸⁴ However, this depends on the industry.⁴⁸⁵ The producer of consumer goods might envisage more severe consequences of negative media attention than a company in the arms industry and might profit more because of positive media if it complies with private CSR regulation.⁴⁸⁶ For the company in the arms

⁴⁷⁵ See Gasiorowski-Denis, *supra* note 411, at 11.

⁴⁷⁶ See INT'L S. ORG. FOR STANDARDIZATION ser. 14000 (2013) (providing standardization on environmental issues); see also INT'L S. ORG. FOR STANDARDIZATION ser. 26000 (2010) (providing standardization on CSR as a whole).

⁴⁷⁷ Cherie Metcalf, *Corporate Social Responsibility As Global Public Law: Third Party Rankings As Regulation by Information*, 28 Pace Env'tl. L. Rev. 145, 160 (2010).

⁴⁷⁸ See *id.* at 155.

⁴⁷⁹ See *id.* at 158; see, e.g., ADINDA P. INSYIRANI ET AL., THE IMPACT OF CORPORATE SOCIAL RESPONSIBILITY TO INTERNAL EMPLOYEE MOTIVATION 9, 10 (2013), available at http://www.caal-inteduorg.com/ibsm2/proceedings/FP04-Adinda_Putri_Insyirani—The_Impact_of_Corporate_Social.pdf.

⁴⁸⁰ Metcalf, *supra* note 477, at 161.

⁴⁸¹ See *id.*

⁴⁸² See *id.*

⁴⁸³ See *id.* at 160.

⁴⁸⁴ See *id.* at 169.

⁴⁸⁵ See *id.*

⁴⁸⁶ See *id.*

industry the expected benefit from compliance with international private regulation in the CSR arena might be lower.⁴⁸⁷ Furthermore, the abandonment of child labor, for example, turns on whether the industry in general is child-labor dependent and whether products are sold to consumers and not in a business-to-business market.⁴⁸⁸ If both requirements are met, negative media attention is deemed to have adverse effects on a certain company.

Therefore, economic effects of international private CSR regulation on the micro level are not measured easily and depend on the specifics of a certain industry.⁴⁸⁹ However, as has been mentioned before, research has shown that CSR might be profitable to companies, consumers, and local communities as well as to the environment.⁴⁹⁰ For example, a certified eco-label might lower the cost of reputation-building for a company in the environmental arena because the eco-label might be well known in the market and might be connected to environmental improvement by consumers.⁴⁹¹ The eco-label supports the environmental claim and the (environmental) reputation of the company in such instances. It might even permeate to the other (non-labeled) products of such a company.⁴⁹²

How then to find a method to assess the economic effects of international private CSR regulation on the micro level? Many methods exist to measure the economic effects of CSR on companies.⁴⁹³ The

⁴⁸⁷ *See id.*

⁴⁸⁸ *Cf. Kolk & van Tulder, supra note 22, at 7.*

⁴⁸⁹ *See id.* at 160.

⁴⁹⁰ *See, e.g., Eccles et al., supra note 471, at 4; Porter & Kramer, supra note 471, at 9; Gandara, supra note 25, at 159-60.* However, Gandara notices that a correlation between sustainability and financial performance has been found, but no causal relation. *See id.* at 151.

⁴⁹¹ *See Gandara, supra note 25, at 88.* However, she also addresses the downside because the aforementioned cost reduction is the highest for companies with a rather poor environmental performance. *Id.* at 90. Furthermore, companies with a good environmental performance might incur high cost because of the certification process and might receive marginal benefits. *See id.* at 92.

⁴⁹² *Cf. id.* at 100.

⁴⁹³ It is not possible to review all methods in this contribution. Indicators to measure detriment to local communities by analyzing complaints (e.g. about illness, increased mortality as well as damage to economic and environmental assets) are provided by Renda. Renda, *supra note 94, at 132.* However, these indicators are not considered to be adequate measurement tools. *Id.* The human development indicator might also provide for some insight in the economic advantages of international private regulation to other stakeholders (for example, local communities). However, it is contended an increase of wealth may not constitute a social improvement unless it furthers some other goal such as utility and therefore is not a useful indicator. *Id.* at 104. Furthermore, an aid in the environmental area might be SimaPro software, which uses many of these methods to assess the effects of

Global Reporting Initiative (GRI) might play a role in this.⁴⁹⁴ Another useful instrument for the agricultural sector might be the joint ISEAL and FAO initiative Sustainability Assessment of Food and Agriculture systems (SAFA guidelines).⁴⁹⁵ GRI provides organizational reporting

company activities on the environment, climate and health. See SIMAPRO 7, http://www.pre-sustainability.com/download/Webdemo/SimaPro_7_Introduction.htm. (last visited Mar. 12, 2014); see also *About the Consortium*, THE SUSTAINABILITY CONSORTIUM, <http://www.sustainabilityconsortium.org/what-we-do/> (last visited Mar. 12, 2014) (developing the Sustainability Measurement and Reporting System (SMRS), a global platform which enables research on the effects of company activities on climate, raw materials, health, water use, and the environment at an industry level); *Earthster 2: Semantic Web-based Life Cycle Assessment*, EPIMORPHICS LTD., <http://www.epimorphics.com/web/Earthster> (developing software that assesses the impact of company activities at an industry level); see, e.g., <http://www.sustainabilityconsortium.org/open-io/use-the-model/>.

⁴⁹⁴ See GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Pages/default.aspx> (last visited Mar. 12, 2014); see also Alberto Fonseca, *Barriers to Strengthening the Global Reporting Initiative Framework: Exploring the perceptions of consultants, practitioners and researchers 3–4* (n.d.), available at http://www.csin-rcid.ca/downloads/csin_conf_alberto_fonseca.pdf (discussing the history of the initiative). This type of reporting is required by some certifiable management systems by the Dutch 'MVO prestatieladder' (at application level 5 in which GRI reporting application level B+ is required). See MVO PRESTATIELADDER (CSR PERFORMANCE), <http://www.mvoprestatieladder.nl> (last visited Mar. 12, 2014). However, although the GRI seems an open inclusive organization aiming at public policy goals, its performance in this respect is questioned. FONSECA, *supra* note 494, at 5. Some consider the nature of the indicators rather formalistic and giving rise to a 'box-ticking' mentality as well as difficult to apply (e.g. the human rights indicators). *Id.* A survey amongst stakeholders on the performance of GRI has revealed a lack of integrated indicators, no obligation for external assurance, a lack of guidance on stakeholder engagement and limited participation as well as a lack of real inclusiveness because of the focus on internal organizational performance and losing sight of the physical space surrounding specific facilities or industrial plants. See *id.* at 5-7; cf. Cafaggi & Renda, *supra* note 46, at 18. However, some contend the GRI has succeeded in operationalizing accountability as a virtue. See Curtin & Senden, *supra* note 11, at 178. Besides the GRI, a new organization has been established, the International Integrated Reporting Committee (IIRC), which aims at creating an internationally accepted reporting framework enabling companies to combine financial and non-financial reporting. See INTEGRATED REPORTING, <http://www.theiirc.org> (last visited Mar. 12, 2014).

⁴⁹⁵ FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org> (last visited Mar. 12, 2014); see, e.g., Cafaggi & Renda, *supra* note 46, at 23–25. See also *About Us*, TRUE PRICE FOUNDATION, <http://www.trueprice.org> (last visited Oct. 30, 2013) (aiming to establish a methodology to make external social and environmental impact transparent at the price-level of individual products). This might be an interesting tool to assess impact of an initiative which is implemented by a company on the price-level (in terms of improvement of environmental and social impact).

guidance. Its framework enables all companies and organizations to measure and report their sustainability performance.⁴⁹⁶ The SAFA guidelines entail a comparable (and comprehensive) framework in the agricultural area. The following research on the GRI therefore *mutatis mutandis* applies to the SAFA guidelines. A sustainability report is an organizational report that gives information about economic, environmental, social, and governance performance.⁴⁹⁷ Sustainability reporting is a form of non-financial reporting. It is also an intrinsic element of integrated reporting, a recent development that combines the analysis of financial and non-financial performance. Sustainability reporting involves the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development.⁴⁹⁸ In order to produce a regular sustainability report, companies should set up a program of data collection, communication, and responses.

A sustainability report should provide a balanced and reasonable representation of the sustainability performance of the reporting organization, including both positive and negative contributions. The GRI provides that companies, amongst others, provide performance indicators that elicit comparable information on the economic, environmental, and social performance of this company.⁴⁹⁹ Furthermore, the

⁴⁹⁶ See ISEAL ALLIANCE, ASSESSING THE IMPACTS OF SOCIAL AND ENVIRONMENTAL STANDARDS SYSTEMS v1.0, at 8 (2010), available at <http://www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice> (providing elements the assessment should entail); see, e.g., THE DANISH INST. FOR HUMAN RIGHTS, HUMAN RIGHTS COMPLIANCE ASSESSMENT (HRCA) QUICK CHECK 4, available at https://hrca2.humanrightsbusiness.org/docs/file/HRCA%20Quick%20Check_English.pdf (providing indicators regarding human rights); Shift, From Audit to Innovation: Advancing Human Rights in Global Supply Chains 9 (2013), available at http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf (assessing human rights impact in supply chains); see also Cafaggi & Renda, *supra* note 46, at 20-23. Third party rating agencies assess human rights performance of entities on behalf of investors too, but unfortunately their analysis is not public. See, e.g., *About Us*, VIGEO, <http://www.vigeo.com> (last visited Dec. 23, 2013); SUSTAINALYTICS, <http://www.sustainalytics.com> (last visited Dec. 23, 2013). Some public indices such as the Dow Jones Sustainability Index entail human rights indicators as well; however, to date only 6% of the indicators are related to them. See ROBECOSAM, CORPORATE SUSTAINABILITY ASSESSMENT 33 (2013), available at <http://www.robecosam.com/images/sample-questionnaire.pdf> (providing a corporate sustainability questionnaire).

⁴⁹⁷ See GLOBAL REPORTING INITIATIVE, *supra* note 494, at 9.

⁴⁹⁸ See *id.* at 17.

⁴⁹⁹ To date the most advanced performance indicators are entailed in the G4 reporting framework. *G4 Sustainability Reporting Guidelines*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/reporting/g4/Pages/default.aspx> (last

sustainability report has to focus on the organization's key impacts on sustainability and effects on stakeholders, including rights as defined by national laws and relevant internationally agreed standards.⁵⁰⁰ In order to meet the GRI requirements, the reporting organization should identify (i) on which topics it has significant economic, environmental, and social impact,⁵⁰¹ (ii) its stakeholders⁵⁰² and explain in the report how it has responded to their reasonable expectations and interests, and (iii) should put the performance information in the context of the limits and demands placed on environmental or social resources at the sectorial, local, regional, or global level.⁵⁰³ For example, this could mean that in addition to reporting on trends in eco-efficiency, an organization might also present its absolute pollution loading in relation to the capacity of the regional ecosystem to absorb the pollutant in a sustainable manner. Furthermore, (iv) coverage of the material topics and indicators and definition of the report boundary should be sufficient to reflect significant economic, environmental, and social impacts⁵⁰⁴ (for example along the supply chain⁵⁰⁵) and enable stakeholders to assess the reporting company's performance in the reporting period.⁵⁰⁶ Reported information should be presented in a manner that enables stakeholders to analyze changes in the performance of the company over time, and could support analysis relative to other companies.⁵⁰⁷ A company should include total numbers (absolute data such as tons of waste) as well as ratios (normalized data such as waste per unit of production) to enable analytical comparisons.⁵⁰⁸ GRI has different application levels.⁵⁰⁹

visited Mar. 12, 2014); *see also* GLOBAL REPORTING INITIATIVE, REPORTING PRINCIPLES AND STANDARD DISCLOSURES 1 (2013).

⁵⁰⁰ *See id.* at 17.

⁵⁰¹ *See id.*

⁵⁰² Which refers to entities or individuals significantly affected by the activities of the company. Examples of stakeholder groups are civil society, customers, employees (and other workers, and their trade unions), local communities, shareholders, and providers of capital and suppliers. *See* REPORTING PRINCIPLES, *supra* note 499, at 5.

⁵⁰³ *See id.*

⁵⁰⁴ *See id.*

⁵⁰⁵ However, this is only if the company has control over the entity in the supply chain or has significant influence on this entity. In the first circumstance, the company has to provide performance indicators and in the latter it has to disclose the management approach of the entity in the supply chain. *See id.* at 20.

⁵⁰⁶ *See id.*

⁵⁰⁷ *See id.*

⁵⁰⁸ *See id.* at 50.

⁵⁰⁹ These are A, B and C to which a "+" might be added if external assurance is utilized. *See id.* at 11, 15. Level A is the most elaborate level of reporting and

Because the GRI reporting, especially if the highest (A) application level is implemented, enables stakeholders to analyze changes in the performance of a company over time and could support analysis relative to other companies, it might be a helpful tool to assess the economic impact of the implementation of private regulation in the area of CSR. If a company uses the GRI reporting tool, one could assess its economic, environmental, and social performance indicators before and after the implementation of certain private regulation in the CSR arena. Because the sustainability reports are made public, stakeholders and researchers are able to make this assessment too.⁵¹⁰

From this analysis, it could be inferred that private regulation in the CSR arena seems to be effective in an economic sense if (i) the profits of the reporting company increase (in the long run) after implementing the private regulation,⁵¹¹ which could be inferred from the common financial reporting, and (ii) the external (environmental and societal) consequences of the company's operations do not increase (or ideally decrease), which could be inferred from the non-financial performance indicators.⁵¹² However, an increase or decrease of profit might have many causes, especially if measured over a longer period of time.⁵¹³ Therefore, increase or decrease of profit might not be attributable to the implementation of certain private CSR regulation.⁵¹⁴ So, the financial statements should be scrutinized to assess whether other factors could have caused changes in profit. As far as possible, these other factors should be left out of the analysis. However, these other factors, such as an increase in production, might also cause an increase in environmental and social consequences. Such an increase might only be left out of the analysis if the increase is consistent with the implemented private CSR initiative. A further complication is that many companies do not adhere to a single private CSR initiative but implement more initiatives. Therefore, it might be difficult to assess which increase of profit could be attributed to the implementation of a certain CSR initiative. This hurdle might be overcome by assessing at which time certain private CSR initiatives are implemented. If these initiatives are not implemented at the same time, one could commence measuring an increase in profits and the change of external consequences after implementation of a first initiative but before the imple-

entails all indicators of the GRI on economic, environmental, and social impact of a company.

⁵¹⁰ See, e.g., *id.* at 16.

⁵¹¹ Fully implementing private CSR regulation might be rather time consuming and therefore the moment of measuring profits before and after implementation might be quite remote. See Gandara, *supra* note 25, at 151.

⁵¹² See *id.* at 5.

⁵¹³ See Gandara, *supra* note 25, at 151.

⁵¹⁴ *Id.*

mentation of a second. In this regard it is of importance that GRI requires companies to indicate to which initiatives they adhere in their non-financial report.⁵¹⁵ Furthermore, it is conceivable that private CSR initiatives concern different topics, for example water usage and sustainable fishery. In such cases it might be possible to attribute part of the increase of profit and a change in environmental and social consequences to a certain initiative.

Put in a formula: private CSR regulation is efficient (on a micro level) if:

$$PAc_{csr} - PBc_{csr} > 0 \text{ and} \\ \Delta EC + \Delta SC = 0$$

In which formula:

- PAc_{csr} is the company's profit after implementation of a certain private CSR initiative,
- PBc_{csr} is the company's profit before implementation,
- ΔEC is the change of environmental consequences of the company's operations, and
- ΔSC is the change of social consequences of the company's operations.⁵¹⁶

An objection to this way of measuring efficiency through the GRI reporting might be that the figures and statements are provided by the company. Therefore, they might be considered to be less trustworthy, especially by external stakeholders. However, regarding the financial statement, this distrust seems only partially justified be-

⁵¹⁵ See *id.* at 5.

⁵¹⁶ EC and SC are assumed to be quantifiable in this formula. However, it should be noted that these consequences cannot be monetized regarding all aspects. In the GRI-reports these consequences are considered to be of a non-financial nature. See REPORTING PRINCIPLES, *supra* note 499, at 5 n.1. For example, the impact on human rights in a certain local community or on diversity is not easy to measure in a figure. In such instances, the non-financial report stating the changes in this respect have to be considered without attributing a figure to these changes. Obviously, this may cause problems if the environmental and social consequences are not aligned. For example, if the figures regarding environmental impact show a positive effect and the (non-figurative) social statements a negative, the question arises whether the overall effect (EC + SC) is positive. Furthermore, it might be hard to assess whether the human rights situation has improved if the number of human rights issues has decreased but the severity of the remaining issues has increased. Unfortunately, the answer to these questions cannot be given in a truly objective way, but only more subjectively through assessing which effect seems to be predominant (for example by engaging with the affected community). However, this is still better than refraining from any assessment at all, especially if reports from other companies adhering to certain private regulation are available too.

cause external assurance (by an accountant) is required in most countries.⁵¹⁷ As to the non-financial statements this distrust might be understandable, but in this regard GRI also provides for external assurance.⁵¹⁸ Obviously, if external assurance is applied, the credibility of the reports increases.⁵¹⁹ Furthermore, one might assess the efficiency of certain private CSR regulation by using financial and non-financial GRI reports from multiple companies.⁵²⁰ If efficiency in the abovementioned sense could be inferred from several GRI-reports, this strengthens the assumption of efficiency of a particular initiative (this entails an assessment at the meso level).⁵²¹ Considering the reports of multiple companies also could assist in assessing the efficiency of private CSR initiatives if a certain company has implemented several initiatives at the same time or close to each other. If one compares the reports of multiple companies which, but for one, have implemented different initiatives and assesses efficiency in the abovementioned sense with all these companies, this raises the assumption that the initiative they all have implemented is efficient.

Therefore GRI-reports are helpful to assess the efficiency of private CSR regulation on a micro-economic level, especially if companies have adopted the A+ (the highest externally assured) application level. If so, they have to report on all environmental and social performance indicators with external assurance of this report. From these reports, the efficiency of private CSR regulation can be inferred best in the way described above.

However, not many companies have adopted the GRI A(+) application level.⁵²² Because companies which have adopted the GRI B or C application level do not have to report on all environmental and social performance indicators, assessing the efficiency of private CSR regulation is more complex, although these reports might still provide some guidance using the indicators which are reported on. Furthermore, GRI-reporting seems to be adopted by companies which have an interest in sustainability.⁵²³ Therefore, assessing the effects of not implementing private CSR regulation by using GRI-reports is less feasible because the companies which have not implemented private CSR

⁵¹⁷ See Iris H-Y Chiu, *Transparency Regulation in Financial Markets - Moving into the Surveillance Age?*, 2 Eur. J. Risk Reg. 305, 306 (2011).

⁵¹⁸ If external assurance is utilized the company adds a "+" to the application level of GRI. See *id.* at 11, 15; see also Gandara, *supra* note 25, at 151.

⁵¹⁹ See, e.g., Gandara, *supra* note 25, at 151.

⁵²⁰ See, e.g., *id.*

⁵²¹ See, e.g., *id.*

⁵²² Only 20% of the GRI-based reports published in 2008 declared an A+ level. These reports mainly stem from large transnational corporations based in OECD countries. See FONSECA, *supra* note 494, at 13.

⁵²³ See FONSECA, *supra* note 494, at 1

regulation are not very likely to use the GRI-reporting tool. Thus the assessment of efficiency is mainly undertaken by using reports from companies which implemented private regulation.⁵²⁴ This might be compensated for, and this method might also be of use, if no GRI-reports are available of companies which have implemented a particular private CSR initiative, by using other assessment tools for example on environmental impact in connection with scrutinizing publicized financial data.⁵²⁵ However, the current assessment tools do not require companies to make the results of their assessments public. Therefore, these assessments are not fit for external research on the efficiency of private CSR initiatives. In order to enable and improve future research on the effectiveness of international private CSR regulation, the implementation of GRI-reporting (preferably at the A(+) application level) or comparable reporting requirements should be promoted.⁵²⁶ An even better solution would be to adopt a GRI or comparable reporting requirement in future international private CSR regulation (or elsewhere).⁵²⁷ Thus, the requirement of GRI-reporting (or comparable kinds of reporting) becomes an indicator of effective-

⁵²⁴ See *Regulating for a More Sustainable Future: New Norwegian CSR Regulation Entered Into Force*, GLOBAL REPORTING INITIATIVE (last visited Mar. 12, 2014), <https://www.globalreporting.org/information/news-and-press-center/Pages/Regulating-for-a-more-sustainable-future-New-Norwegian-CSR-regulations-entered-into-force/> (showing how these companies might be intrinsically motivated to make a success of international private CSR regulation, which might cause an increase in profit although the regulation itself is rather ineffective. However, the more companies which have implemented particular private CSR regulation report an increase in profit after implementation, the more likely it becomes that this is (at least partly) attributable to the private regulation. Furthermore, this increase of profit after implementation provides at least an indication of efficiency as opposed to refraining from this assessment at all).

⁵²⁵ See, e.g., THE CARBON DISCLOSURE PROJECT, <http://www.cdproject.net> (last visited April 29, 2013); THE SUSTAINABILITY MEASUREMENT & REPORTING SYSTEM, SMRS <http://www.sustainabilityconsortium.org/open-io/use-the-model> (last visited April 29, 2013).

⁵²⁶ Cf. Balleisen & Eisner, *supra* note 62, at 136, 142; see, e.g., *OECD Guidelines for Multinational Enterprises*, OECD, <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>, (last visited Mar. 20, 2013). Furthermore, the SEC requires companies listed at the New York stock exchange to report on sustainability issues such as climate change. See, e.g., *New SEC Guidelines May Cause an Outbreak of Sustainability Reporting*, CA. SUSTAINABILITY ALLIANCE, <http://sustainca.org/blog/climate/sec-guidelines-sustainability-reporting> (last visited Nov. 27, 2013).

⁵²⁷ Cf. *MSI-evaluation Tool*, *supra* note 97, at 19–20; and Kolk & van Tulder, *supra* note 22, at 10 (arguing that the extent to which a code of conduct entails quantitative standards should be adopted as an effectiveness indicator).

ness of future international private CSR regulation itself because it enables better research on its efficiency.

However, the economic approach by itself is not a reliable indicator that emanates *ex post* effectiveness of international private regulation. Unlike what classical economic theory assumed, human decision-making is not solely based on economic appraisal of a situation, but also on other assessments and is biased.⁵²⁸ For example, network effects, herd behavior, and bandwagon effects are typical cases in which the interdependence between individuals and their dynamic interaction makes it impossible to follow a single mathematical aggregation of individual preferences as in the Pareto efficiency (connected to the macro level approach), in which an aggregate increase of wealth agreed upon by all members of society is predominant.⁵²⁹ As biases emerge, effective international private regulation ought to operate directly on them and attempt to assist people either to reduce or to eliminate them, but this aspect of effectiveness is not covered by the economic avenue.⁵³⁰ Besides this, acceptance of particular international private regulation by stakeholders is important. Economic efficiency, for example, tends to neglect the division of wealth caused by international private regulation,⁵³¹ which is an important factor in the acceptance thereof. The welfare of an individual most often depends on that individual's relative, rather than absolute, well-being.⁵³² An individual earning €50,000 in a company where everybody receives the same amount might be happier than an individual who earns €60,000 in a company in which everyone else earns €80,000.⁵³³ If the per capita income of a local community increases by \$5 as a result of the implementation of private CSR regulation, it makes a difference whether this community is located in Nigeria or Canada. Such and other distributional issues, which relate to returns on income and the assessment of how much an increase of wealth contributes to the utility for an

⁵²⁸ See, e.g., Renda, *supra* note 94, at 110–11.

⁵²⁹ *Id.* at 117–18, 126. The same is true regarding the Kaldor-Hicks principle, albeit in this principle the possibility that someone is left worse-off after an efficient policy change is explicitly contemplated. This principle is an important feature of the US impact assessment on major legislation issued by agencies. See *id.* at 127–28. Therefore, the aggregate increase of wealth agreed upon by all members of society has lost its predominant position in current law and economics. See, e.g., Faure, *supra* note 134, at 1061.

⁵³⁰ Christine Jolls, *Behavioural Law and Economics*, in Behavioral economics and its application 34–35 (Diamond et al. eds., Princeton Univ. Press 2007).

⁵³¹ Cf. Renda, *supra* note 94, at 122.

⁵³² *Id.* at 118.

⁵³³ *Id.* at 125.

individual (the same increase in wealth has different utility for a poor or a rich individual),⁵³⁴ are neglected in classical economics.⁵³⁵

As discussed above, the economic avenue as a whole is especially fit to measure ex post effects of international private regulation.⁵³⁶ Only the macro-economic approach is helpful in assessing the economic efficiency of international private regulation ex ante. However, it emanated from the foregoing that a single economic approach does not suffice to assess the ex post effectiveness of international private regulation. Other disciplines are needed to correct the shortcomings of the economic avenue.⁵³⁷ As to the distributional shortcomings of the economic approach, the acceptance of international private regulation is important. The sociological approach covers this avenue.⁵³⁸ That said, the economic avenue ought to be one of the main factors in the ex post assessment of the effectiveness of international private regulation, next to the legal approach, in spite of these shortcomings.

5.3 Sociological Approach

The sociological approach might be important too in the ex post approach to assessing the effectiveness of existing international private regulation. The better international private regulation is actually accepted, the greater the incentives are to comply with it. This might reduce the costs of enforcement and dispute resolution. Alternatively, if acceptance is rather poor, this might be a contra-indicator.

However, the degree of acceptance is not easily measured. It might, for example, take some time before the implementation of a certain private regulatory regime brings about perceptible effects. Furthermore, private regulation is often intertwined with government

⁵³⁴ In technical terms: a diminishing marginal utility of income. See, e.g., Richard A. Easterlin, Diminishing Marginal Utility of Income 2004, <http://ssrn.com/abstract=539262> (last visited March 20th 2013).

⁵³⁵ Renda, *supra* note 94, at 122 (giving the example of a poor and a rich cousin who have to divide an inheritance on the condition that they agree on how to divide the sum).

⁵³⁶ See Faure, *supra* note 134, at 1061. (showing that it is possible to assess the economic effects of a particular desirable division of wealth, and that the economic approach also might assist the ex ante appraisal of international private regulation).

⁵³⁷ Therefore, the importance of human behavior is recognized in current law and economics. See, e.g., Faure, *supra* note 134, at 1061–62; cf. Jonathan Klick, The Empirical Revolution in Law and Economics 23 (Inaugural lecture Rotterdam) (Eleven Publ. 2011).

⁵³⁸ This approach is, as has been discussed hereinabove, of importance to alternative forms of legitimacy of international private regulation as well. Beside this, insights might be derived from social psychology and political science which also research acceptance of norms.

regulation, and it is therefore rather complicated to isolate the effects of a private regulatory regime.⁵³⁹ Beside this, acceptance may vary between the different actors subject to the regime. Acceptance then might be assessed by conducting surveys with relevant stakeholders. It should be noted this approach is *ex post*; *ex ante* research of this kind is not conceivable. However, this requires research which is often rather time consuming and costly. Acceptance preferably should be assessed without the necessity of extensive surveys. An indicator of acceptance at the company level might be the commitment of the management of a company as well as financial commitment of that company to a certain initiative.⁵⁴⁰ The higher the management and financial commitment of the company is, the higher the degree of assumed acceptance. Obviously, the fact that a company has implemented a certain ISO-standard indicates acceptance thereof. Furthermore, it seems, for example, clear which company has committed itself to the Global Compact (in the CSR area), because of the list of adhering companies. However, this might not be a very reliable indicator. A company could adhere to the Global Compact, but the implementation of the principles might be scant. In such instances, the existence of an effective enforcement framework as well as extensive referral to it in social or other media might be indicators of acceptance.

Some examples might illustrate the importance of actual acceptance of international private regulation. The acceptance/legitimacy of ISO standards was traditionally assessed by reference to the degree of expertise and the extent to which ISO standards rationalized technical standards.⁵⁴¹ The ISO, however, expanded its scope from technical standards to a social responsibility standard with ISO 26000.⁵⁴² Expertise and rationalization were insufficient to legitimate the new standard. The ISO recognized that, given the potential users of such a standard, it had to adapt its standard-setting procedure to open it up to wider stakeholders such as NGOs and consumer groups. In order to do this, ISO set up six specific stakeholder categories and created new procedural rules so that it represented all stakeholder views.⁵⁴³ By doing so, it faced new types of stakeholders who had dif-

⁵³⁹ Oude Vrielink, *supra* note 132, at 69.

⁵⁴⁰ See Kolk & van Tulder, *supra* note 22, at 10.

⁵⁴¹ Casey & Scott, *supra* note 66, at 92. This however is not an informal process of rule-making, the ISO has created a set of procedures for the creation of standards. See KOPPELL, *supra* note 29, at 148.

⁵⁴² ISO 26000 – Social Responsibility, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/iso26000> (last visited Apr. 10, 2014).

⁵⁴³ Casey & Scott, *supra* note 66, at 92. (Such a multi-stakeholder model was also applied when drafting the model mining development agreement, *supra* note 13, a model agreement drafted for the extracting industry, which model, *inter alia*, contains provisions on CSR (provisions 22-27 including an obligation to adopt a com-

ferent legitimacy demands from those previously dealt with.⁵⁴⁴ In particular, NGO and consumer stakeholder groups created a legitimacy dilemma when they demanded that the standard-setting process be more transparent and opened to the media.⁵⁴⁵ However, industry stakeholder groups successfully contested this demand for increased transparency.⁵⁴⁶

The acceptance and legitimacy of the Dutch corporate governance code, principle II.1.2.d, which obliges companies listed at the Dutch stock exchange to state the main elements of CSR issues that are relevant to the company,⁵⁴⁷ is also questioned. It is purported that the identity of the stakeholders is unclear. Furthermore, no industry organization established this code. Instead, different stakeholders of different disciplines, backgrounds, and interests established the code. A clear picture of the organization is absent, and, stemming from this, it remains unclear whether all stakeholders feel adequately represented.⁵⁴⁸ Furthermore it is questionable whether all the information and expertise gathered was needed to solve the societal problem and to support the measures implemented.⁵⁴⁹ Despite these objections, section 2:8 of the Dutch Civil Code, which deals with good faith and fair dealing in company law, converts the corporate governance code into norms which are enforceable through national courts.

The social perspective may be used to assess whether a certain initiative is effective *ex post*. One might assess actual acceptance of international private regulation. Obviously acceptance might differ among different groups of stakeholders. Therefore, the level of acceptance has to be assessed within all groups of stakeholders. To assess actual acceptance, the same indicators which have been found in para. 3.3 might be helpful. The *ex post* sociological approach bridges some pitfalls of the economic approach. Effectiveness of international private regulation in a sociological sense might infer that distributional issues (the “fair” division of wealth), return on income, and some aspects of individual happiness, have been covered.⁵⁵⁰ If not, this regulation obviously has a high probability of not being effective in a sociological sense. Using the sociological approach to bridge these pit-

pany based grievance mechanism) and requires the operator to conduct a feasibility study and assess the environmental and social impact of its operations prior to commencing its operations (provision 2.4).

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.*

⁵⁴⁷ See *Corporate Governance Code*, MONITORING COMMISSIE, <http://commissiecorporategovernance.nl/> (last visited Nov. 13, 2013).

⁵⁴⁸ Overmars, *supra* note 7, at 25.

⁵⁴⁹ *Id.* at 25.

⁵⁵⁰ *Cf.* Renda, *supra* note 94, at 139.

falls of the economic approach is, in my opinion, preferable to trying to adjust economic models, which by their nature have difficulties in dealing with concepts of fairness and distributional issues.⁵⁵¹ Furthermore, acceptance might bridge the lack of legitimacy, in the traditional sense, of existing international private regulation, at least in part.

6. INTEGRATED APPROACH

Four avenues have been explored to assess the effectiveness of international private regulation. All of them provide useful insights, either for the rule-setting process (ex ante approach) or assessment of existing international private regulation (ex post assessment) or for both. However, none of them are sufficient by themselves to make an overarching effectiveness assessment. All approaches have their qualities, but also their pitfalls. Research has also revealed that trust in certain standards results from all these approaches.⁵⁵² Therefore, an integrated (ex ante and ex post) approach is needed to enhance the scientific value of this type of effectiveness research and to bridge the gaps left by the separate approaches. In this contribution, the focus has been on international private regulation in the CSR arena. Hence, the models mentioned hereinafter refer to the effectiveness of international private regulation in that arena.

6.1 *Ex Ante Approach*

The ex ante approach could, as has been elucidated above, benefit from the legal, macro-economic, sociological, and psychological perspectives to assist private rule makers in instigating effective international private regulation. Therefore, the effectiveness assessment will be more useful and based on actual future impact as more perspectives are taken into consideration.

The relative value of the legal, sociological, and psychological/behavioral avenues as such is equal. One should attempt to meet as many indicators as possible derived from these three perspectives. These indicators require a yes/no (0/1) answer regarding some indica-

⁵⁵¹ Cf. *id.* at 141–43.

⁵⁵² Alvarez and von Hagen refer to a survey of business, government and NGOs commissioned by ISEAL in 2010, *The ISEAL 100: A survey of thought leader views on sustainability standards 2010*. ISEAL Alliance, London, 2011, in which respondents mentioned four main elements that create trust in a standard: credible verification processes, including accreditation and third-party certification (55%); a standard document being science-based, comprehensive, and practical (38%); a credible multi-stakeholder standard-setting process that has the support of all relevant stakeholders (NGOs, local communities/smallholders/producers, enterprises) (35%); a transparent governance model (32%) and an ability to show impacts (11%). See Alvarez & von Hagen, *supra* note 67, at 20.

Elaboration of effectiveness assessment	Perspectives
A	All four perspectives
B	Three perspectives
C	Two perspectives
D	One perspective

tors and a more elaborate answer to others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be higher than on others. This does not necessarily mean that an avenue with a lesser possible highest score is less important, but, in comparison to other initiatives, the overall score is a useful tool to compare effectiveness. Furthermore, the expected impact on a macro level (if applicable) should be assessed in order to strive toward macro-economic efficiency in the design process of international private regulation. This expected impact should be assessed in actual figures. International private regulation is more effective compared to other private regulation if it shows a higher total score on the legal, sociological, and psychological perspectives and a positive future economic impact is expected. It is less effective if positive future economic impact is expected but a lower score on the other three avenues is recorded. It is least effective if negative economic impact (economic avenue) is expected and a lower score on the other three avenues is recorded. The *ex ante* effectiveness model is as follows:

Effectiveness indicators (<i>ex ante</i>)		Yes (1)- No(0) ⁵⁵³
Legal approach		
	Articulate specific and assessable objectives	0-3 ⁵⁵⁴
	Existing (public or private) regulation does not reach these objectives (if all objectives are met refrain from new regulation)	0-6 ⁵⁵⁵

⁵⁵³ Unless indicated otherwise.

⁵⁵⁴ 0: no specific and assessable objectives, 1: specific objectives only, 2: specific objectives and criteria/indicators to assess whether these objectives have been met, 3: as 2 but with verifiers to make this assessment.

⁵⁵⁵ 0: verifiers indicate that other regulation meets all the objectives, 1: indicators/criteria indicate that other regulation meets all the objectives, 2: it is not possible to assess whether other regulation meets the objectives, 3: verifiers indicate that other regulation meets part of the objectives, 4: indicators/criteria indicate that other regulation meets part of the objectives, 5: indicators/criteria indicate that no other regulation exists which meets the objectives, 6: verifiers indicate that no other regulation exists which meets the objectives,

Articulate 'conflict of law' rules		0-6 ⁵⁵⁶
Regular evaluation of the regulation and its functioning and (if necessary) review of the regulation		0-6 ⁵⁵⁷
Enforcement		
	The existence of an supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions	0-3 ⁵⁵⁸
	A supervisory body which controls access to scarce resources	
	(A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or (effective) enforcement by states	0-3 ⁵⁵⁹

⁵⁵⁶ 0: no such rules, 1: only general explanation which rules prevail and why, 2: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for less than 50% of the standards/rules, 3: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for more than 50% of the standards/rules, 4: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for less than 50% of the standards/rules, 5: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules, 6: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules and other relevant bodies which set international private regulation are informed if rules are set or reviewed.

⁵⁵⁷ 0: no evaluation and review, 1: irregular evaluation not involving stakeholders or past grievances and without review, 2: regular evaluation (at least every 5 years) not involving stakeholders or past grievances and without review, 3: irregular evaluation involving stakeholders and past grievances without review, 4: regular evaluation (at least every 5 years) involving stakeholders and past grievances without review, 5: irregular evaluation and review involving stakeholders and past grievances, 6: regular evaluation and review (at least every 5 years) involving stakeholders and past grievances.

⁵⁵⁸ 0: no supervisory body, 1: supervisory body exists, but no accountability (possibility to pass judgment) and no sanctions, 2: supervisory body exists and accountability but no sanctions, 3: supervisory body exists, accountability and possibility of imposing sanctions (such as expelling members).

⁵⁵⁹ 0: no possibility to enforce, 1: only private enforcement (e.g. through (blocking) entrance to a market, shareholders, media attention etc.), 2: (contractual or other) enforcement through state legislation in some states, 3: (contractual or other) enforcement through state legislation and/or treaties on a global level (e.g. trademarks).

	Specific rules/standards	0-9 ⁵⁶⁰
	Sufficient bureaucratic capacity	
	Sufficient (legal) knowledge of the private rule maker	
	An effective complaint and dispute management mechanism	0-9 ⁵⁶¹
	Certification or assessment of compliance by third parties supported by a reporting requirement	0-6 ⁵⁶²
Sociological approach		
	The degree of knowledge and application of regulation	0-2 ⁵⁶³

⁵⁶⁰ 0: principles only, 1: the norms meets none of the criteria for specificity ((i) entails a clear norm/standard which is interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), (iv) refers to applicable (international) norms and treaties (e.g. in the area of human rights or environment)), 2: as one but less than 50% of the norms meet one criterion, 3: as one but less than 50% of the norms meet two criteria, 4: as one but less than 50% of the norms meet three criteria, 5: as one but less than 50% of the norms meet all criteria, 6: as one but more than 50% of the norms meet one criterion, 7: as one but more than 50% of the norms meet two criteria, 8: as one but more than 50% of the norms meet three criteria, 9: as one but more than 50% of the norms meet all criteria.

⁵⁶¹ 0: dispute management mechanism meets none of the criteria of Guiding Principle 31 of the Ruggie framework entails no evaluation of outcomes, 1: dispute management mechanism meets at least one of the criteria of Guiding Principle 31, 2: dispute management mechanism meets at least two of the criteria of Guiding Principle 31 (etc.), 9: dispute management mechanism meets all criteria of Guiding Principle 31 and entails an evaluation of the outcomes of the mechanism.

⁵⁶² 0: no certification or assessment by third parties, 1: entails assessment by independent third parties, 2: entails certification for less than 50% of the operations of members, 3: entails certification for more than 50% of the operations of members, 4: entails assessment by independent third parties and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 5: entails certification for less than 50% of the operations of members and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 6: entails certification for more than 50% of the operations of members and a reporting requirement.

⁵⁶³ 0: no training and education on norms and no explanation on background and objectives, 1: explanation on background and objectives but no training and education on norms, 2: explanation on background and objectives and training and education on norms.

Acceptance [has to be assessed per (group of) stakeholder(s)]	A stable group of stakeholders	
	Willingness to collaborate and to address relevant issues	0-2 ⁵⁶⁴
	Shared vision on relevant issues	0-2 ⁵⁶⁵
	The degree to which the actions of a governing body are aligned with this shared vision	0-2 ⁵⁶⁶
	Tradition of and experience with private rulemaking	
	The way the regulation fits within the strategic choices and dilemmas faced by the regulatees	0-2 ⁵⁶⁷
	Own interest in the regulation	0-2 ⁵⁶⁸
	A slowly changing environment	
	Support from governments	0-2 ⁵⁶⁹
	Effective mode of transmission	0-3 ⁵⁷⁰
	Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement	0-7 ⁵⁷¹

⁵⁶⁴ 0: no willingness to collaborate, 1: minority of stakeholders wants to collaborate, 2: majority of stakeholders wants to collaborate.

⁵⁶⁵ 0: no shared vision, 1: minority of stakeholders has a shared vision, 2: majority of stakeholders has a shared vision.

⁵⁶⁶ 0: actions are not aligned, 1: minority of actions is aligned, 2: majority of actions is aligned.

⁵⁶⁷ 0: does not fit, 1: only fits within the strategic choices of a minority of the regulatees, 2: fits within the strategic choices of the majority of the regulatees.

⁵⁶⁸ 0: no own interest, 1: only in the own interest of a minority of the stakeholders, 2: in the own interest of the majority of the stakeholders.

⁵⁶⁹ 0: no support, 1: support from (western) government(s), 2: global support from governments.

⁵⁷⁰ 0: no transmission through market mechanisms or contracts, 1: transmission through market mechanisms, 2: transmission through contracts, 3: transmission through market mechanisms and contracts.

⁵⁷¹ 0: no stakeholder engagement, 1: one of four criteria ((i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule setting process, preferably through (with administrative procedures comparable)

Psychological approach			
	Takes into account that human decision making is not flawless and expects failures	0-2 ⁵⁷²	
	Structures complex choices	Restricts the number of choices	0-4 ⁵⁷³
		Provides information which assists people in making proper decisions	0-4 ⁵⁷⁴
		Demands	0-4 ⁵⁷⁵

engagement rules, (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it and (iv) sufficient documentation of the process and reporting to the stakeholders) on stakeholder engagement is met, 2: two of four criteria are met (etc.), 4: all criteria are met, 5: all criteria are met and affected stakeholders make up a meaningful segment of the participants, 6: all criteria are met, affected stakeholders make up a meaningful segment of the participants and necessary funding is provided for stakeholder engagement; 7: all criteria are met, affected stakeholders make up a meaningful segment of the participants, necessary funding is provided for stakeholder engagement and diversity of stakeholders (e.g. geographical spread, gender, constituency) is maintained.

⁵⁷² 0: no account of behavioral effects, 1: takes into account the behavioral effects on regulatees, 2: takes into account the behavioral effects on all stakeholders.

⁵⁷³ 0: no restriction, 1: less than 50% of the norms that entail an element of choice restrict the choices of regulatees, 2: more than 50% of the norms that entail an element of choice restrict the choices of regulatees, 3: less than 50% of the norms that entail an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation, 4: more than 50% of the norms that entail an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation.

⁵⁷⁴ 0: no information, 1: less than 50% of the norms that entail an element of choice provide information to the regulatees, 2: more than 50% of the norms that entail an element of choice provide information to the regulatees, 3: less than 50% of the norms that entail an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that entail an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation.

⁵⁷⁵ 0: no transparency, 1: less than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees, 2: more than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees, 3: less than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that entail an element of choice provide transparency on the

	transparency as to the consequences of a choice	
	Entails a default option which is beneficial to the majority of regulatees	0-2 ⁵⁷⁶
	If business is involved, takes into account the organizational model of the regulatees	0-2 ⁵⁷⁷
	Enhances crystallization as to govern behavior	0-2 ⁵⁷⁸
Total score		

Macro-economic approach (figures of expected impact)(if effects occur at the macro level)		
	(Administrative) burdens by international private regulation according to the Standard Cost Model	
	Changes in the growth of gross domestic product caused by international private regulation	
	Additional consumer detriment	
	Impact on competitiveness and trade	
	Impact on the potential for innovation and technological development	
	Impact on labor conditions and social welfare	
	Additional detriment to the public interest	

6.2 *Ex Post Approach*

The ex post approach might especially benefit from the legal and economic avenues. In addition, the sociological avenue might bridge some of the gaps that the economic avenue leaves. The lower the sociological score, the higher the non-acceptance of international private regulation and thus the risk of less effectiveness thereof. In such circumstances, positive impact has to be scrutinized because, for example, distributive effects might have been neglected. Hence, the more these perspectives are taken into account, the more significant the effectiveness assessment will be.

consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation.

⁵⁷⁶ 0: no default option, 1: less than 50% of the norms that entail an element of choice provide a default option, 2: more than 50% of the norms that entail an element of choice provide a default option.

⁵⁷⁷ 0: does not take the organizational model into account, 1: takes into account the organizational model of the minority of the regulatees, 2: takes into account the organizational model of the majority of the regulatees.

⁵⁷⁸ 0: no crystallization, 1: crystallization with the minority of regulatees, 2: crystallization with the majority of regulatees.

Elaboration of effectiveness assessment	Perspectives
A	All three perspectives
B+	Legal and economic perspective
B-	Legal or economic perspective combined with sociological perspective
C+	Legal or economic perspective only
C-	Sociological perspective only

The following indicators require a yes/no (0/1) answer regarding some indicators and are more elaborated score regarding others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be higher than on others. This does not necessarily mean that the avenue with the lesser possible highest score is less important, but, in comparison to other initiatives, the overall score is a useful tool to compare effectiveness. Furthermore, the actual impact on a macro level (if applicable) and micro level (both in figures) should be assessed in order to assess macro and micro-economic efficiency of existing international private regulation. Existing international private regulation is more effective compared to other private regulation if it has a higher score on the legal and sociological perspectives and shows positive economic impact. It is less effective if it shows positive economic impact but a lower score on the other two avenues and least effective if it shows negative economic impact as well as a lower score on the other two avenues. Furthermore, the effectiveness comparison reflects effectiveness at a certain moment in time. It might well be that a certain initiative gains effectiveness later on. The ex post model might be defined as follows:

Effectiveness indicators (ex post)		Yes(1) or no (0) ⁵⁷⁹
Legal approach		
	Articulate specific and assessable objectives	0-3
	Objectives are effectively achieved	0-3 ⁵⁸⁰

⁵⁷⁹ Unless indicated otherwise (see for the explanation of the elaborated indicators lacking a footnote the footnotes in the ex ante model).

⁵⁸⁰ 0: objectives are not met, 1: it is not possible to assess whether objectives are met, 2: criteria/indicators indicate that the objectives are met, 3: verifiers indicate that the objectives are met.

Existing (public or private) regulation does not reach these objectives		0-6
Entails “conflict of law” rules		0-6
Regular evaluation of the regulation and its functioning (and if necessary) review of the regulation		0-4
Enforcement		
	The existence of an supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions	0-3
	A supervisory body which controls access to scarce resources	
	(A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or enforcement by states	0-3
	Specific rules/standards	0-9
	Sufficient bureaucratic capacity	
	Sufficient (legal) knowledge of the private rule maker	
	An effective complaint and dispute management mechanism	0-9
	Certification or assessment of compliance by third parties supported by a reporting requirement	0-6
	Susceptibility of a certain industry to negative (social) media attention and active NGOs or other organizations monitoring	0-2 ⁵⁸¹
Sociological approach		
	The degree of knowledge and application of regulation	0-2
Acceptance [has to be assessed per (group of) stakeholder(s)]	A stable group of stakeholders	
	Willingness to collaborate and to address relevant issues	0-2
	Shared vision on relevant issues	0-2
	The degree to which the actions of a governing body are	0-2

⁵⁸¹ 0: no susceptibility, 1: susceptibility of less than 50% of a certain industry, 2: susceptibility of more than 50% of a certain industry.

	aligned with this shared vision	
	Tradition of and experience with private rulemaking	
	The way the regulation fits within the strategic choices and dilemmas faced by the regulatees	0-2
	Own interest in the regulation	0-2
	A slowly changing environment	
	Support from governments	0-2
	Effective mode of transmission	0-3
	Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement	0-7
Total score		

Economic approach		
Macro level (if applicable)	(Administrative) burdens by international private regulation according to the Standard Cost Model	
	Changes in the growth of gross domestic product caused by international private regulation	
	Additional consumer detriment	
	Impact on competitiveness and trade	
	Impact on the potential for innovation and technological development	
	Impact on labor conditions and social welfare	
	Additional detriment to the public interest	
Micro level [(private) regulation lacking macro impact or with macro impact but at level of individual enterprise] ⁵⁸²	$PAC_{csr} - PBC_{csr} > 0$ and $\Delta EC + \Delta SC = 0$ ⁵⁸³ (measuring through e.g. GRI)	

⁵⁸² If international private regulation has impact on more than one regulatee, this impact should preferably be assessed by aggregating the impact on individual regulatees.

⁵⁸³ In which formula PAC_{csr} is the company's profit after implementation of a certain private CSR initiative, PBC_{csr} is the company's profit before

6.3 Conclusion

To conclude, the outline of a methodology has been developed to assess the effectiveness of international private regulation in the CSR arena. This methodology is useful to evaluate and perhaps, where necessary, to abandon the plethora of existing international private regulation in the CSR arena and to design new private CSR regulation. To perform this function, public data needs to be collected to enable external assessment of the effectiveness of international private regulation in the CSR arena. However, it seems substantial work remains ahead. The outline of the methodology has been described, but the details still need elaboration.⁵⁸⁴ Furthermore, for example, the effectiveness of complaint and conflict resolution mechanisms requires further research. I expect to elaborate these topics in future research.

implementation, ΔEC is the change of environmental consequences of the company's operations, and ΔSC is the change of social consequences of the company's operations.

⁵⁸⁴ *E.g.*, how to assess the macro-economic factors and sociological indicators mentioned properly.

THE SURPRISING ACQUITTALS IN THE *GOTOVINA* AND *PERIŠIĆ* CASES: IS THE ICTY APPEALS CHAMBER A TRIAL CHAMBER IN SHEEP'S CLOTHING?

By: Mark A. Summers*

I. INTRODUCTION

Over a decade ago, not long after the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ had begun its work, one commentator opined that because of the three trial judge/five appellate judge structure of the tribunal, a three-judge majority of an Appeals Chamber could overturn a unanimous judgment by a Trial Chamber. Thus, there is “a risk . . . that three voices may prevail over five, where all the judges who have actually viewed the evidence are on the defeated side.”²

That happened in November 2012, when a three-judge majority ICTY Appeals Chamber overturned a unanimous Trial Chamber judgment.³ The lead defendant in the case was Ante Gotovina, a Croatian General and war hero, who led Operation Storm, which finally drove the Serbians out of Croatia after three years of occupation.⁴ This was the beginning of the end of the Yugoslav war.⁵ In Croatia, Gotovina's conviction by the Trial Chamber in 2011 was met with scorn and cynicism. The wags commented that Gotovina, the Croatian word for “cash,” was the price of Croatia's admission to the European Union.⁶

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¹ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

² Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 *Tex. Int'l L.J.* 111, 115 (2002).

³ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). Trial Chamber Judge Ćinić partially dissented from some of the majority's findings but not from its judgment. Prosecutor v. Gotovina, Ćermak & Markač, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

⁴ See *infra* Part IV.

⁵ See RICHARD HOLBROOKE, *TO END A WAR* 72-73 (1998).

⁶ As a Fulbright Scholar at the University of Zagreb in the spring of 2011, I have first-hand knowledge of these events. See Nick Carey, *Croatia Finds EU's Entry*

Gotovina's surprise acquittal by the Appeals Chamber was celebrated in Croatia and decried in Serbia.⁷ It was praised by some commentators and panned by others.⁸ It is no surprise that some were shocked when, only three months later, another ICTY Appeals Chamber overturned the conviction of Momèilo Perišiæ, who had been the top general in the Serbian army during the war.⁹

One crucial similarity between the two cases is the focus of this article. In each case, the Appeals Chamber found that the Trial Chamber had insufficiently explained why it had come to a factual conclusion.¹⁰ This failure to provide a reasoned opinion was an error of law, which, both Appeals Chambers asserted, gave them the right to undertake a *de novo* review of the record without giving any deference to the findings of the Trial Chamber.¹¹ This maneuver permitted the Appeals Chambers to substitute their findings for those of the Trial Chambers without applying the standard of review normally applicable to errors of fact. A Trial Chamber's judgment is overturned only if no reasonable trier of fact could have come to same conclusion.¹² The Appeals Chambers' novel use of *de novo* review in cases where the error is the failure to provide a reasoned opinion based on a Trial Chamber's factual mistake is unsupported by the case law of either the ICTY or the International Criminal Tribunal for Rwanda (ICTR)¹³, and could have future

Price Steep, WALL ST. J., Mar. 7, 2005, <http://online.wsj.com/news/articles/SB111015177847171707>.

⁷ Jens David Ohlin, *Why the Gotovina Appeals Judgment Matters*, EJIL: TALK! (Dec. 21, 2012), <http://www.ejiltalk.org/why-the-gotovina-appeals-judgment-matters/>.

⁸ Compare Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013), with Marko Milanovic, *The Gotovina Omnishambles*, EJIL: TALK! (Nov. 18, 2012), <http://www.ejiltalk.org/the-gotovina-omnishambles/>.

⁹ Prosecutor v. Perišiæ, Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013). Perišiæ's acquittal was celebrated in Serbia. Christopher Jenks, *Prosecutor v. Perišiæ, Case No. IT-04-81-A*, 107 AM. J. INT'L L. 622, 626 (2013). It was a bit less controversial, however, because the Perišiæ Trial Chamber had split 2-1 and the Appeals Chamber reversed 4-1, the majority including one of the dissenting judges in *Gotovina*. Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Momèilo Perišiæ*, EJIL: TALK! (Mar. 11, 2013), <http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/#more-7749>.

¹⁰ See *infra* Part VI.

¹¹ See *id.*

¹² Milanovic, *supra* note 8.

¹³ U.N. Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

negative repercussions if the International Criminal Court (ICC) follows these cases.¹⁴

This article argues that the decisions in *Gotovina* and *Perišić* are wrong because *de novo* review is not the appropriate standard to apply when there is a failure to provide a reasoned opinion. First, Part II examines the origins of reasoned opinions in international criminal trials. Part III explains why reasoned opinions are necessary in international criminal trials. Part IV will identify the necessary elements of a reasoned opinion. Part V analyzes the ICTY and ICTR case law to ascertain the standards of review used in international criminal trials. Part VI dissects the portions of the *Gotovina* and *Perišić* Appeals Judgments dealing with the failure to provide reasoned opinions and the use of *de novo* review. Finally, Part VII offers my conclusions.

II. THE ORIGINS OF REASONED OPINIONS IN INTERNATIONAL CRIMINAL TRIALS: THE ADVERSARIAL AND INQUISITORIAL MODELS OF CRIMINAL PROCEDURE

Most of the world's national criminal justice systems can be classified as either adversarial or inquisitorial. And while none of these national systems is entirely "pure," there are certain salient features that characterize each of the models.¹⁵

A. *The Adversarial Model*

The adversarial systems are predicated upon opposing parties, equally armed, who are responsible for investigating the case and presenting it in court.¹⁶ The jury is composed of laypersons.¹⁷ The parties elicit facts in open court from witnesses who testify under oath and from documents and other physical evidence.¹⁸ The jury and, most of the time, the judge learn what they know about the case only when the evidence is presented in court.¹⁹ The judge plays the role of a "neutral" referee, administering complex rules of evidence, which determine what the jury may hear, instructing the jury as to the law applicable to the facts, and imposing the sentence following a guilty verdict.²⁰ The accused may or may not testify.²¹ If he chooses to tes-

¹⁴ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 83.

¹⁵ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 366 (2008). See Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 13-14, 16 (1995).

¹⁶ CASSESE, *supra* note 15, at 356.

¹⁷ *Id.* at 357.

¹⁸ Doran et al., *supra* note 15, at 17-18.

¹⁹ CASSESE, *supra* note 15, at 361-62.

²⁰ *Id.* at 361, 363. See Doran et al., *supra* note 15, at 15-16.

tify, he is put under oath and treated as any other witness.²² If he chooses not to testify, the jury is instructed that it may not draw any adverse inferences from his failure to do so.²³ The verdict is tersely “enigmatic”—guilty or not guilty—unaccompanied by any statement of the reasons for or against.²⁴ Only the defendant may appeal a guilty verdict and an appellate court must assume that, in order for it to find guilt beyond a reasonable doubt, the jury found the facts most favorable to the prosecution’s case.²⁵ Appellate courts almost never hear additional evidence, and appellate review is ordinarily limited to correcting mistakes of law, except in those rare instances when no reasonable jury could have reached the same conclusion as the trial jury.²⁶

B. *The Inquisitorial Model*

In the inquisitorial systems, there is an investigating judge who is responsible for gathering the evidence. The judge investigates both sides of the case and can terminate weak cases prior to trial.²⁷ If the investigating judge determines that there is sufficient evidence of guilt, she sends the factual record (*dossier de la cause*) to the trial court.²⁸ The dossier itself is the evidence and the oral testimony in court is often merely an affirmation of the accuracy of the information contained in the dossier.²⁹ In some countries, the jury panel is a mixture of laypersons and professional judges.³⁰ The presiding judge is the dominant figure in the trial, aggressively questioning the witnesses who testify, including the defendant, who is not under oath.³¹ Because the judges are professionals, there are few rules of evidence.³² Consequently, the panel normally considers all the evidence (*liberté des preuves*)³³ and specifies that on which it relied in a written judgment, which is called a “reasoned opinion.”³⁴ The reasoned opinion explains why the court reached its conclusions both as to the facts and as to the

²¹ CASSESE, *supra* note 15, at 360.

²² *Id.*

²³ LAFAYE ET AL., CRIMINAL PROCEDURE § 24.5(b) (4th ed. 2004).

²⁴ Doran et al., *supra* note 15, at 18, 21.

²⁵ LAFAYE ET AL., *supra* note 23, §27.5(d).

²⁶ *See infra* note 88 discussing *Jackson v. Virginia*.

²⁷ CASSESE, *supra* note 15, at 356.

²⁸ *Id.*

²⁹ *Id.* at 358.

³⁰ *Id.*

³¹ *Id.* at 361-62.

³² Doran et al., *supra* note 15, at 19-20.

³³ CASSESE, *supra* note 15, at 363.

³⁴ *Id.* at 358.

law.³⁵ Appeals are trials *de novo*, with the appellate court conducting a thorough review of the record, substituting its judgment for that of the trial court, both as to the law and as to the facts.³⁶

C. *International Criminal Trials: A Blended Procedure*

When the first international criminal tribunal was established following Germany's defeat in World War II, the victorious allies represented both criminal procedure models. The United States and the United Kingdom followed the adversarial model while the French epitomized the inquisitorial model; this is because one of its most important features, the investigating judge, was instituted in the 1808 Napoleonic Code.³⁷ The Soviet Union, supported by France, wanted speedy trials followed by speedier executions, which would have had none of the features of a fair trial and would have provided no protection for the rights of the accused.³⁸

In the end, the adversarial system of oral evidence presented in open court by the parties largely prevailed.³⁹ The fact-finder, however, was a panel of professional judges whose judgment was rendered in a reasoned opinion.⁴⁰ The International Criminal Court has adopted, as have all the post-war *ad hoc* international criminal tribunals, that basic model.⁴¹ Consequently, the courtroom part of an international criminal trial would be familiar to any common law lawyer. Live witnesses, whom the parties call, are placed under oath and are subjected to both direct and cross-examination. Likewise, the parties present the documentary and physical evidence, which become part of the trial record when admitted by the court.

On the other hand, the decision-making process would not be so familiar. Once all the evidence is presented, the trial court retires to consider its verdict. Unlike a lay jury, which usually announces its verdict after hours or, at most, days of deliberation, the international jury renders its verdict months later in the form of a written opinion,

³⁵ CRYE, et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 387 (2008).

³⁶ CASSESE, *supra* note 15, at 364. Some countries limit the right of appeal to questions of law when the lower court decisions are reached by panels of professional judges because the "risk of erroneous conviction is lower." Fleming, *supra* note 2, at 114.

³⁷ CASSESE, *supra* note 15, at 357.

³⁸ See WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBURG, GERMANY, 1945-1946, at 16-17 (Southern Methodist Press ed., 1999).

³⁹ *Id.* at 11.

⁴⁰ Charter of the International Military Tribunal arts. 2, 26, Aug. 8, 1945, 82 U.N.T.S. 280.

⁴¹ CASSESE, *supra* note 15, at 369-70.

which is often hundreds, if not more than a thousand, pages long.⁴² This reasoned opinion resolves issues of fact and law and imposes a sentence.⁴³

The requirement for a reasoned judgment was included in the statute of the International Military Tribunal at Nuremberg, although there was no necessity for a written judgment because there was no appeal.⁴⁴ The Tribunal's judgment was more than one-hundred fifty pages long and, while it did resolve the difficult legal questions the Tribunal faced, the bulk of it was devoted to the Tribunal's findings of fact and the bases upon which it had concluded that the defendants were either guilty or innocent.⁴⁵

The statutes of the post-war *ad hoc* international criminal tribunals and the ICC all contain provisions requiring a verdict in the form of a "reasoned opinion,"⁴⁶ and they all provide for appellate review.⁴⁷ A reasoned opinion is considered an essential element of a fair trial.⁴⁸

⁴² For example, in the *Gotovina* case, final arguments concluded on September 1, 2010, and the Trial Chamber Judgment was issued April 15, 2011. *Case Information Sheet: The Prosecutor v. Ante Gotovina, Ivan Ćermak, & Mladen Markač*, INT'L TRIBUNAL FOR THE FORMER YUGOSLAVIA, available at http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf [hereinafter *Gotovina Information Sheet*]. The Trial Chamber's Judgment in *Gotovina* was nearly 1400 pages. *Prosecutor v. Gotovina, Ćermak & Markač*, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

⁴³ *See, e.g.*, *Prosecutor v. Gotovina, Ćermak & Markač*, Case No. IT-06-90-T, Judgment.

⁴⁴ Charter of the International Military Tribunal, *supra* note 40, art. 26. The Charter does not mandate that the judgment be in writing, although, practically speaking, there was no other way to announce the verdict of the court and give the reasons for it. The lack of an appeal was one of the criticisms of both the Nuremberg and Tokyo Tribunals. *See* Fleming, *supra* note 2, at 111.

⁴⁵ International Military Tribunal (Nuremberg), Judgment (October 1, 1946), available at http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgment.pdf.

⁴⁶ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 23(2), U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter *ICTY Statute*]; U.N. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 22(2), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter *ICTR Statute*]; Rome Statute of the International Criminal Court, art. 74(5), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *ICC Statute*].

⁴⁷ *ICTY Statute, supra* note 46, art. 25; *ICTR Statute, supra* note 46, art. 24; *ICC Statute, supra* note 46, art. 81.

⁴⁸ *See, e.g.*, *Toriya v. Spain*, 303 Eur. Ct. H.R. (ser. A) ¶¶ 18-19 (1994).

III. THE NECESSITY FOR REASONED OPINIONS IN INTERNATIONAL CRIMINAL TRIALS

It is a fair question why a reasoned opinion is required when judges are fact-finders, but not when laypersons are the fact-finders. Intuitively, it would seem that it should be the other way around. But, as one appeals chamber of the ICTR observed:

When considering this case in the context of the Tribunal, it has to be borne in mind that here the trier of fact is not a jury, but a panel of professional judges. In the case of the jury, the one question that has to be answered is the question of guilty or not guilty, and the factual findings supporting this conclusion are neither spelled out nor can they be challenged by one of the parties. The instruction given to the jury concentrates on this ‘ultimate issue’ of the case. In this Tribunal, on the other hand, Trial Chambers cannot restrict themselves to the ultimate issue of guilty or not guilty; they have an obligation pursuant to Article 22(2) of the Statute, translated into Rule 88 (C) of the Rules, to give a reasoned opinion.⁴⁹

Aside from this legal obligation to render a reasoned opinion, there are a number of cogent reasons supporting the reasoned opinion requirement.

First, since appellate courts in the inquisitorial model have greater latitude to overturn the factual findings of a trial court, a reasoned judgment is necessary so that the defendant can exercise his right to appeal.⁵⁰ This is so because, unlike in the adversarial model where the jury may only consider the evidence the judge admits, in the inquisitorial model all or almost all of the evidence in the dossier is considered.⁵¹ Without a reasoned opinion, it would be impossible for an appellate court to tell what influenced the verdict and what did not.⁵²

⁴⁹ Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶ 169 (Int'l. Crim. Trib. for Rwanda July 7, 2006).

⁵⁰ Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 165 (Int'l Crim. Trib. for Rwanda Mar. 18, 2010).

⁵¹ Bernard H. Oxman, *International Criminal Procedure – Scope of ICTY Appellate Review – Eyewitness Credibility – Reasoned Opinion by Trial Judges – Adequacy of Factual Allegations in Indictment*, 96 AM. J. INT'L L. 439, 444 (2002) (observing that “international criminal tribunals employ a hybrid procedure: they allow cross-examination, as at common law, yet also admit evidence more freely, as at civil law”).

⁵² Cf. *id.* at 444 (“[The] reasoned opinion . . . invites more rigorous appellate review.”); see also Doran et al., *supra* note 15, at 49.

Second, scholars have studied the “Diplock” courts, which were instituted in Northern Ireland to deal with terrorist cases.⁵³ These courts follow common law procedures, except that the judge is both the fact-finder and the decision-maker.⁵⁴ In the cases that were studied, the researchers found that the Diplock judges tended to be more interventionist than their counterparts who presided over jury trials.⁵⁵ Unlike lay jurors, who are “passive” fact-finders, judges charged with making the ultimate determination in a case “often react to their duty by trying to bring the hearing into some order and coherence by following their own partial lines of inquiry, which may prevent the parties from having a sufficient opportunity to present their cases.”⁵⁶ To safeguard against this “adversarial deficit,” Diplock judges are required to issue reasoned opinions.⁵⁷

Finally, international criminal trials are extremely complex with the evidentiary phase of the trial lasting months and sometimes years.⁵⁸ In many of them, hundreds of witnesses testify, and thousands of exhibits are admitted into evidence.⁵⁹ The reasoned opinions are hundreds, and sometimes thousands, of pages long.⁶⁰ In such circumstances, appellate review of the trial record without a reasoned opinion would be a daunting task to say the least.

IV. THE ELEMENTS OF A REASONED OPINION

There is extensive case law in both the ICTY and the ICTR regarding the essential elements that a reasoned opinion must contain.⁶¹ Trial chambers are required to make findings of fact for each essential element of a charged crime.⁶² But they are not required to

⁵³ Doran et al., *supra* note 15, at 11-13.

⁵⁴ *Id.* at 12.

⁵⁵ *See id.* at 28-29.

⁵⁶ *Id.*

⁵⁷ Oxman, *supra* note 51, at 444.

⁵⁸ For example, in the Gotovina trial, there were 303 trial days spanning the period from March 11, 2008 until September 1, 2010. Gotovina Information Sheet, *supra* note 42.

⁵⁹ *See id.*

⁶⁰ The *Gotovina* trial chamber judgment was nearly 1400 pages in length. *See supra* note 42 and accompanying text.

⁶¹ The ICTY and the ICTR share an appeals chamber and the chambers frequently cite each other’s opinions. *See* Gabrielle McIntyre, *The International Residual Mechanism and the Legacy of the International Criminal Tribunals of the Former Yugoslavia and Rwanda*, 3 GO. J. INT’L L. 3, 923, 928-29 n.8 (2011).

⁶² *Renzaho v. Prosecutor*, Case No. ITCR-97-31-A, Judgment, ¶ 320 (Int’l Crim. Trib. for Rwanda Apr. 1, 2011). But, even where no explicit factual findings are made, an appeals chamber may infer that “by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings re-

refer to every “witness testimony or every piece of evidence,” and “although certain evidence may not have been referred to . . . it may be reasonable to assume that the Trial Chamber took it into account.”⁶³ A trial chamber may not, however, disregard a piece of evidence that is “clearly relevant” to findings made by the trial chamber.⁶⁴ The failure to provide a reasoned opinion that meets this standard is treated as an error of law, even when that failure relates to a finding of fact.⁶⁵

Although there is a presumption that a trial chamber has “evaluated all the evidence presented to it,”⁶⁶ there are situations where an appeals chamber holds the trial chamber to a higher standard to provide a reasoned opinion.⁶⁷ One such circumstance is where the guilty verdict depends upon “identification evidence given by a witness under difficult circumstances.”⁶⁸ In that case, “the Trial Chamber must rigorously implement its duty to provide a ‘reasoned opinion.’”⁶⁹

Another situation where a trial chamber is required to make reasoned findings is when the evidence relating to one of the essential elements of the crime is circumstantial. In that instance the trial

quired to cover the elements of the crimes.” Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 384 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

⁶³ Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 166 (Int’l Crim. Trib. for Rwanda Mar. 18, 2010).

⁶⁴ *Id.*; Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 45 (Int’l Crim. Trib. for Rwanda Nov. 16, 2009).

⁶⁵ Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 46 (holding *inter alia* that the Trial Chamber’s failure to address the feasibility of defendant’s traveling between two locations in the amount of time alleged by the prosecution was an error of law); see also Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶¶ 144, 147-48 (Int’l Crim. Trib. for Rwanda Aug. 29, 2008) (finding that the Trial Chamber’s failure to address inconsistencies in witness testimony was an error of law).

⁶⁶ Prosecutor v. Kvočka, *et. al.*, Case No. IT-98-30/1-A, Judgment, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

⁶⁷ *Id.* ¶ 24.

⁶⁸ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 39 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001). In assessing identification testimony, “‘little or no credence’ is given to the witness’s in-court identification.” Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 96 (Int’l Crim. Trib. for Rwanda Oct. 20, 2010) (quoting Kamuhanda v. Prosecutor, Case No. ICTR-95-54A-A, Judgment, ¶ 243 (Int’l Crim. Trib. for Rwanda Sept. 19, 2005)).

⁶⁹ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 39; see also Oxman, *supra* note 51, at 444 (opining that under the “difficult-circumstances doctrine” the trial chamber has an “enhanced duty” to “articulate adequate reasoning”).

chamber must explain how the findings it made were the “only reasonable inference that could be drawn from the evidence.”⁷⁰

A third instance when findings must be explicit is when there is conflicting testimony about a fact that is relevant to a finding of guilt. Then, the trial chamber must “provide sufficient reasons” for crediting the testimony of the witnesses it relied upon over that of the conflicting witnesses.⁷¹ Otherwise, the appeals chamber cannot “determin[e] whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly.”⁷²

V. STANDARDS OF REVIEW

Because additional evidence may be admitted on appeal⁷³ and the prosecutor may appeal from a judgment of acquittal,⁷⁴ there are additional standards of review in the *ad hoc* international criminal tribunals to deal with situations not confronted by common law courts. Because this article deals with appellate acquittals in cases where no additional evidence was admitted on appeal, it will limit itself to the standards of review applicable to errors of law, errors of fact, mixed errors of law and fact, and instances where the trial chamber has made no findings.

The ICTY and ICTR statutes contain identical provisions regarding appellate review of a trial chamber’s judgment.⁷⁵ Both provide that the appeals chamber can reverse the trial chamber when there is either: a) “an error on a question of law invalidating the decision;” or b) “an error of fact which has occasioned a miscarriage of justice.”⁷⁶ Neither statute elaborates upon either “invalidating the decision” or “miscarriage of justice,” leaving these as matters for judicial interpre-

⁷⁰ *Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, Judgment, ¶ 319 (Int’l Crim. Trib. for Rwanda Apr. 1, 2011).

⁷¹ *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment, ¶ 147.

⁷² *Id.* ¶ 148.

⁷³ *See, e.g.*, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (defining additional standards of review in cases where there is an alleged error of fact and additional evidence has been admitted on appeal and cases where there is an alleged error in the legal standard plus an alleged error of fact and additional evidence has been admitted on appeal).

⁷⁴ *See, e.g.*, *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2007) (setting the standard of review for prosecution appeals).

⁷⁵ U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 25, U.N. Doc. S/RES/827 (1993); U.N. Statute of the International Criminal Tribunal for Rwanda, art. 24, U.N. Doc. S/RES/955 (1994).

⁷⁶ *Id.*

tation. Similarly, the statutes do not define the applicable standards of review.⁷⁷

A. *Errors of Law*⁷⁸

Where the appeals chamber identifies an error of law, for example if the trial chamber has applied an incorrect legal standard, “the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.”⁷⁹ In doing so, not only is the legal error corrected, but also the appeals chamber satisfies itself whether, given the application of the correct legal standard, it is convinced beyond a reasonable doubt of the defendant’s guilt.⁸⁰

Indeed, with regard to pure errors of law, it may be a misnomer even to say that there is a standard of review because:

Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake.⁸¹

⁷⁷ The tribunals’ rules of procedure and evidence are likewise silent on these questions. ICTY Rules of Procedure and Evidence, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf. ICTR Rules of Procedure and Evidence, *available at* http://www.unicttr.org/Portals/0/English/Legal/Evidence/English/130410amended%206_26.pdf.

⁷⁸ Fleming, *supra* note 2, at 124:

A question of law, on the other hand, is a determination of the legal effect of the facts as found. The determination of a question of law involves two steps that are not distinguished in Article 25 [of the ICTY Statute], but are often identified in domestic jurisprudence. The first, which could be called a question of “pure law,” is one where the court determines an abstract principle of general application that is independent of the facts of the case under consideration.

⁷⁹ Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l. Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 41 (Int’l Crim. Trib. for the former Yugoslavia Feb. 28, 2013) (holding that the trial chamber’s ruling that “specific direction is not an element of the *actus reus* of aiding and abetting was an error of law”).

⁸⁰ Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14. These basic principles are repeated in every ICTY and ICTR appeals judgment in a section of the opinion entitled, “Standard of Review.”

⁸¹ Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 35 (Int’l. Crim. Trib. for the Former Yugoslavia July 21, 2000).

>Logically then, the presence or absence of a reasoned opinion is irrelevant when the question is whether there was a pure error of law because the appeals chamber will identify and correct the error no matter how much reasoning was supplied by the trial chamber making it.⁸² For example, in *Perišiæ*, the Appeals Chamber corrected the Trial Chamber's definition of the legal standard for aiding and abetting. In so doing, it stated:

The Appeals Chamber emphasises [sic] that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić* and *Šljivančanin* Appeal Judgement. However, the Appeals Chamber's duty to correct legal errors remains unchanged. Accordingly, the Appeals Chamber will proceed to assess the evidence relating to *Perišiæ*'s convictions for aiding and abetting *de novo* under the correct legal standard.⁸³

B. Errors of Fact⁸⁴

Errors of fact are less straightforward. The ICTY Appeals Chamber addressed this issue in its very first case when it stated that the standard of review for an error of fact is "unreasonableness, that is a conclusion which no reasonable person could have reached."⁸⁵ Since that decision, appeals chambers of both the ICTY and ICTR have consistently echoed this same standard.⁸⁶ In applying this standard, appeals chambers have stressed that "two judges, both acting

⁸² See *Prosecutor v. Perišiæ*, Case No. IT-04-81-A, Judgment, ¶¶ 25-44.

⁸³ *Id.* ¶ 43.

⁸⁴ There is no reason for appellate courts to review questions of fact to achieve their purposes of assuring the "consistency of verdicts and the orderly development of law" because "[t]he decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case." Fleming, *supra* note 2, at 135. Instead, appellate review of factual issues serves another purpose—"justice in the individual case." *Id.* at 136.

⁸⁵ *Prosecutor v. Tadiæ*, Case No. IT-94-1-A, Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). See Fleming, *supra* note 2 at 138 (noting that the Appeals Chamber in *Tadiæ* adopted the "common law standard").

⁸⁶ See, e.g., *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgment, ¶ 9 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010). An alternative formulation of the standard of review is that the trial chamber's finding must be "wholly erroneous." *Prosecutor v. Galiæ*, Case No. IT-98-29-A, Judgment, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (quoting *Prosecutor v. Kupreškiæ*, Case No. IT-95-16-A, Judgment, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001)).

reasonably, can come to different conclusions on the basis of the same evidence.”⁸⁷

ICTY and ICTR appeals chambers apply a rule of deference to the factual findings of the trial chambers. Thus an appeals chamber “will not lightly disturb findings of fact by a Trial Chamber . . . [because] the Trial Chamber has the advantage of observing the witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.”⁸⁸ Moreover, the appeals chambers have repeatedly explained that, unlike in the inquisitorial systems,⁸⁹ an appeal is not a trial *de novo*.⁹⁰ Finally, where a trial chamber has not made a finding of fact, “the party seeking to have the Appeals Chamber make that finding for itself must demonstrate that such a finding is the only reasonable conclusion available.”⁹¹

⁸⁷ Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 30. .

⁸⁸ Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000).

This is almost identical to the approach taken in U.S. courts:

Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

⁸⁹ *CASSESE*, *supra* note 15, at 364.

⁹⁰ See, e.g., Prosecutor v. Furundžija, Judgment, ¶ 40 (“This Chamber does not operate as a second Trial Chamber.”); *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgment, ¶ 17 (Int’l. Crim. Trib. for Rwanda Nov. 16, 2001) (“The Appeals Chamber stresses, as it has done in the past, that an appeal is *not* an opportunity for a party to have a *de novo* review of their case.”); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) (“Furthermore, it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness. The Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record.”). *Accord* Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

⁹¹ Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2001).

C. *Mixed Questions of Law and Fact*

Neither the ICTY nor the ICTR statute addresses mixed questions of law and fact—that is, where a court applies “an objective legal standard to the facts”⁹²—and there is scant case law addressing the issue. In *Prosecutor v. Strugar*, the defendant challenged the Trial Chamber’s finding that he should be held liable for crimes committed by those under his command because it had erroneously concluded that the facts established a superior-subordinate relationship.⁹³ Despite the defendant’s characterization of the issue as a question of law, the Appeals Chamber thought it was “a mixed error of law and fact” and, therefore, applied the deference standard applicable to errors of fact—“whether the conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached.”⁹⁴ *Strugar* appears to be the only case squarely addressing this issue,⁹⁵ so it is fair to say that the Tribunals’ jurisprudence is underdeveloped.⁹⁶

⁹² *Ornelas v. United States*, 517 U.S. 690, 701 (1996) (Scalia, J. dissenting). One commentator has described this as “a question of ‘applied law,’ [which] is the concrete determination of the consequences of a specific set of facts under a specific principle of pure law.” Fleming, *supra* note 2, at 124.

⁹³ *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶ 246 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008).

⁹⁴ *Id.* ¶ 252.

⁹⁵ A search of the ICTR/ICTY Case Law Database using the search term “mixed errors (law and fact)” disclosed only the *Strugar* case as dealing squarely with that issue. As we shall see, however, the *Perišić* Appeals Chamber took the position that whether a superior-subordinate relationship had been established was a question of law because the Trial Chamber had failed to provide a reasoned opinion. *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶ 95 (Int’l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

⁹⁶ This becomes apparent when one looks at the approach of the U.S. Supreme Court described by Justice Scalia in his dissenting opinion in *Ornelas*:

Merely labeling the issues “mixed questions,” however, does not establish that they receive de novo review. While it is well settled that appellate courts “accep[t] findings of fact that are not ‘clearly erroneous’ but decid[e] questions of law de novo,” there is no rigid rule with respect to mixed questions. We have said that “deferential review of mixed questions of law and fact is warranted when it appears that the district court is ‘better positioned’ than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.”

Ornelas v. United States, 517 U.S. at 701 (citations omitted).

Strugar also illustrates the point that a party's characterization of the issue is not controlling.⁹⁷ In *Prosecutor v. Blagojević and Jokić*, Jokić, who did not contest the legal standard utilized by the Trial Chamber, argued that Chamber's conclusion that he had the *mens rea* required for aiding and abetting was a legal error because the facts were not sufficient to prove his knowledge beyond a reasonable doubt.⁹⁸ Rejecting Jokić's argument, the Appeals Chamber stated:

"[A]lthough a Trial Chamber's factual findings are governed by the legal rule that facts essential to establishing the guilt of an accused have to be proven beyond reasonable doubt, this does not affect their nature as factual conclusions. A party arguing that a Trial Chamber based its factual conclusions on insufficient evidence therefore submits that the Trial Chamber committed an error in fact, not an error in law."⁹⁹

Based on *Strugar* and *Blagojević and Jokić*, it is not easy to differentiate between a "pure" error of fact and a "mixed" error of law and fact. In both of these cases, the court applied the correct legal standard. In both cases, the appellants argued that the trial chamber's findings were not based upon sufficient evidence, and yet the appeals chambers characterized the issue differently. In the end perhaps it doesn't much matter, because the standard of review is the same—deference.

VI. THE DECISIONS IN THE *GOTOVINA* AND *PERIŠIĆ* CASES

A. *Gotovina*

i. *Background and Charges*

Croatia declared its independence from Yugoslavia on June 25, 1991.¹⁰⁰ By the end of that year, the Yugoslav People's Army (JNA)¹⁰¹

⁹⁷ See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009) (citing *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, ¶¶ 252, 269):

[W]here the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but essentially challenges the Trial Chamber's factual findings in terms of its assessment of evidence, it will either analyse these allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.

⁹⁸ *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

⁹⁹ *Id.* ¶ 145.

¹⁰⁰ *Prosecutor v. Gotovina, Ćermak, & Markač*, Case No. IT-06-90-T, Judgment, ¶ 2 (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

and “various Serb forces” occupied about one-third of Croatia.¹⁰² This occupation was concentrated in the Krajina region between Croatia and Bosnia-Herzegovina.¹⁰³ In December of 1991, the occupied territory was declared the Republic of the Serbian Krajina (RSK) and it established its own government.¹⁰⁴ From then until 1995, Croatia engaged in a series of military operations with the goal of retaking the Krajina.¹⁰⁵ The culmination of this effort was Operation Storm, which began on August 2, 1995 and ended on August 5, 1995 with a Croatian declaration of victory.¹⁰⁶

According to the best estimate, in the wake of Operation Storm, 180,000 Croatian Serbs fled Croatia, going mostly to Bosnia-Herzegovina and the Federal Republic of Yugoslavia (FRY).¹⁰⁷ Elisabeth Rhen, the Special Rapporteur of the UN Commission on Human Rights, testified: “In the three years before the military operations of 1995, the proportion of Serbs in the Krajina had significantly increased,”¹⁰⁸ while after Operation Storm, “only 3,500 Serbs remain[ed] in the former Sector North and 2,000 Serbs remain[ed] in the former Sector South, representing a small percentage of the former Krajina Serb population.”¹⁰⁹

Ante Gotovina was the commander of the Split Military District (MD) of the Croatian Army (HV)¹¹⁰ and overall operational commander of Operation Storm in the southern Krajina region.¹¹¹ He was charged, along with Ivan Èernak, the commander of the Knin Garrison,¹¹² and Mladen Markaè, the Assistant Minister of the Interior,¹¹³

¹⁰¹ *Id.* ¶¶ 2, 7.

¹⁰² *Id.* ¶ 2.

¹⁰³ Historically, the Krajina was the military border between Croatia and Bosnia Herzegovina. NOEL MALCOLM, BOSNIA: A SHORT HISTORY 77 (1994). Ethnic Serbs had lived there peacefully with their non-Serb neighbors since World War II. MICHAEL P. SCHARF, Balkan Justice 129 (1997).

¹⁰⁴ Prosecutor v. Gotovina, Èernak, & Markaè, Case No. IT-06-90-T, Judgment, ¶ 2.

¹⁰⁵ Prosecutor v. Gotovina, Èernak, & Markaè, Case No. IT-06-90-T, Amended Joinder Indictment ¶ 25-27 (May 17, 2007), available at <http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf>.

¹⁰⁶ *Id.* ¶ 27.

¹⁰⁷ Prosecutor v. Gotovina, Èernak, & Markaè, Case No. IT-06-90-T, Judgment, ¶ 1712.

¹⁰⁸ *Id.* ¶¶ 1711-12.

¹⁰⁹ *Id.* ¶ 1712.

¹¹⁰ *Id.* ¶ 7.

¹¹¹ *Id.* ¶ 4.

¹¹² *Id.* ¶ 5.

¹¹³ Prosecutor v. Gotovina, Èernak, & Markaè, Case No. IT-06-90-T, Judgment, ¶ 6. By virtue of his position, Markaè was also the commander of the Special Police, who also participated in Operation Storm.

with being a member of a Joint Criminal Enterprise (JCE) whose purpose was to bring about the “permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means.”¹¹⁴ The membership of the JCE also included some of the highest-ranking officials in the Croatian government, including its then president, Franjo Tužman.¹¹⁵ According to the Appeals Chamber, the Trial Chamber found that Gotovina had significantly contributed to, and shared the objective of, the JCE by virtue of “ordering unlawful attacks against civilians and civilian objects in Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed against Serb civilians in the Split MD.”¹¹⁶

Membership in a JCE is not itself a crime.¹¹⁷ It is a way of attributing liability to those who do not directly participate in the commission of a substantive offense.¹¹⁸ In this sense, it performs some of the same functions as conspiracy in U.S. law.¹¹⁹ There are three forms of JCE, only two of which (JCE I and JCE III) are relevant to this analysis.¹²⁰ JCE I imputes liability for substantive crimes based on the shared intent of the JCE members to achieve its common pur-

¹¹⁴ Prosecutor v. Gotovina, Ćermak, & Markač, Case No. IT-06-90-T, Amended Joinder Indictment ¶¶ 10, 12 (May 17, 2007), available at <http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf>.

¹¹⁵ *Id.* ¶ 15. Tužman was deceased at the time of the indictment. The alleged other members of the JCE, all of whom were deceased at the time of trial, were Gojko Šušak, the Minister of Defense, Janko Bobetka, the Chief of the Main Staff of the HV, and Zvonimir Ćervenko, who succeeded Bobetka. *Id.*

¹¹⁶ Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 3 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹¹⁷ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 118 (2005). Although there is substantial case law and academic debate about JCE, a brief overview of the doctrine is all that is necessary here. For a more thorough analysis, see Mark A. Summers, *The Problem of Risk in International Criminal Law*, WASH. U. GLOBAL STUD. L. REV. (forthcoming Spring 2014).

¹¹⁸ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 226-28 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

¹¹⁹ Danner & Martinez, *supra* note 117, at 140-41.

¹²⁰ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 226-28; Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 Eyes on the ICC 49, 53 (2008), available at <http://www.americanstudents.us/Pages%20from%20Guliyeva.pdf> (noting that JCE II involves the liability for crimes committed within the framework of an “‘organized criminal system’ such as concentration or detention camps”).

pose.¹²¹ JCE III makes the members of a JCE liable for crimes outside its common purpose (deviant crimes) if those crimes are “a natural and foreseeable consequence of the implementation of the common purpose.”¹²² Via JCE I, the Trial Chamber convicted Gotovina of the crimes which were within the common purpose of the JCE.¹²³ He was also found guilty of deviant crimes under JCE III.¹²⁴

ii. The 200-Meter Standard

The Appeals Chamber made it crystal clear that the ultimate validity of the Trial Chamber Judgment rested on its conclusion that Gotovina had ordered “unlawful” artillery attacks against civilian targets during Operation Storm.¹²⁵ Moreover, the Appeals Chamber found that the Trial Chamber’s conclusion that the attacks were unlawful was ineluctably linked to its “impact analysis” of the artillery strikes, which, in turn, was predicated on its finding that “with no exceptions . . . impact sites within 200 metres of such targets were evidence of a lawful attack, and impact sites beyond 200 metres from such targets were evidence of an indiscriminate attack.”¹²⁶ Indeed, the Trial Chamber’s reliance on the 200-Meter Standard was so pivotal that other evidence suggesting that there had been indiscriminate shelling of civilian objects “was indicative of an unlawful attack only in

¹²¹ Guliyeva, *supra* note 120, at 52-53.

¹²² *Id.* at 53 (*citing* Prosecutor v. Br?anin, Case No. IT-99-36-T, Judgment, ¶ 258 (Int’l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004)).

¹²³ Prosecutor v. Gotovina, Èermak, & Markaè, Case No. IT-06-90-T, Judgment, ¶ 2619 (Int’l Crim. Trib. for the former Yugoslavia Apr. 15, 2011) (Crimes against humanity – Persecution (Count 1), Deportation (Count 2), and War crimes (wanton destruction)).

¹²⁴ *Id.* (Crimes against humanity, murder, inhumane acts (Counts 6 and 8, respectively); War Crimes, wanton destruction, murder, and cruel treatment (Counts 5, 7 and 9, respectively)).

¹²⁵ See, e.g., Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Judgment, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (stating that unlawful attacks were the “touchstone” of the Trial Chamber’s analysis concerning the existence of a JCE); *id.* ¶ 77 (observing that unlawful attacks were the “core indicator that the crime of deportation had taken place”); *id.* ¶ 92 (finding that unlawful attacks were “the primary means by which the forced departure of Serb civilians from the Krajina region was effected”); *id.* ¶ 96 (concluding that the unlawful attacks “constituted the core basis for finding that Serb civilians were *forcibly* displaced”).

¹²⁶ *Id.* ¶ 64. See also *id.* ¶ 25 (“Using the 200 Metre Standard as a yardstick, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack.”); *id.* ¶ 51 (“The Trial Chamber heavily relied on the 200 Metre Standard to underpin its Impact Analysis. . ..”); and *id.* ¶ 57 (“The Trial Chamber’s Impact Analysis never deviated from the 200 Metre Standard.”).

the context of the Trial Chamber's application of the 200-Meter Standard."¹²⁷ Thus, as it was portrayed by the Majority, the 200-Meter Standard was the lynchpin of the Trial Chamber's Judgment, so that if the 200-Meter Standard fell, then surely, so would Gotovina's conviction.

Yet, despite the fact that all five of the Appeals Chamber judges agreed that the Trial Chamber erred in adopting the 200-Meter Standard,¹²⁸ only three concluded that Gotovina's conviction should be reversed.¹²⁹ The Majority found that the Trial Chamber's mistake regarding the 200-Meter Standard was due to the lack of evidence in the record to support it and because the Trial Chamber failed adequately to explain its reasoning, *i.e.*, failed to provide a reasoned opinion.¹³⁰ Based on this, the Appeals Chamber undertook *de novo* review of the Trial Chamber Judgment.¹³¹ In so doing, it swept aside not only the Trial Chamber's findings based on the 200-Meter Standard, but also all the other evidence of Gotovina's guilt.¹³²

iii. Error of Fact, Error of Law or Something Else?

While the Appeals Chamber was quite clear that the Trial Chamber's error regarding the 200-Meter Standard was the fatal flaw in its judgment, it was much less clear regarding the nature of this error. At first it appeared that the Appeals Chamber regarded it as an error of fact when it said that when a Trial Chamber's approach leads to an "unreasonable assessment of the facts," an appeals chamber must consider "carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its appli-

¹²⁷ *Id.* ¶ 65. *See also id.* ¶ 82 ("[T]he Trial Chamber assessed much of the other evidence on the record to be ambiguous and considered it indicative of unlawful artillery attacks only when viewed through the prism of the Impact Analysis."); and *id.* ¶ 83 ("The Trial Chamber's reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful.").

¹²⁸ *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Separate Opinion of Judge Theodor Meron, ¶ 2. (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹²⁹ *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment, ¶ 158. Judges Meron, Robinson, and Güney concurred in the decision; Judges Agius and Pocar dissented.

¹³⁰ *Id.* ¶ 61.

¹³¹ *Id.* ¶ 64.

¹³² *See Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (criticizing that the Majority's reliance on the Trial Chamber's error regarding the 200-meter standard because it then proceeded to "discard *all evidence on the record* with respect to the impact sites").

cation thereof.”¹³³ This seemed to perfectly describe the situation in *Gotovina*; *i.e.*, the trial court erred both in its choice of the 200-Meter Standard as its “method of assessment,” and it also erred in its application of that standard to the facts.¹³⁴ After identifying a factual error, the Appeals Chamber should have applied the “no reasonable trier of fact” standard of review to determine whether any reasonable trial chamber could have reached the same result¹³⁵ and, if not, whether the mistake caused a miscarriage of justice.¹³⁶

¹³³ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Judgment, ¶ 50 (quoting Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment, ¶ 119 (Int’l Crim. Trib. for Rwanda June 1, 2001)). The *Kayishema and Ruzidana* Appeals Chamber stated that if the Trial Chamber’s “approach in assessment of evidence . . . is reasonable, the [Appeals] Chamber is bound to respect it”; Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment, ¶ 121. The *Gotovina* Appeals Chamber also cited Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000). In *Aleksovski*, the Trial Chamber found that witnesses had suffered without requiring any medical or scientific evidence to substantiate their testimony. The Appeals Chamber observed that it “has to give a margin of deference to the Trial Chamber’s evaluation of the evidence presented at trial” and that it may overturn that determination “only where the evidence could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous.”

¹³⁴ Though he called it an error of law, dissenting Judge Pocar described the Trial Chamber’s use of the 200-meter standard as an assessment tool:

Thus, in its assessment of the evidence, the Trial Chamber used the 200 Metre Standard as a presumption of legality—which was generous and to the benefit of Gotovina—to analyse in part the evidence of the shelling attacks and the artillery impacts. In my view, there is therefore no doubt that, while the error was allegedly founded on a factual basis, the establishment of the 200 Metre Standard and its use ultimately constitutes an error of law. The 200 Metre Standard was, as its name indicates, a standard or a legal tool that the Trial Chamber used in order to determine that Rajèiæ was not credible when he claimed that Gotovina’s attack order was understood as directing his subordinates only to target designated military objectives.

Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011). In fact, as I will argue, the best classification is a mixed error of law and fact as to which deference to the trial court’s findings is the appropriate standard of review. *See infra* Part VI.

¹³⁵ *See* Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 19 (reasoning that there was other evidence, apart from the 200-meter standard upon which a reasonable trier of fact could have relied to find that the artillery attacks were unlawful).

¹³⁶ Prosecutor v. Furund_ija, Case No. IT-95-/7/1-A, Judgment, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia July 21, 2000) (“In putting forward this question

Thereafter, the Appeals Chamber proceeded to analyze the evidence that the Trial Chamber heard regarding the 200-Meter Standard,¹³⁷ concluding that “[t]he Trial Judgment contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error.”¹³⁸ It also rejected the prosecution’s argument that the 200-Meter Standard was “a maximum possible range of error,” not because this was not a reasonable interpretation of the evidence, but rather because “the Trial Chamber did not justify the 200 Metre Standard on this basis.”¹³⁹ Even if that were so, given the Appeals Chamber’s approach to errors of fact discussed above, it should not have summarily dismissed the prosecution’s argument, since a Trial Chamber’s findings should stand if they are reasonable.¹⁴⁰

Instead, and although the Appeals Chamber had stated that there was “no indication of any evidence” supporting the 200-Meter Standard, the Appeals Chamber then described the problem as a failure by the Trial Chamber to “explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of the evidence on the record.”¹⁴¹ In the next paragraph, the Majority observed that “absent any specific reasoning as to the derivation of this margin of error, there is no obvious relationship between the evidence received and the 200 Metre Standard.”¹⁴² The Majority thus changed course from its original approach to the issue as one of factual error, making it explicit that there were in two errors in the Trial Chamber’s judgment:

[T]he Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error.¹⁴³

Was the real issue that the 200-Meter Standard was not supported by the evidence, or that the Trial Chamber failed to explain why? And, if

[of fact] as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.” (quoting *Seruhago v. Prosecutor*, Case No. ICTR 98-39-A, Reasons for Judgment, ¶ 22 (Int’l Crim. Trib. for Rwanda Apr. 6, 2000)).

¹³⁷ *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment ¶¶ 52-57 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹³⁸ *Id.* ¶ 58.

¹³⁹ *Id.* ¶ 59.

¹⁴⁰ See *supra* note 85 and accompanying text.

¹⁴¹ *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment, ¶ 58.

¹⁴² *Id.* ¶ 59.

¹⁴³ *Id.* ¶ 61.

there really was no evidence that any reasonable trier of fact could have relied upon, how could such an explanation have been possible? Notwithstanding these ambiguities,¹⁴⁴ the Majority confidently concluded that, given the error of law in failing to provide a reasoned opinion, it would “consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid.”¹⁴⁵

iv. De Novo Review

Gotovina appears to be the first case in which an ICTY Appeals Chamber has held that a *de novo* review of the record is appropriate when the legal error was a failure to provide a reasoned opinion.¹⁴⁶ Indeed, the ICTY cases are replete with assertions that an appeals chamber will not conduct a trial *de novo*.¹⁴⁷ One appeals chamber went so far as to say that “[t]he Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record.”¹⁴⁸ When it identifies an error of law because the Trial Chamber applied an incorrect legal standard:

The Appeals Chamber . . . will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.¹⁴⁹

¹⁴⁴ See Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 10 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (observing that the Majority should have “clearly explained” why the Trial Chamber’s error in “adopting a margin of error that was not linked to any evidence in the record” constituted the application of an incorrect legal standard (which would then permit it to proceed with a *de novo* review)).

¹⁴⁵ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Judgment, ¶ 64.

¹⁴⁶ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 9. As Judge Agius observed, the failure to provide a reasoned opinion is “clearly not an error of law arising from the application of an incorrect legal standard.”

¹⁴⁷ See *supra* note 90.

¹⁴⁸ Prosecutor v. Kordiaè & Èerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

¹⁴⁹ Prosecutor v. Dragomir Miloševiaè, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). Based on my research, *Gotovina* is the first ICTY case to omit the language cited in the text from the “Standard of Review” section of its opinion. *Perišiaè*, decided a few months later, was the other. Interestingly, the case decided in between those two cases contained the language. See Prosecutor v. Lukiaè & Lukiaè, Case No. IT-98-321/1-A, Judgment, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012).

Some cases refer to this standard of review as *de novo* review, though it is clearly a less extensive review than trial *de novo* as it is limited to the evidence in the trial chamber judgment and in the record, only if the parties bring the latter to the appeals chamber's attention.¹⁵⁰ Nonetheless, an error in failing to provide a reasoned opinion does not justify even this more restricted form of *de novo* review.

The ICTR case cited by the majority provides, at best, ambiguous support for its holding that *de novo* review of the record is appropriate when there is a failure to provide a reasoned opinion.¹⁵¹ *Kalimanzira* involved the reliability of identifications made by two different witnesses. Regarding the first witness, BWK, the Appeals Chamber found that the Trial Chamber had not "explicitly explained why it had accepted BWK's identification evidence" and that its failure to do so was an error of law.¹⁵² It then "consider[ed] the relevant evidence," concluding that BWK's uncorroborated identification was "unsafe."¹⁵³ Ultimately, however, the Appeals Chamber did not reverse the appellant's conviction on this ground because the Trial Chamber's error "did not result in a miscarriage of justice."¹⁵⁴ Thus, despite its statement that the error was one of law, and because the miscarriage of justice standard applies only to errors of fact,¹⁵⁵ it is apparent that the *Kalimanzira* Appeals Chamber treated the failure to provide a reasoned opinion as a factual problem.

The *Kalimanzira* Appeals Chamber reached a similar conclusion with regard to the second identification witness, BDK, but, for reasons that are not apparent, applied a different standard of review when it concluded that it was not "convinced beyond a reasonable doubt" by the identification evidence and, therefore, that appellant's conviction was "unsafe."¹⁵⁶ While this more closely resembles the standard of review for errors of law,¹⁵⁷ it is important to note that there is heightened scrutiny of the obligation to provide a reasoned opinion in uncorroborated identification cases.¹⁵⁸ Moreover, the review undertaken in *Kalimanzira* must also be assessed in light of the oft-repeated position of the ICTY Appeals Chamber — that it will not engage in *de*

¹⁵⁰ See, e.g., Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶¶ 10-14.

¹⁵¹ *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Judgment, ¶¶ 99-100, 199-200 (Int'l. Crim. Trib. for Rwanda Oct. 20, 2010).

¹⁵² *Id.* ¶ 99.

¹⁵³ *Id.* ¶ 100.

¹⁵⁴ *Id.* ¶ 126.

¹⁵⁵ See *supra* text accompanying note 76.

¹⁵⁶ *Id.* ¶ 201.

¹⁵⁷ See *supra* text accompanying note 80.

¹⁵⁸ See *supra* text accompanying note 69.

novo review.¹⁵⁹ Thus, the case cited by the Majority does not support its sweeping application of *de novo* review when the error of law is the failure to provide a reasoned opinion.

Moreover, if the failure to provide a reasoned opinion is an error of law, why did the Majority neglect to use the standard of review applicable to such errors? As dissenting Judge Agius pointed out, earlier in its judgment the *Gotovina* Majority parroted the correct standard of review when a Trial Chamber applies an incorrect legal standard.¹⁶⁰

[T]he Appeals Chamber will articulate the correct legal standard and review the relevant findings of the trial chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond a reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.¹⁶¹

Several observations are apparent. First, the Majority never even attempted to articulate a correct legal standard.¹⁶² Second, it is impossible to articulate a correct legal standard when dealing with an insufficiently reasoned opinion grounded on a factual error because the error is essentially one of fact, not law.¹⁶³ Finally, the Majority's purported *de novo* review was a thinly disguised ruse for substituting its judgment for that of the Trial Chamber without following its own rules. By its own standards, the Majority had only two choices: 1) substitute its findings of fact for those of a trial chamber only if no reasonable trier of fact could have reached the same conclusion and the result would be a miscarriage of justice;¹⁶⁴ or 2) identify an error of law, articulate the correct standard, and apply the correct standard to the facts in order to ascertain whether guilt has been proved beyond a reasonable doubt.¹⁶⁵ A third option—identify an error of fact, characterize it as an error of law, and conduct a *de novo* review, substituting the

¹⁵⁹ See *supra* note 90.

¹⁶⁰ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶8 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹⁶¹ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

¹⁶² See Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 14.

¹⁶³ See *id.* ¶ 9.

¹⁶⁴ Prosecutor v. Gotovina & Markaè, Case No. IT-06-90-A, Judgment, ¶ 13.

¹⁶⁵ *Id.* ¶ 12.

Appeals Chamber's findings for those of the Trial Chamber—simply does not exist in the current jurisprudence of the Tribunal.¹⁶⁶

v. The House of Cards Collapses

With the 200-Meter Standard out of the way and along with it the Trial Chamber's findings regarding the unlawfulness of the attacks, the Majority made swift work of the other arguments for affirming the conviction. It waved aside evidence that showed that the attacks were indiscriminate because some of the shells landed so far from any legitimate target that they could not be justified by any margin of error.¹⁶⁷ Likewise, it belittled other evidence of the unlawfulness of the attacks—including statements made by Gotovina during a meeting with Tu?man and others to plan Operation Storm (the Brioni Meeting) and Gotovina's order to attack the towns without specifying targets—because the evidence was ambiguous or somehow tainted by the original sin of the 200-Meter Standard.¹⁶⁸

It found that, without the unlawful artillery attacks, it could not “affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE, aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force, existed.”¹⁶⁹ The Appeals Chamber also rejected arguments that the artillery attacks that Gotovina had ordered proved that he had aided and abetted the deportation of the Serbs who fled the Krajina in their wake.¹⁷⁰ The Majority's rejection of the aiding and abetting theory was principally grounded on its observation that the Trial Chamber “would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians.”¹⁷¹

¹⁶⁶ Judge Agius characterized the Majority's approach as one which “fail[ed] to comport with any recognisable standard of review.” *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Dissenting Opinion of Judge Agius, ¶ 14.

¹⁶⁷ *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment, ¶ 66.

¹⁶⁸ *See id.* ¶¶ 72-83.

¹⁶⁹ *Id.* ¶ 91.

¹⁷⁰ *Id.* ¶ 115.

¹⁷¹ *Id.* ¶ 114. This statement by the Majority was disingenuous for two reasons. First, the Trial Chamber was referring to the shelling of locations other than the Four Towns which were the focus of the trial. *See Prosecutor v. Gotovina, Èermak & Markaè*, Case No. IT-06-90-T, Judgment, ¶¶ 1754-55 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), available at http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf; *see also Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011) (pointing out that “paragraph 1755 of the Trial Judgment to which the Majority refers to support this

Finally, the Majority dismissed the Trial Chamber's conclusion that Gotovina had made a substantial contribution to the JCE by failing to make a "serious effort" to ensure that reports of crimes against Serb civilians in the Krajina were followed up and future crimes were prevented.¹⁷² Without identifying any legal standard misapplied to the facts by the Trial Chamber, the Appeals Chamber reached the conclusion that evidence of the measures taken by Gotovina, coupled with the Trial Chamber's failure to address the testimony of a defense witness,¹⁷³ created a "reasonable doubt" as to Gotovina's guilt under this theory.¹⁷⁴

B. *Perišić*

Momèilo Perišić was the Chief of the Yugoslav Army (VJ) General Staff from August 1993 until November 1995.¹⁷⁵ As such, he was the VJ's highest-ranking officer.¹⁷⁶ He was charged with various crimes¹⁷⁷ that had occurred in Sarajevo and Srebrenica based on his role "in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS")."¹⁷⁸ The prosecution alleged that he was responsible for these crimes under two different theories—aiding and abetting and superior responsibility.¹⁷⁹

i. *Aiding and Abetting*

As to the former, the Appeals Chamber held that the Trial Chamber applied an incorrect legal standard for aiding and abetting.

claim is not linked to the Trial Chamber's findings on the departure of persons from the Four Towns on 4 and 5 August 1995 but rather concerns the departure of persons from other locations"). Second, the Trial Chamber did not conclude that the attacks on those other towns were "lawful." Rather, it found that "an unlawful attack on civilians or civilian objects in these towns was not the only reasonable interpretation of the evidence." *Prosecutor v. Gotovina, Āermak & Markaè*, Case No. IT-06-90-T, Judgment, ¶ 1755.

¹⁷² *Prosecutor v. Gotovina & Markaè*, Case No. IT-06-90-A, Judgment, ¶118.

¹⁷³ The witness, Anthony R. Jones, a retired U.S. Lieutenant General, "opined that Gotovina's actions were appropriate and sufficient." *Id.* ¶ 121.

¹⁷⁴ *Id.* ¶ 134.

¹⁷⁵ *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), available at http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

¹⁷⁶ *Id.*

¹⁷⁷ The crimes included "murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war." *Id.* ¶ 3.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 7(1), 7(3), U.N. Doc. S/RES/827 (1993).

Specifically, it found that the Trial Chamber had erred as a matter of law by “holding that specific direction is not an element of the *actus reus* of aiding and abetting.”¹⁸⁰ And, while this error was “understandable” because of the confusing language in some of the Tribunal’s cases, “the Appeals Chamber’s duty to correct legal errors remain[ed] unchanged.”¹⁸¹ Applying the correct legal standard, it then reviewed and assessed “*de novo* relevant evidence, taking into account, where appropriate, the Trial Chamber’s findings.”¹⁸² The result of this review and assessment was the Appeals Chamber’s conclusion that the evidence did not establish beyond a reasonable doubt that Perišiæ’s acts were specifically directed at aiding and abetting crimes committed by the VRS.¹⁸³ The first part of the *Perišiæ* Appeals Chamber Judgment was thus a straightforward application of the standard of review for errors of law.

ii. Superior Responsibility

The Appeals Chamber then turned to the second theory of individual responsibility—superior responsibility. There are three necessary elements for a conviction based on the theory of superior responsibility: “(i) the existence of superior-subordinate relationship; (ii) the superior’s failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions; (iii) . . . the superior knew or had reason to know that a criminal act was about to be committed or had been committed.”¹⁸⁴ The superior-subordinate relationship is established by proof that the superior had “the actual ability to exercise sufficient *control* over the subordinates so as to prevent them from committing crimes.”¹⁸⁵ Appellant challenged the Trial Chamber’s finding that Perišiæ exercised effective control over both the soldiers in the SVK and those in the VJ, who had been seconded to the SVK.¹⁸⁶ The Appeals Chamber determined that the Trial Chamber had insufficiently analyzed the evidence, which “can amount to a failure to provide a reasoned opinion . . . [and which] constitutes an error of law requiring *de novo* review of evidence by the Appeals Chamber.”¹⁸⁷

¹⁸⁰ Prosecutor v. Perišiæ, Case No. IT-04-81-A, Judgment, ¶ 41.

¹⁸¹ *Id.* ¶ 43.

¹⁸² *Id.* ¶ 45.

¹⁸³ *Id.* ¶ 73.

¹⁸⁴ Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L. CRIM. JUST. 159, 161 (2007).

¹⁸⁵ *Id.* at 162.

¹⁸⁶ Prosecutor v. Perišiæ, Case No. IT-04-81-A, Judgment, ¶¶ 80-82.

¹⁸⁷ *Id.* ¶ 92. It is interesting that Judge Agius, who so vociferously criticized the Majority’s use of *de novo* review in *Gotovina*, joined in the *Perišiæ* judgment, even though the *Perišiæ* Appeals Chamber followed the same approach.

iii. *De Novo* Review

As it did in *Gotovina*, the Appeals Chamber cited *Kalimanzira* as support for its conclusion that *de novo* review was warranted. Additionally, it cited three other ICTR cases and one ICTY case but, curiously, it did not cite *Gotovina*. The three other ICTR cases cited by the *Perišić* Appeals Chamber do not strengthen the case for *de novo* review. Instead, they strongly suggest that the appropriate standard of review should be similar to that for errors of fact.

In *Zigiranyirazo*,¹⁸⁸ the Appeals Chamber found that the Trial Chamber failed to consider clearly relevant evidence suggesting that the defendant could not have been in two locations within the timeframe argued for by the prosecution.¹⁸⁹ Although the Trial Chamber erred in failing to provide a reasoned opinion and the Appeals Chamber categorized it as a error of law, it did not purport to conduct *de novo* review on that basis, nor did it identify the correct applicable legal standard, as it had done a few paragraphs earlier when it found that the Trial Chamber had reversed the burden of proof applicable to an alibi defense.¹⁹⁰ Instead, it accepted appellant's estimate of the travel time as "reasonable" based on the evidence on the record that the Trial Chamber had failed to consider.¹⁹¹

In *Muvunyi*,¹⁹² the Appeals Chamber found that the Trial Chamber erred in failing to explain why it relied on the testimony of witnesses YAI and CCP to convict appellant, even though their evidence was contradicted by the testimony of another witness.¹⁹³ In reaching its conclusion that there had been a failure to provide a reasoned opinion, the Appeals Chamber observed that it could not "conclude whether a reasonable trier of fact could have relied on the testimony of witnesses YAI and CCP to convict Muvunyi for this event."¹⁹⁴ This strongly suggests that the appropriate standard of review when there is a failure to provide a reasoned opinion based on a factual error is the same as that applicable to errors of fact. This conclusion is bolstered by the fact that the *Muvunyi* Appeals Chamber did not substitute its own factual findings for those of the Trial Chamber.

¹⁸⁸ *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Judgment, (Int'l Crim. Trib. for Rwanda Nov. 16, 2009).

¹⁸⁹ *Id.* ¶¶ 44-46.

¹⁹⁰ *Id.* ¶ 43.

¹⁹¹ *Id.* ¶ 44. The Appeals Chamber noted that at the hearing the prosecution had essentially conceded the point. *Id.* ¶ 44 n.118.

¹⁹² *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55 A-A, Judgment (Int'l Crim. Trib. for Rwanda Aug. 29, 2008).

¹⁹³ *Id.* ¶ 147.

¹⁹⁴ *Id.*

Rather, it took the exceptional step of remanding the case for a retrial on this issue.¹⁹⁵

In the *Simba* judgment,¹⁹⁶ also cited by the *Perišić* Appeals Chamber, the issue was essentially the same as in *Munvunyi*—the failure to provide a reasoned opinion explaining why the Trial Chamber had credited the testimony of a witness regarding the time the defendant arrived at a particular location.¹⁹⁷ Rather than stating that it intended to conduct a *de novo* review, the *Simba* Appeals Chamber said that it would “consider . . . whether and, if necessary, to what extent the Trial Chamber’s error affects its findings relating to the Appellant’s participation in the attacks at the Murambi Technical School and Kaduha Parish on 21 April 1994 within the time frame emerging from the relevant testimonies.”¹⁹⁸ After reviewing the evidence, the Appeals Chamber concluded that “a reasonable trier of fact could have found beyond a reasonable doubt” that appellant had been in the two locations on the relevant date, thus applying the standard of review applicable to errors of fact.¹⁹⁹

The final cited case, the ICTY’s appeals judgment in *Limaj*,²⁰⁰ likewise seems to weaken the support for *de novo* review and strengthen the case for applying the deference standard when there is no reasoned opinion based on an error of fact. The *Limaj* Appeals Chamber found no error based on the claim that the Trial Chamber had failed to cite in its judgment relevant evidence claimed to undercut the credibility of two prosecution witnesses because “the Trial Chamber reasonably accepted the honesty of their testimony.”²⁰¹ Therefore, “a reasonable trier of fact” could have found the witnesses credible.²⁰²

Limaj well illustrates the point that failing to provide a reasoned opinion does not genuinely convert an error of fact into one of law that alters the appropriate standard of review. While it did not do so, the Appeals Chamber could have characterized the Trial Cham-

¹⁹⁵ *Id.* ¶ 148. Because of the length and complexity of international criminal trials and the long periods of time defendants spend in jail prior to trial (Munvunyi had been in jail for eight years), the *ad hoc* tribunals are reluctant to order retrials. *Id.*

¹⁹⁶ *Simba v. Prosecutor*, Case No. ICTR-01-76-A, Judgment. (Int’l Crim. Trib. for Rwanda Nov. 27, 2007).

¹⁹⁷ *Id.* ¶ 142.

¹⁹⁸ *Id.* ¶ 143.

¹⁹⁹ It should be noted that the failure to provide a reasoned opinion was intertwined with other alleged errors of fact. *Id.* ¶ 144. But, the Appeals Chamber did not separate them when it made the statement quoted in the text.

²⁰⁰ *Prosecutor v. Limaj, et. al.*, Case No. IT-03-66-A, Judgment. (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

²⁰¹ *Id.* ¶ 88.

²⁰² *Id.*

ber's failure to address "clear and identical" discrepancies in the witnesses' stories²⁰³ as the failure to provide a reasoned opinion. But that does not change the fact that the essential nature of the appellate review is the same in both cases; that is, whether the trial chamber acted reasonably in reaching its conclusions.

In addition to the fact that its cited precedents do not support the *Perišić* Appeals Chamber's conclusion that *de novo* review was appropriate, its approach contradicts that taken by another ICTY Appeals Chamber that had faced the identical question. In *Strugar*,²⁰⁴ the appellant argued that the Trial Chamber erred when it found that a superior-subordinate relationship existed because he had the ability to prevent or punish the crimes that were committed and, therefore, that he had "effective control."²⁰⁵ The *Strugar* Appeals Chamber rejected the appellant's characterization of the issue as an alleged error of law, finding that "it is more accurately characterized as a mixed error of law and fact" to which it would apply the "no reasonable trier of fact" standard of review,²⁰⁶ the same standard applicable to pure questions of fact.²⁰⁷

Strugar is clearly the better-reasoned case. In neither *Strugar* nor *Perišić* did the Trial Chamber misapprehend the correct legal standard. Instead, in both cases the issue was whether the Trial Chamber had correctly applied the legal standard to the facts. While merely labeling the issue as a mixed question is not dispositive, a court should not treat the issue as one of law if the trial court is in a better position to decide the question and the result would not bring greater clarity to the law.²⁰⁸ That rationale clearly applies to both *Strugar* and *Perišić*. In neither case did the Appeals Chamber add to, or subtract from, the interpretation of the effective control necessary to establish the existence of a superior-subordinate relationship. On the other hand, both did involve ascertaining whether the trial chamber had correctly applied the well-established legal standard to the facts, an issue which should be decided by giving the trial chamber's findings due deference and reversing it only if no reasonable trier of fact could have reached the same conclusion.

²⁰³ *Id.* ¶ 87.

²⁰⁴ Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

²⁰⁵ *Id.* ¶¶ 247-248, 251.

²⁰⁶ *Id.* ¶ 252.

²⁰⁷ See Milanovic, *supra* note 8.

²⁰⁸ See *supra* note 96.

VII. CONCLUSION

The reasoned opinion requirement originating in the civil law systems sits somewhat uncomfortably next to the deference standard for the review of a trial chamber's factual findings imported from the common law model.²⁰⁹ There is a strong argument, however, that both are necessary. The reasoned opinion is an essential element of a fair trial because complex international criminal cases take years to try and the verdicts are based on voluminous evidence. Without reasoned opinions, appellate review would simply be impossible. On the other hand, because the international criminal tribunals largely follow the common law procedure of presenting the trial evidence in open court, it is unarguably true that the trial judges are in a better position when it comes to determining the credibility of witnesses and the weight and persuasiveness of the evidence. Thus, deference seems to be the appropriate standard of review.

The vexing question is what standard of review is applicable when there is a failure to provide a reasoned opinion. It is unassailable that the failure to provide such an opinion is an error of law because all of the tribunals' statutes impose that obligation on trial chambers.²¹⁰ But, it is equally true that this error of law does not stem from the failure to apply the correct legal standard, which triggers a limited form of *de novo* review requiring articulation of the correct legal standard and application of it to the facts of the case. The failure to provide a reasoned opinion cannot result in this form of review because it is impossible to articulate a correct legal standard if there has been no mistake in that regard.

Moreover, *de novo* review of these errors does not serve the main purposes of appellate review, which are to insure consistency and develop the law:

The decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case, where the quantity and type of evidence, as well as the demeanor and credibility of witnesses, will necessarily be different.²¹¹

In the *Gotovina* and *Perišić* decisions, the Appeals Chambers employed a *trompe l'oeil* to transform what was essentially an error of fact into an error of law, which freed them to substitute their findings for that of the Trial Chambers'. Consequently, these decisions have "lessen[ed] the ICTY historical record of the conflict in the former Yu-

²⁰⁹ See Fleming, *supra* note 2, at 138.

²¹⁰ See *supra* note 46.

²¹¹ Fleming, *supra* note 2, at 135.

goslavia” and “might result in a lack of predictability and confidence in the tribunal writ large.”²¹²

The most obvious way to correct the deficiencies in the reasoned opinions in these cases would have been to remand the cases to the trial chambers. Fearing additional delays in cases when defendants may have already been in jail for years and because of the finite existence of the *ad hoc* tribunals, appeals chambers have been reluctant to remand.²¹³ Such fears are overblown when the remand is to correct a reasoned opinion because there would be no need for additional evidence, and the specific areas requiring clarification would be identified.

Unlike the statutes of the *ad hoc* tribunals, the ICC Statute authorizes its Appeals Chamber to “remand a factual issue to the original Trial Chamber for it to report back accordingly.”²¹⁴ This method of curing deficiencies in a reasoned opinion would be rendered nugatory if the ICC follows the ICTY cases which characterize such errors as errors of law. Hopefully the ICC Appeals Chamber will see such errors for what they really are—errors of fact that have been insufficiently explained in the reasoned opinion—and use the power of remand rather than making its own findings of fact from its inferior position to assess the evidence based only on the cold record.

²¹² Jenks, *supra* note 9, at 626-27.

²¹³ Theodor Meron, *Hudson Lecture: Anatomy of an International Criminal Tribunal*, 100 Am. Soc’y Int’l L. Proc. 279, 285 (March 29-April 1, 2006) (observing that the “the length of proceedings, combined with the tribunals’ need to complete their work, largely prevents their Appeals Chambers from using remand as a means of curing errors”).

²¹⁴ Rome Statute of the International Criminal Court, art. 83(2)(b), July 17, 1998, 2187 U.N.T.S. 3.

PRIVATE ENFORCEMENT OF TRIPS BY APPLYING THE EU LAW PRINCIPLES OF DIRECT EFFECT AND STATE LIABILITY

*By: Saud Aldawsari**

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INTRODUCTION

The World Trade Organization (“WTO”) Marrakesh agreements¹ are treaties negotiated between Member States to help trade flow as freely as possible by lowering interstate trade barriers.² Consequently, the organization regulates in areas that are inevitably a product of globalization that generates new problems and disputes requiring international cooperation.³ The WTO accommodates for the resolution of such disputes by the creation of the Dispute Settlement

¹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S 3 [hereinafter Marrakesh Agreement].

² *Understanding the WTO: Who We Are*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Mar. 3, 2014).

³ AMRITA NARLIKAR, *THE WORLD TRADE ORGANIZATION A VERY SHOT INTRODUCTION* 59 (2005).

Understanding (“DSU”)⁴. The utilization of the DSU, however, is limited to disputes between Member States and does not provide a venue for private litigants to address their concerns.⁵ Indeed, private litigants will not be able to utilize the DSU mechanism anytime soon.⁶ Though the WTO obligations are, at least theoretically, supposed to help producers of goods and services conduct their business, the obligations only bind Member States and do not confer rights on private individuals.⁷

Yet, as the WTO evolves, so does the legalism of the organization.⁸ This comment proposes a mechanism of private enforcement of the WTO obligations against Member States. The mechanism is derived from the laws of the European Union (“EU”). The theory, however, is only applied to the Trade Related Agreement on Intellectual Property Rights (“TRIPS”)⁹ agreement section of the Marrakesh Agreement.¹⁰ TRIPS is part of the Marrakesh Agreement package and it requires Member States to provide a minimum standard of protection for intellectual property rights.¹¹ It also requires WTO Members to incorporate the agreement’s obligations into their national laws.¹² For this reason, the requirement of national implementation of international obligation may render the TRIPS agreement more fixable to private enforcement.¹³ With such an arrangement, the private litigant, for instance, could challenge the constitutionality of national law

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.C 401 [hereinafter DSU].

⁵ *Dispute Settlement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Jan. 14, 2014) (“The authors of these agreements are the member governments themselves — the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body.”).

⁶ *The WTO in Brief*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm (last visited Jan. 13, 2014) (stating that WTO negotiation “bind governments to keep their trade policies within agreed limits to everybody’s benefit.”).

⁷ *Id.* (stating that WTO negotiations’ purpose is to help producers but they are negotiated by governments and only bind governments).

⁸ NARLIKAR, *supra* note 3, at 86.

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.C 299 [hereinafter TRIPS].

¹⁰ See Marrakesh Agreement, *supra* note 1.

¹¹ TRIPS, *supra* note 9, art. 3, 4.

¹² *Id.* art. 1.

¹³ See *infra* Part III.B.

implementing the TRIPS as opposed to the terms of the international agreement itself.¹⁴

This nature also facilitates the analysis in light of EU law. The requirement to implement TRIPS obligation under the national legal order makes the agreement very similar to EU directives,¹⁵ which are binding in their result yet give Member States of the EU the freedom in their implementation.¹⁶

The EU principles that are relevant to the proposal in this comment are the Principle of Direct Effect¹⁷ and the Principle of State Liability.¹⁸ Under EU law, and in the event that an EU Member State fails to honor its obligation under the EU treaties, the two principles enable private litigants to enforce their rights which EU law has conferred on them.¹⁹

The theoretical exercise in this article applies EU Principles of Direct Effect and State Liability to the recent *Novartis AG v. Union of India*²⁰ (“*Novartis v. UOI*”) case. In *Novartis v. UOI*, the claimant alleged that India, a WTO member, failed to honor its TRIPS obligations. In 2005, India amended its intellectual property (“IP”) laws to bring them in conformity with its obligations under TRIPS. However, *Novartis* alleged that the current amendments are contrary to India’s obligations under the TRIPS agreement. Although the outcome would probably not be any different, *Novartis* provides a useful factual pattern to apply the proposed mechanism.

It is worthwhile to keep in mind that the EU legal order may sound different, yet theoretically, it is the same as the WTO agreements: an international agreement, signed by members of different sovereign, in the wake of the Second World War, for the purpose of trade liberalization, and ultimately benefiting the nations and citizens of the members to agreement.²¹ What was then farfetched, like relin-

¹⁴ See e.g. *Novartis AG v. Union of India*, (2007) 4 MADRAS L.J. 1153 [hereinafter *Novartis v. UOI* (Mardas H.C.)], available at <http://www.scribd.com/doc/456550/High-Court-order-Novartis-Union-of-India>, *aff’d*, *Novartis AG v. Union of India*, Civil Appeal Nos. 2706-2716 of 2013 (India Apr. 1, 2013) [hereinafter *Novartis v. UOI* (Ind.)], available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=40212>.

¹⁵ See *infra* Part III.C.2.b.iii.

¹⁶ The European Parliament, SOURCES AND SCOPE OF EUROPEAN UNION LAW 3 (2014), available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part III.

¹⁹ See *Infra* Part II.C.

²⁰ *Novartis v. UOI* (Ind.), *supra* note 14, at X.

²¹ Compare PASCAL FONTAINE, EUROPE IN 12 LESSONS at 6 (2010), available at <http://bookshop.europa.eu/en/europe-in-12-lessons-pbNA3110652> (“To ensure that

quishing state autonomy and control on issues of trade to a higher body, is now the current reality.

This comment is divided into three sections. Part I introduces the WTO generally and analyzes the TRIPS agreement specifically. Part II discusses the proposed theory and its basis. It then introduces *Novartis*. The comment then explores the relevant EU laws and analyzes the jurisprudence of Direct Effect and State Liability. Part III applies EU law to *Novartis*.

PART I: THE WTO AND TRIPS: A BIT OF BACKGROUND

A. *WTO-Generally*

The Marrakesh Agreement²² is composed of four Annexes. It covers mainly three areas of international trade: goods, services, and intellectual property.²³ The purpose of the WTO is to provide a forum that facilitates multilateral trade liberalization.²⁴ The expected benefits of membership are market access, protection against the powerful developed countries, and enforceable dispute-settlement mechanism.²⁵ Those benefits, however, are certainly debatable. Yet regardless of the debate on the politicized “questionable decision-making process,” and the willingness to give up a lot, Member States still believe that the benefits of belonging to the WTO outweigh the downsides.²⁶ This is apparent from the membership increase since the creation of the WTO.²⁷ The organization started with 123 members in 1995 and the membership increased to 159 members by March 2013.²⁸

as many people as possible benefit from this Europe-wide market of 500 million consumers, the EU is endeavouring to remove obstacles to trade and is working to free businesses from unnecessary red tape.”), *with The WTO in Brief*, *supra* note 6 (stating that WTO negotiations’ purpose is to help producers but they are negotiated by governments and only bind governments).

²² Marrakesh Agreement, *supra* note 1.

²³ NARLIKAR, *supra* note 3, at 60.

²⁴ *Id.* at 51.

²⁵ *Id.* at 58.

²⁶ *Id.*

²⁷ *Id.* at 51.

²⁸ Compare *The Uruguay Round*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Mar. 19, 2014), *with Members and Observers*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 19, 2014).

B. *The TRIPS Agreement*

1. *Generally*

Annex 1C of the Marrakesh Agreement contains the TRIPS agreement.²⁹ TRIPS establishes minimum standards that countries must abide by in seven areas³⁰ of intellectual property rights. The agreement is based on the principles of transparency and non-discrimination between Member States.³¹

2. *Reasons for Inclusion*

There are several reasons³² for the inclusion of TRIPS under the WTO package.³³ First, developed countries were pushing for the expansion of the WTO mandates in the directions of new issues.³⁴ In fact, the agreement was a product of U.S. and EU concerns that their competitive advantage as exporters of intellectual property was being undermined by counterfeits.³⁵ Second, by the 1980s and concurrent with the WTO negotiations, the United States started imposing unilateral sanctions on developing countries that are in breach of the U.S. patent laws.³⁶ Fearing such threats; developing countries began to reconsider their opposition to TRIPS. Third, developing countries underestimated the technical nature of TRIPS and, at the time of signing the agreement, believed that TRIPS was limited to counterfeit goods when the agreement was far more complex than what the developing countries perceived.³⁷

3. *Two Sides of the Debate*

TRIPS is an exceptional agreement and perhaps the most important development in international intellectual property law since

²⁹ TRIPS, *supra* note 9.

³⁰ The areas of intellectual property that TRIPS covers are: copyright and related rights, trademarks, geographical indications, industrial designs, patents; the layout-designs of integrated circuits, and undisclosed information including trade secrets and test data. *Overview: the TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Jan. 17, 2014).

³¹ TRIPS, *supra* note 9, art. 3, 4.

³² Those reasons are not exclusive.

³³ NARLIKAR, *supra* note 3, at 82.

³⁴ *Id.* at 82.

³⁵ *Id.* at 81.

³⁶ Special 301 section of the Omnibus Trade and Competitiveness Act of 1988 empowered the U.S. Trade Representative to threaten countries with objectionable IPR regime. *Id.* at 82.

³⁷ *Id.*

the 1880s.³⁸ However, the agreement has been criticized severely on several grounds. First, the treaty may be far reaching and affects vital sectors in a country, including health services, human rights, and economic and technological development.³⁹ Second, it raises clear issues of economic coercion and reveals the adverse effects of intellectual property on economic development, access to food, medicines, public goods, and ultimately sustainable development.⁴⁰ Third, it also has been labeled as a treaty of adhesion that is unfair to developing countries.⁴¹

On the other side, the WTO defends the agreement on the basis that it strikes a balance between the long term benefits and possible short term costs to society.⁴² Society benefits in the long term when intellectual property protection encourages creation and invention, especially when the period of protection expires and the creations and inventions enter the public domain.⁴³ For better or for worse, TRIPS was included as part of WTO package.⁴⁴

C. *The Dispute Settlement Understanding*

1. *Generally*

Annex 2 of the Marrakesh Agreement concerns the Dispute Settlement Understanding (“DSU”).⁴⁵ The DSU and the WTO enforcement mechanism are unique in the history of interstate dispute resolutions.⁴⁶ The “jewel in the crown” of the WTO achievement is the powerful DSU and through this DSU, it has been said, the WTO has acquired teeth.⁴⁷ For better or worse, the mechanism embodies an unprecedented level of legalization in the WTO.⁴⁸ The developments are significant with major system-wide consequences.⁴⁹

³⁸ Donald P. Harris, *Carrying a Good Joke Too Far: Trips and Treaties of Adhesion*, 27 U. Pa. J. Int'l Econ. L. 681, 724 (2006).

³⁹ *Id.* at 749.

⁴⁰ *Id.* at 683-84.

⁴¹ *Id.* at 685.

⁴² *Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Jan. 11, 2014).

⁴³ *Id.*

⁴⁴ NARLIKAR, *supra* note 3, at 82.

⁴⁵ DSU, *supra* note 4.

⁴⁶ Harris, *supra* note 38, at 749.

⁴⁷ NARLIKAR, *supra* note 3, at 85.

⁴⁸ *Id.* at 85.

⁴⁹ *Id.*

2. *Characteristics*

There are several significant characteristics to the DSU. First, the use of the DSU is the exclusive responsibility of the Member States⁵⁰ and private parties have no access to the WTO venues. A dispute arises when one country adopts a trade policy measure that other WTO members consider to be breaking the WTO agreements, or when a country fails to live up to its obligations.⁵¹ The DSU allows for the creation of the Dispute Settlement Body (“DSB”) that could issue decisions that compel a Member States to abide by the rules of the WTO or face retaliation by another Member States.⁵² Second, contrary to its predecessor in the GAAT, the establishment of the DSB and the adoption of a panel report can no longer be blocked by one of the parties of a dispute.⁵³ Finally, the parties can also appeal a panel ruling to the Appellate Body (“AB”) on points of law, creating a two-tiered dispute settlement system.

3. *Two Sides of the Debate*

The WTO praises the system as being time efficient⁵⁴ characterized by structured procedural process.⁵⁵ The mechanism also deprives developed countries from resorting to unilateral and bilateral measures and imports certainty and predictability in the system.⁵⁶ By contrast, some view the dispute settlement system as structurally imbalanced and claim it favors powerful members.⁵⁷ Developing countries find it difficult to use the mechanism in their advantage.⁵⁸

D. Private Enforcement of TRIPS against Member States

Currently, the WTO treaty does not provide for private enforcement of the WTO obligations nor does it grant individual access to the DSB.⁵⁹ This is understandable. Currently the Appellate Body is facing

⁵⁰ *Id.* at 89.

⁵¹ *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 11, 2014).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ According to the WTO, disputes should not take longer than 15 months, including the appeal process. *See id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Harris, *supra* note 38, at 687.

⁵⁸ NARLIKAR, *supra* note 3, at 86.

⁵⁹ *See id.* at 89.

significant growth in the volume of disputes.⁶⁰ The system is already operating at its maximum with only 153 possible litigants. It would be impossible to contain the workload if private parties had access to the DSB and the DSB opened its gate “to the world.”⁶¹

This comment, however, provides a theoretical procedure that may enable the private enforcement of one of the WTO agreements against Member States. The procedure is limited to TRIPS but it may be a partial solution to such limited access to the “fortress of the DSB.” Before exploring the procedure, it may be beneficial to examine the pros and cons of it. The argument for and against private enforcement of TRIPS against a Member State may shed light on its utility.

1. *Argument for Private Enforcement of TRIPS*

There are several arguments that may support the need for private enforcement of TRIPS agreement. First, the need for private enforcement may stem from defects in the WTO system generally and the dispute settlement system specifically. The WTO negotiation process can sometimes skew the outcomes in favor of the already powerful in the WTO.⁶² Additionally, recent remarks by a former WTO judge convey a sentiment of frustration on the current situation, and warning on the future of the dispute settlement system.⁶³ The judge criticizes the stagnation in the development WTO negotiations.⁶⁴ He stresses on the need for “legislative complement” and development in the WTO project as a whole, otherwise the “the institution will wither, and with it, the system of dispute settlement.”⁶⁵ The judge also advocates the reform of the dispute settlement system to make it more efficient and capable of handling the increase in the number and complexity of cases. Such views only support the need for an alternative to the current disputes settlement procedure if the system were to survive. Second, the WTO Appellate Body stated that treaties are “the international equivalent of contracts.”⁶⁶ Hence, it could be argued that

⁶⁰ *WTO Appellate Body Chairman Reiterates Concerns Over Increased Workload, Delays*, Int'l Trade Daily Online (BNA) No. 51 (Mar. 17, 2014) (“The ‘overall trend since 1995 has been a significant increase in the workload of the Appellate Body,’ Ramirez-Hernandez said. ‘The year 2013 has been an exceptionally busy year for WTO panels and it is to be expected that this will translate into a heavy workload for the Appellate Body in 2014 and beyond.’”).

⁶¹ *Cf. id.*

⁶² NARLIKAR, *supra* note 3, at 51.

⁶³ *Former WTO Judge Says Failure to Advance Trade Agenda Threatens to Fragment System*. 31 Int'l Trade Rep. (BNA) No.6, at 264-65 (Feb. 6, 2014).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, 15, WT/DS8/AB/R (Oct. 4, 1996).

if a country fails to honor its commitment under TRIPS, a private citizen should not be the victim when the failure is attributed to the Member State. Third, addressing social, economic, and political concerns can rescue the international system from structural imbalances in the WTO dispute settlement system that favors powerful members.⁶⁷ It is not surprising then when a former WTO judge says that the Appellate Body “does not represent the membership, but it must reflect the diversity that makes up the membership” and that “it has always been a strength of the Appellate Body that its Members come from very different legal traditions, and very different societies.” Thus, private enforcement in national courts may be a mechanism to address the concerns of the judge.⁶⁸ This is because national courts may be better equipped in addressing such concerns than the WTO bodies.⁶⁹ Third, broadening the WTO jurisdiction may stretch the limited WTO resources and may result in inconsistency in international law.⁷⁰ Consequently, WTO panels and Appellate Bodies should be reserved as a last resource. Fourth, TRIPS allows Member States to take public interest into consideration when implementing the TRIPS obligations.⁷¹ Hence, a national court may be at a better position in interpreting the special interest of a Member State and may be an effective means to retain the cultural diversity of the WTO and limit the global Americanization of intellectual property rights (“IPR”) enforcement.⁷² Fifth, a helpful analogy could be drawn from the EU legal order. Just like an EU directive, TRIPS is an instructive agreement. TRIPS and EU directives are binding in their result, yet leave Member States free in their implementation.⁷³ The Court of Justice of the European Union (the “ECJ”) noted that freedom in implementing directives preserves the cultural diversity of the Union which must be respected. It also opined

⁶⁷ Harris, *supra* note 38, at 687.

⁶⁸ See, e.g., *id.* (advocating applying the doctrine of adhesion in contracts to interpret TRIPS as a method to remedy the unfairness of TRIPS and accommodate for the national needs of individual Member States).

⁶⁹ See *id.* at 737-38 (“TRIPS . . . affects critical aspects of society . . . and global governance-related issues (e.g., the ability of states to determine for themselves which issues take precedence and where to allocate scarce resources).”)

⁷⁰ *Id.* at 717.

⁷¹ TRIPS, *supra* note 9, art. 8 (“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”)

⁷² See Harris, *supra* note 38, at 725 (“[T]he United States began efforts to move intellectual property from WIPO to GATT . . . [GAAT] included the relatively strong and effective enforcement mechanisms . . . Those mechanisms were one of the prizes sought by the developed countries in TRIPS.”).

⁷³ Compare *supra* Part I.B, with *infra* Part III C.2.b.iv.

that the ability to enforce directives against the state is necessary for the effectiveness of the EU system.⁷⁴ Fifth, the enforcement would provide an avenue of relief for citizens of the Member State who may not be able to enforce their rights against their own nation since the DSU is reserved for disputes between Member States.⁷⁵

2. *Argument Against Private Enforcement of TRIPS*

Certainly this comment is not blind to the possible adverse effect of private enforcement of TRIPS or even its impossibility. First, giving Member States the power to interpret TRIPS may amount to judicial activism that rewrites TRIPS provisions and alters members' rights and obligations.⁷⁶ Second, the power may also lead developing countries to avoid the democratic framework of the WTO.⁷⁷ Third, the mechanism may be futile as the United States and other developed countries would probably strive to circumvent any adverse interpretation of TRIPS by resorting to unilateral pressures outside the scope of TRIPS.⁷⁸ Such may lead developed countries to obtain the same or greater obligations from developing countries.⁷⁹

PART II: THE PATH TO PRIVATE ENFORCEMENT OF TRIPS AGAINST MEMBER STATES

After providing the abovementioned background information about the WTO, it is helpful to reiterate the main theoretical exercise of this comment. The discussion below will provide the structure of the proposal, its components, and its conclusion.

A. *A Proposal for Private Enforcement of TRIPS against Member States*

1. *The Proposal*

In simple terms, the proposal provides a procedure: (i) by which private litigants can enforce the TRIPS agreement; (ii) against a Mem-

⁷⁴ See Case 41/74, *Van Duyn v. Home Office.*, 1974 E.C.R. 1337, para 12. (“[T]he useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.”).

⁷⁵ See *supra* Part I.C.

⁷⁶ See *e.g.* Harris, *supra* note 38, at 746 (stating that applying the contract's doctrine of adhesion as part of DSB interpretation of TRIPS may amount to judicial activism and may allow WTO panels and Appellate Body to rewrite TRIPS provisions and alter member's rights and obligations.).

⁷⁷ *Id.* at 746.

⁷⁸ *Id.* at 752.

⁷⁹ *Id.*

ber State; (iii) in circumstances where the Member State fails to afford private parties their rights that TRIPS confer on them.

2. *Its Feasibility*

The objective of the proposal is feasible because of two reasons: (1) the special nature of TRIPS implementation which makes it more fixable for private enforcement; and (2) the EU Principles of Direct Effect⁸⁰ and State Liability provide,⁸¹ a well-developed framework existing in very similar circumstances.

B. *The Special Nature of TRIPS*

What makes this exercise less futile and more plausible is the special nature of the TRIPS agreement. There are several characteristics of TRIPS that make the agreement more malleable to private enforcement against a Member State than its sister agreements, the GATT and GATS.

First, unlike GATT and GATS, the agreement requires Member States to implement domestic laws that translate the TRIPS protections within the legal order of the Member State.⁸² This step removes the protection from the realm of international law and makes the protection afforded by the agreement a part of the domestic law. Generally, in the context of international law, the relationship between a private claim and an international public treaty is rarely sufficiently direct so that it may be said to “arise under” the treaty.⁸³ By contrast, the domestic laws implementing TRIPS become “the carrier of the protection.” Consequently, private individuals could challenge such law within the domestic system based on grounds such as: constitutionality, due process, equal protection of citizen, public interest, morals, etc.⁸⁴

Second, taking the United States as an example, an international treaty becomes part of the legal order if it is self-executing or if Congress ratifies it.⁸⁵ Consequently “[b]ecause a treaty ratified by the

⁸⁰ See *infra* Part III.C.2.b.

⁸¹ See *infra* Part III.C.2.c.

⁸² TRIPS, *supra* note 9, art. 1.1 (“Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.”).

⁸³ 44B AM. JUR. 2D International Law § 178.

⁸⁴ See, e.g., *Novartis v. UOI (Madras H.C.)*, *supra* note 14, para. 5 (answering the question of whether Indian national law that implementing the TRIPS agreement on the basis that it is against the Constitution of India).

⁸⁵ *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (“[T]reaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either en-

United States is not only the law of [the United States] . . . but also an agreement among sovereign powers,” the U.S. Supreme Court “traditionally considered as aids to its interpretation the negotiating and drafting history . . . and the postratification understanding of the contracting parties.”⁸⁶ Similarly, and in the context of WTO, interpretation of domestic laws could be performed in light of TRIPS.⁸⁷

Third, in implementing TRIPS into their legal order, Member States usually have discretion over the implementation that may be abused or erroneously exercised. This discretion is derived from Article 27 of TRIPS which provides that “[m]embers may exclude from patentability inventions . . . to protect [public order] or morality, including to protect human, animal or plant life or health.”⁸⁸ A Member State however, may err in its implementation.⁸⁹ Such error would be a breach of the Member State’s treaty obligations⁹⁰ and damages should be reserved to compensate the injured party. This becomes more relevant if the error caused an injury to a citizen of the State itself. In this case, the DSU would not hear the claim because it would be paradoxical for a nation to sue itself.⁹¹

1. *A Case Exactly on Point: Novartis v. UOI.*

The special characteristics of TRIPS make it the “path of least resistance” for private litigants to enforce their WTO rights within, and particularly against, a Member State. Indeed, private litigants discovered such a path rather quickly. In 2005, the claimants in *Novartis v. UOI*,⁹² challenged India’s Patent Act implementing the TRIPS agreement within a year from its complete adoption into the

acted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”)

⁸⁶ *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996).

⁸⁷ *Cf.* TRIPS, *supra* note 9, art. 41.5 (“It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general.”).

⁸⁸ TRIPS, *supra* note 9, art. 27, para. 2.

⁸⁹ *See, e.g.*, C-393/93, *The Queen v. H. M. Treasury ex parte British Telecomm. Plc*, 1993 E.C.R. I-1656, paras. 39, 40. (holding that EU directives, which require national implementation, give rise to state liability when incorrectly implemented in the national legal order of a Member State).

⁹⁰ TRIPS, *supra* note 9, art. 1.1 (“Members shall give effect to the provisions of [the TRIPS] Agreement.”).

⁹¹ *See* DSU, *supra* note 4, art. 1.1 (“The rules and procedures of the DSU shall . . . apply to . . . the settlement of disputes between Members concerning their rights and obligations under the provisions of the [WTO] Agreement . . .”).

⁹² *See* *Novartis v. UOI (Madras H.C.)*, *supra* note 14.

Indian legal order in 2005.⁹³ The case sheds lights on the special nature of TRIPS and the agreement's similarity to the EU directives. I examine the relevant facts and the procedural posture of the case to highlight these points.

a. The General Facts

Novartis International AG ("Novartis") is a public pharmaceutical corporation headquartered in Basel, Switzerland.⁹⁴ In 1998, Novartis filed a product-improvement patent in India for a drug used for the treatment of blood cancer.⁹⁵ Prior to its accession to the WTO, India's patent law only allowed for process, but not product, patents for pharmaceutical inventions.⁹⁶ After implementing the latest amendment to the Patent Act 1970, India removed the restriction on product patent for pharmaceutical compounds in 2005. However, the amendment added section 3(d) which prevents trivial modification to existing pharmaceutical inventions.⁹⁷

The patent application was for the Beta Crystalline ("Beta") form of an already patented product, Imatinib Mesylate salt,⁹⁸ and marketed in India under the name "Gleevec."⁹⁹ Novartis claimed that Beta has more beneficial flow properties, better thermodynamic stability, and lower hygroscopicity than Gleevec.¹⁰⁰ The company alleged that these properties make Beta a new and superior product.¹⁰¹

⁹³ The Patents Act, No. 39 of 1970 amended by The Patents (Amendment) Act, No. 17 of 1999, The Patents (Amendment) Act, No. 38 of 2002, and The Patents (Amendment) Act, No. 15 of 2005 [hereinafter The Patent Act 1970], available at http://www.ipindia.nic.in/ipr/patent/patent_Act_1970_28012013_book.pdf

⁹⁴ *About Navartis*, NOVARTIS US, <http://www.us.novartis.com/about-novartis/index.shtml> (last visited Mar. 25, 2014).

⁹⁵ *Novartis v. UOI (Ind.)*, *supra* note 14, paras. 2, 8.

⁹⁶ The Patent Act 1970, *supra* note 93, §5 ("[N]o patent shall be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture shall be patentable."); *see also* Linda L. Lee, Note, *Trials and TRIPS-Ulations: Indian Patent Law and Novartis AG v. Union of India*, 23 BERKELEY TECH. L.J. 281, 284 (2008).

⁹⁷ *See* Patent Act 1970, *supra* note 93, §3(d) ("[T]he mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.").

⁹⁸ *Id.* para. 8.

⁹⁹ *Id.* para. 2.

¹⁰⁰ *Id.* para. 8.

¹⁰¹ *Id.*

In 2006, The Office of Controller General of Patents, Designs and Trademarks (“Controller”)¹⁰² rejected the application primarily on the basis that section 3(d) of the Patents Act 1970 disallowed the patentability of Beta.¹⁰³ Novartis petitioned the Indian government to reverse the Controller’s decision and due to subject matter jurisdiction reasons, the case was bifurcated.¹⁰⁴ Novartis appealed the decision of the Controller General to the Intellectual Property Appellate Board (“IPAB”) which dismissed the Novartis appeal.¹⁰⁵ Novartis then petitioned the Supreme Court to grant the patent and review the case on the merits.¹⁰⁶ The Supreme Court reviewed the case *de novo* and stayed the IPAB decision by dismissing the case.

In addition to the IPAB appeal, Novartis challenged section 3(d) in another proceeding, on constitutionality grounds and compliance with TRIPS by petition to the Madras High Court. Novartis alleged that section 3(d) was not compliant with TRIPS and that section 3(d) was vague, unambiguous and in violation of Article 14 of the Constitution.¹⁰⁷ The Madras High Court also dismissed the petition.

b. The Madras Court Arguments

Novartis challenges section 3(d) on two grounds, mainly that “(a) it is not compatible to [TRIPS] and (b) it is arbitrary, illogical, vague and offends Article 14 of the Constitution of India.”¹⁰⁸ The Court then entertained three questions: (i) whether the Court has jurisdiction to review the compatibility of Section 3(d) with TRIPS, and alternatively whether the Court can grant declaratory relief that section 3(d) is not compliant with TRIPS; (ii) assuming that the Court has jurisdiction, whether Section 3(d) is compliant with TRIPS; and (iii)

¹⁰² INDIA CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADEMARKS, <http://www.ipindia.nic.in/> (last visited Mar. 20, 2014). The Patent Act vest most powers to the Controller, and the Controller may delegate some powers to subordinate offices. Lee, *supra* note 99, 287. Filing of a patent is done through one of the multiple offices of Controller. See *Patents*, CONTROLLER GENERAL OF PATENTS DESIGNS AND TRADEMARKS, <http://ipindia.nic.in/ipr/patent/patents.htm> (last visited Mar. 13, 2014).

¹⁰³ *Novartis v. UOI (Ind.)*, *supra* note 14, para. 14.

¹⁰⁴ See Lee, *supra* note 96, 299-300.

¹⁰⁵ In 2007, The Intellectual Property Appellate Board commenced to hear appeals from the decisions of the Controller of Patents. See *INTELLECTUAL PROPERTY APPELLATE BOARD*, <http://www.ipab.tn.nic.in/> (last visited Mar. 2014); See also Lee, *supra* note 96, at 288 n.50.

¹⁰⁶ *Novartis v. UOI (Ind.)*, *supra* note 14, para. 16.

¹⁰⁷ *Novartis v. UOI (Madra H.C.)*, *supra* note 14, para. 2.

¹⁰⁸ *Id.*

whether Section 3(d) violates Article 14¹⁰⁹ of the Constitution of India.¹¹⁰

i. Jurisdiction

Although the Court rejected the argument, it is not surprising that Novartis relied on a case from the United Kingdom addressing the direct applicability of EU law within the United Kingdom. In *Equal Opportunities Commission v. Secretary of State for Employment*,¹¹¹ the British courts answered the question of whether claimants have standing to challenge United Kingdom laws that are incompatible with EU directives in a British court. The court answered the question in the affirmative by relying on Section 2 of the European Communities Act, 1972 which recognizes that EU treaties' rights are "without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly." The Madras Court held that the European Community Act "domesticated" EU laws as the domestic laws of England. By contrast, India did not domesticate TRIPS.¹¹² Additionally, the Court rejected jurisdiction because TRIPS is a contractual agreement between Member States and opined that the contracting parties decided that disputes shall be resolved by the DSB.¹¹³

Regarding the alternative argument, the Court held that declaratory relief should not be given where it would serve no useful purpose to Novartis because Novartis could not compel the Indian legislators to amend or enact a law even if the Court declares that section 3(d) is unconstitutional.¹¹⁴

ii. Compliance with TRIPS

After rejecting jurisdiction, the Madras Court did not examine section 3(d) compliance with TRIPS. However, the court recognized the flexibility of TRIPS to accommodate individual needs of the Member States.¹¹⁵

¹⁰⁹ INDIA CONST. art. 14. ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.")

¹¹⁰ *Novartis v. UOI (Madras H.C.)*, *supra* note 14, paras. 5, 6.

¹¹¹ *R v. Sec'y of State for Emp't*, [1994] UKHL 2, [1995] A.C. 1 (H.L.) (appeal taken from Eng.) available at <http://www.bailii.org/uk/cases/UKHL/1994/2.html>.

¹¹² *Novartis AG v. UOI (Madra H.C.)*, *supra* note 14, para. 6.

¹¹³ *Id.* para. 8.

¹¹⁴ *Id.* para. 9.

¹¹⁵ *Id.* para. 15.

iii. Constitutionality

The Madras Court also held that section 3(d) did not violate Article 14 of the Constitution of India and was not vague or arbitrary.¹¹⁶ The court acknowledged that section 3(d) contains undefined terms that were not defined in the Patent Act.¹¹⁷ However, it held that legislators use general language and leave discretion to administrative agencies to interpret the language based on the facts of each case.¹¹⁸

c. The Supreme Court Arguments

The India Supreme Court reviewed the appeal from the IPAB on the rejection of the Gleevec patent by the Patent Office.¹¹⁹ As mentioned above, prior to the signing of TRIPS, India did not allow for product patents.¹²⁰ The Court acknowledged India's obligation under TRIPS¹²¹ and heavily discussed some of the articles of the TRIPS Agreement.¹²²

The three relevant sections affected by the amendment are: section 2(1)(j), 2(1)(ja), and section 3(d) of the Patent Act, 1970.¹²³ Section 2(1)(j) requires a product to satisfy three conditions to qualify as invention.¹²⁴ The product must be: i) new, ii) involve an inventive step, and iii) capable of an industrial application.¹²⁵ Inventive step is defined in section 2(1)(ja) as a feature of an invention that involves technical advance and makes the invention *not obvious* to a person skilled in the art.¹²⁶

The Court held that Beta did not qualify as an invention. It held that patent was for a known substance and hence did not qualify as an "invention" in terms of Section 2(1)(j)¹²⁷ and Section 2(1)(ja)¹²⁸ of

¹¹⁶ *Id.* para. 19.

¹¹⁷ *Id.* para. 14.

¹¹⁸ *Id.*

¹¹⁹ *Novartis v. UOI (Ind.)*, *supra* note 14.

¹²⁰ *Novartis v. UOI (Madra H.C.)*, *supra* note 14, para. 24 ("[T]he Patent Act, 1970, had a provision in section 5 . . . that barred grant of patent to substance intended for use . . . as food or medicine or drug . . .").

¹²¹ *Novartis v. UOI (Ind.)*, *supra* note 14, para. 59.

¹²² *Id.*

¹²³ *Id.* para. 3.

¹²⁴ *Id.* para. 88.

¹²⁵ *Id.*

¹²⁶ *Id.* para. 89.

¹²⁷ Patent Act, 1970, *supra* note 93, § 2(1)(j) ("invention' means a new product or process involving an inventive step and capable of industrial application.").

¹²⁸ Patent Act, 1970, *supra* note 93, § 2(1)(ja) ("inventive step' means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.").

the Act.¹²⁹ The Court also held that section 3(d) bars the patentability of Beta.¹³⁰ It held that Beta is a new form of a known substance and thus fully implicates section 3(d).¹³¹ Further, it held the mere change of form with properties inherent to that form would not qualify as “enhancement of efficacy” of a known substance.¹³²

The Court also analyzed the amendments’ compliance with TRIPS. The appellees, Union of India, asserted that the Act is fully compliant with TRIPS.¹³³ They took the stand that TRIPS has sufficient flexibility in a manner to avoid an adverse impact on public health.¹³⁴ The Court agreed. It held that TRIPS allows Member States to take “public order”—such preventing the deprivation of affordable drugs to the poor—considerations in implementing its commitments.¹³⁵ It also held that in amending its legislation, India strove to balance its international treaty commitment and the promotion of public health.¹³⁶

d. Conclusion

All the arguments advanced in the *Novartis v. UOI* decisions show the special nature of TRIPS and its similarity to EU directives. The case shed light on the availability of private enforcement vehicles that individual could potentially raise against a signatory Member States. The enforcement mechanisms include constitutional challenges, declaratory judgments, and interpretation of domestic laws in light of an international treaty. Such mechanisms are what make TRIPS a flexible treaty for private enforcement.

C. Relying on the Principles of Direct Effect and State Liability to Establish a Mechanism of Enforcement

The Section below discusses the relevance of EU law to the proposal of this comment. It then provides background on the relevant EU jurisprudence and the Principles of Direct Effect and State Liability.

1. Why EU laws May Be Relevant to the Proposal

The abovementioned mechanisms do not provide full protection to private litigants in enforcing their TRIPS rights. All the challenges discussed above are related to existing laws in the national legal order.

¹²⁹ *Novartis v. UOI (Ind.)*, *supra* note 14, paras. 133, 162.

¹³⁰ *Id.* para. 191.

¹³¹ *Id.* para. 161.

¹³² *Id.* para. 181.

¹³³ *Id.* para. 65.

¹³⁴ *Novartis v. UOI (Ind.)*, *supra* note 14, para. 65.

¹³⁵ *Id.* para. 66.

¹³⁶ *Id.*

However, there exist situations where such mechanisms cannot help the private litigants. A gap in the protection would be apparent in two hypothetical circumstances. First, where the Member State fails to implement TRIPS as there would be no national law to challenge. Second, a national law implementing TRIPS could be constitutional on its face but contrary to TRIPS obligations. In these situations, the only recourse to the private litigants, apart from the normal DSU path, is perhaps the direct applicability of TRIPS. Consequently, the EU Principles of Direct Effect and State Liability become relevant to the proposal of this comment.

Direct applicability, however, is an extreme measure. In order to provide a safeguard to Member States against uncontrolled direct applicability, this option should be conditioned to circumstances where the Member State fails to honor its obligation or if the Member State is in clear breach of its TRIPS obligation. In order to achieve this objective, this comment learns from the EU Principles of Direct Effect and State Liability to provide private individual with recovery recourse while reserving direct applicability for cases of breach.

2. *The Relevant EU Jurisprudence and Laws*

After establishing the special nature of TRIPS, this comment proposes utilizing the principles of Direct Effect and State Liability to establish the mechanism of enforcement. Thus, before drawing analogies and exploring the WTO in light of the EU legal order, it is necessary to lay a foundational background on the relevant EU laws. The following section briefly details some relevant EU concepts necessary to the understanding of the Principle of Direct Effect and State Liability.

a. *Types of EU Legislations*

Prior to exploring the principles of Direct Effect and State Liability, it is necessary to examine the scope and types of EU legislations. The ability to invoke the right in a court of law depends on the type of the legislations. There are two types of legislations: (i) Primary and (ii) Secondary.

Primary Legislations are the founding EU Treaties: The Treaty on European Union¹³⁷ (“TEU”), Treaty on the Functioning of the Euro-

¹³⁷ Consolidated Version of the Treaty on European Union, Oct. 2012, 2012 O.J. (C 326) [hereinafter TEU].

pean Union¹³⁸ (“TEFU”), and the Charter of Fundamental Rights of the European Union.¹³⁹

Secondary Legislations are legislative acts by Union institutions and are listed in Article 288 TFEU.¹⁴⁰ They included regulations, directives, decisions, and recommendations. *Regulations* are generally applicable, binding in their entirety, and directly applicable in all Member States as soon as they enter into force, they must be complied with fully by those to whom they apply (private persons, Member States, Union Institutions), and they do not require implementing acts to be transported into national law.¹⁴¹ *Decisions* are binding in their entirety on those they are addressed to (Member States, natural or legal person).¹⁴² *Recommendations and Opinions* do not confer rights or obligation on those to whom they are addressed to.¹⁴³

Directives are binding as to the result to be achieved upon any Member States to whom they are addressed.¹⁴⁴ Just like TRIPS, national legislators must adopt a transporting act or implementing measure to transport directives and bring national law in line with the directives’ objectives.¹⁴⁵ Directives are the most relevant type of secondary legislations for the purpose of this comment and for the discussion of the Principle of Direct Effect discussed below.

b. *The Principle of Direct Effect*

i. *Generally*

The European law not only engenders obligations for Member States, but also rights for individuals.¹⁴⁶ Consequently, the Principle of Direct Effect was enshrined by the ECJ and it enables individuals to invoke EU law before national and EU courts, independent of whether national law exists.¹⁴⁷ Individuals may therefore take advantage of these rights and *directly invoke European acts* before national and European courts. Under the Principle of Direct Effect, an EU law will

¹³⁸ Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 10, 2012, 2012 O.J. (C 236) [hereinafter TFEU].

¹³⁹ Charter of Fundamental Human Rights of the European Union, Oct. 10, 2012, 2012 O.J. (C 326).

¹⁴⁰ TFEU, *supra* note 138, art. 288.

¹⁴¹ The European Parliament, *supra* note 16, at 2.

¹⁴² *Id.* at 3.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ European Union, *The Direct Effect of EU law*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114547_en.htm (last updated Sept. 22, 2010).

¹⁴⁷ *Id.*

prevails over national legislation.¹⁴⁸ For example, an EU law provision creates a directly applicable right which a national of a Member State could invoke in a national court.¹⁴⁹

ii. Aspects of Direct Effect

There are two aspects to the principle: a vertical aspect and horizontal aspect.¹⁵⁰ Vertical direct effect (“VDE”) concerns relationship between individuals and the State.¹⁵¹ It means that an individual could invoke an EU provision *against the State*.¹⁵² Horizontal direct effect (“HDE”) concerns relationships between private parties. It means that an individual could invoke an EU provision *against another individual*.¹⁵³

Depending on the type of EU act or legislation, the ECJ adopted either “full direct effect” that include horizontal direct effect and a vertical direct effect or “partial direct effect” which is confined to VDE.¹⁵⁴ However, this comment only analyzes VDE because it concerns enforcement of private rights against a State.

iii. The Direct Effect of EU Legislations

Primary legislations are directly effective¹⁵⁵ (vertical and horizontal) on the condition that they are precise, clear, unconditional and they require no additional measures.¹⁵⁶ *Regulations* always have direct effect.¹⁵⁷ *Decisions* may have direct effect when they are addressed to a Member State.¹⁵⁸

Directives differ from primary legislations and regulation in their direct effect. Because directives are addressed to Member States—as opposed to creating private rights—in principle, they are not directly applicable.¹⁵⁹ The ECJ, however, recognizes in case law

¹⁴⁸ *Id.*

¹⁴⁹ Van en Loose, C-26/62 Case 26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 3, ¶8. .

¹⁵⁰ European Union, *supra* note 146.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Case 26/62, Van Gend en Loos v. Administratie der Belastingen, 1963 E.C.R. 3, 13.

¹⁵⁶ See Joined Case C-46 & 48/93, Brasserie du Pêcheur v. Bundesrepublik Deutschland, The Queen v. Sec’y of State for Transp. *ex parte* Factortame Ltd., 1996 E.C.R. I-1029, ¶ X [hereinafter *Factortame*].

¹⁵⁷ TFEU, *supra* note 138, art. 288.

¹⁵⁸ European Union, *supra* note 146.

¹⁵⁹ *Id.* By contrast, directives do not impose horizontal direct effects. The ECJ recognized some exceptions for the HDE of directive in limited number of cases. This

the partial or vertical direct effect of directives in order to protect the rights of individuals against a Member State in the national courts of the Member State.

*Van Duyn*¹⁶⁰ is the case that primarily established the Principle of Direct Effect in the EU legal order. In *Van Duyn*, the plaintiff was a Dutch national who was offered a position as a secretary with the Church of Scientology in England.¹⁶¹ The English government refused the plaintiff's entry into the United Kingdom because England did not agree with the ideology of the Church.¹⁶² The plaintiff relied on a directive on the free movement of workers and claimed that her refusal of entry was unlawful. England has implemented the directive but did not adopt its exact wording.¹⁶³ The ECJ held that the directive confers on individuals rights which are enforceable by them in the national courts of a Member State and which national courts must protect.¹⁶⁴

iv. Conditions for the VDE of Directives

An individual can rely on a directive against any national provision which is incompatible with the directive or if the provisions of the directive define rights which individuals are able to assert against the Member State.¹⁶⁵ The conditions for the application of the Principle of Direct Effect are laid down in the *Marshall* decision.¹⁶⁶ The principle is applicable when: (1) The Member State failed to implement the directive or incorrectly implemented the directive,¹⁶⁷ (2) the deadline

means that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon against another private party. Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, para. 48. The jurisprudence of HDE will not be discussed in this comment. See generally C-106/89, *Marleasing v. La Comercial Internacional de Alimentacion*, 1990 E.C.R. I 4135.

¹⁶⁰ Case 41/74, *Van Duyn v. Home Office.*, 1974 E.C.R. 1337.

¹⁶¹ *Id.* at 1343.

¹⁶² *Id.* at 1340.

¹⁶³ See *id.*

¹⁶⁴ *Id.* at 1352.

¹⁶⁵ Case C-6/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, ¶11.

¹⁶⁶ Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723.

¹⁶⁷ *Marshall*, 1986 E.C.R. 723, para. 46. In *Marshall*, the appellant worked as dietitian for a public health institute was dismissed at the age of sixty-two. *Id.* paras. 3, 4. England legislations provide that state pension is to be granted to men from the age of 65 and for women at the age of 60. *Id.* para. 7. The appellant contended that her dismissal was based on sex discrimination, *Id.* para. 9., and infringed on principle of quality of treatment laid down by an EU directive. *Id.* para. 10. The Court held that an individual may rely on a directive where the State fails to implement the directive or incorrectly implement the directive, pro-

to implement the directive has expired,¹⁶⁸ or (3) the obligation in question is unconditional and sufficiently precise.¹⁶⁹ On the precision of the directive, factors to consider are the identity of the person entitled to the guarantee, the content of the minimum guarantee, and the identity of the person liable to provide the guarantee,¹⁷⁰ and (4) the State or an organ of the state is a party against which enforcement is claimed.¹⁷¹

c. *The Principle of State Liability*

i. *Generally*

The principle of State Liability takes the principle of direct effect a step further by compensating the plaintiff for damages in connection with a Member State's failure to honor its EU obligations. In

vided that the directive is unconditional, sufficiently precise, and the State is a party against which the enforcement is claimed. *Id.* para. 46. The Court also held that England law conflicted with the directive and the appellant may rely on the EU directive to set aside the national law. *Id.* Summary of Judgment para. 1.

¹⁶⁸ Case 148/78, *Ratti*, 1979 E.C.R. 1629, para. 43. In *Ratti*, the ECJ held that "it is only at the end of the prescribed period and in the event of the Member State's default. *Id.* at 1629.

¹⁶⁹ *Id.* para. 23.

¹⁷⁰ Joint Cases C-6 & 9/90, *Francovich & Bonifaci v. Italy* 1991 E.C.R. I-5357, para. 12. In *Francovich*, employees of companies that declared insolvencies sued their employer to recover compensation guaranteed by EU directive intended to guarantee employees a minimum level of protection under EU law in the event of the insolvency of their employer. *Id.* para. 3. The Member State, Italy, failed to implement the directive. *Id.* para. 4. The Member State, Italy, failed to implement the directive. The Court examined from the terms of the directives that the persons entitled to the guarantee were employees. *Id.* para. 13. The Court also examined the content of the directive and held that the directive provides that measures must be taken to ensure the payment of outstanding claims resulting from contract of employment. *Id.* para. 15. Finally with regards to the identity of the person liable to provide the guarantee, the ECJ quoted the directive and held that from its terms, the entity responsible of the guarantee is the Member State. *Id.* para. 25. With regard to the unconditional nature of the directive, the Court also held that even when the state has discretion in its options to provide compensation that the possibility of limiting the guarantee under the directive does not make it impossible to determine the minimum guarantee. *Id.* para. 20.

¹⁷¹ C-80/86, *Kolpinghuis Nijmegen*, 1987 E.C.R. 3969, ¶ 10 ("A national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place."). In *Marshall*, the plaintiff claimed that her rights were violated by a public health institute as opposed to the state itself. Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, para. 2. The ECJ held that directives do not impose obligation on private individuals but a person may rely on the directive against a State employer or public authority. *Id.* paras. 48, 51.

Marshall, the plaintiff was able to use the principle of direct effect to set national legislations that contradicted an EU directive.¹⁷² By contrast, in *Francovich*, the case that sets the jurisprudence to State Liability, the plaintiffs relied on the principle of state liability for damages compensation caused by state failure to comply with EU law.¹⁷³

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ii. State Liability Conditions Dependent on Type of Breach

The conditions under which liability gives the right to reparation depends on the nature of the breach of EU law.¹⁷⁴ There are four types of breaches recognized by the ECJ that gives the right of damages by the Member State.

1. Failure to Implement a Directive.

In *Francovich*,¹⁷⁵ the ECJ sets down the state liability jurisprudence for failure to implement a directive or the *Francovich* Principle. The ECJ held that “[a] national court must, in accordance with the national rules on liability, uphold the right of [individual] to obtain reparation of loss and damage caused to them as a result of failure to transport the directive.”¹⁷⁶ Technically, the failure to implement a directive is a breach of primary legislation, Article 189 of the Treaty, which requires a Member States to take all the necessary measures to achieve the result intended by the directive.¹⁷⁷

For failure to implement a directive, the ECJ established the condition for State Liability: (i) the directive must confer rights on individual,¹⁷⁸ (ii) “it should be possible identify the content of those rights on the basis of the provisions of the directive”,¹⁷⁹ and (iii) there must exist a causal link between the breach of the State’s obligation and damages suffered.¹⁸⁰

In *Francovich*, the ECJ upheld the liability of Italy to Italian employees where Italy failed to implement a directive intended to protect employees in case of employer insolvency. The Court held that the directive confers a right on employees because the directive “entails the grant to employees of a right to a guarantee of payment of their

¹⁷² *Marshall*, 1986 E.C.R. 723, ¶ 56

¹⁷³ Case C-6/90. *Francovich v. Italy*, 1991 E.C.R. I-5357, para. 28.

¹⁷⁴ *Id.* para 38.

¹⁷⁵ *Id.* para. 1.

¹⁷⁶ *Id.* para. 45.

¹⁷⁷ *Id.* para. 39.

¹⁷⁸ *Id.* para. 40.

¹⁷⁹ *Francovich*, 1991 E.C.R. I-5357, para. 40.

¹⁸⁰ *Id.*

unpaid wages claims.”¹⁸¹ The Court used its analysis in determining the direct effect of the directive to establish that the content of the rights could be determined on the basis for the provision of the directive.¹⁸² Finally, on causation, the Court held that it is in accordance with the national rules on liability and that national courts determine damages and causation.¹⁸³

2. National Legislation in Breach of a Treaty Provision.

In *Factortame*, the ECJ set down the state liability jurisprudence for national measures that are contrary to the fundamental EU treaty provisions.¹⁸⁴ The ECJ held in *Factortame* that primary EU provisions “have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.”¹⁸⁵

For national measures that are contrary to the EU, the ECJ established the condition for State Liability. First, the rule infringed must confer a right on the individual. Second, the breach must be sufficiently serious established by whether the MS manifestly and gravely disregarded the limits on its discretion.¹⁸⁶ The Court laid down the factors that must be assessed by the national courts,¹⁸⁷ in determining the seriousness of the breach.¹⁸⁸ The factors include: (i) the clarity and precision of the rule breached, (ii) the measure of discretion available to MS in complying with the primary legislation provision, (iii) whether the infringement was intentional and voluntarily, and (iv) whether the error of law was excusable or inexcusable.¹⁸⁹ Third, there must be a direct causal link between the breach of the EU law and the damages suffered.¹⁹⁰

¹⁸¹ *Id.* para. 43.

¹⁸² *Id.* para. 44.

¹⁸³ *Id.* para. 45.

¹⁸⁴ *Factortame*, *supra* note 156.

¹⁸⁵ *Id.* para. 23.

¹⁸⁶ *Id.* para. 55.

¹⁸⁷ *Id.* para. 58.

¹⁸⁸ *Id.* para. 56.

¹⁸⁹ *Id.*

¹⁹⁰ *Factortame*, *supra* note 156, para. 51. In *Factortame*, French beer manufacturers brought action against Germany for losses suffered when Germany imposed marketing restrictions on French beer. The manufacturer alleged that the restriction was incompatible with Article 30 TFEU, which prohibits marketing restriction on lawfully manufactured products by different MS state. *Id.* para. 4. The Court opined that in the absence of harmonization, i.e. no directives or regulations, the national legislature has wide discretion in laying down rules that achieve the objective of the primary EU law, i.e. the EU treaty provisions. *Id.* para. 23. On the

3. *Incorrect Implementation of EU Directive.*

The case of *Ex Parte British Telecom* involved the incorrect implementation of a directive. The court applied the State liability principle subject to *Factortame*¹⁹¹ conditions.¹⁹²

4. *Decision of an Administrative Authority.*

In *Hedley-Lomas*, the ECJ held that the decision of an administrative authority that is not compliant with a directive constituted a breach of a primary legislation.¹⁹³ Because the infringement is a breach of a primary legislation, the court applied the condition of state liability under *Factortame*.¹⁹⁴ The Court held that the Member State has an obligation to compensate the claimant for damages caused by a refusal to issue an export license.¹⁹⁵

first element, the Court held that the marketing restriction was prohibited by Article 30. *Id.* para. 54. Additionally, it held that the provision not only imposed restriction on MS, it also confers rights on individuals. *Id.* On the second element, the Court left the determination to national courts; however, it commented that it would be difficult to consider the marketing prohibition on beer as excusable error. *Id.* para. 59. On the third, element the Court left it for national courts to determine causation and damages under national law. *Id.* para. 65.

¹⁹¹ See supra note 184 and accompanying text.

¹⁹² C-393/93, *The Queen v. H. M. Treasury ex parte British Telecomm. Plc*, 1993 E.C.R. I-1656, paras. 39, 40. In *Ex Parte British Telecom* British company initiated a proceeding against the government of the United Kingdom for annulling a national legislation implementing an EU directive. *Id.* para. 2. The Court held that the U.K. national legislations went beyond the scope of the directive and implemented the directive incorrectly. *Id.* para. 29. The Court, however, held that the breach in this case is not sufficiently serious, and hence the Member State was not required to compensate the claimant. *Id.* para. 45.

¹⁹³ Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland) Ltd.*, 1996 E.C.R. I-2553, para. 17.

¹⁹⁴ *Id.* para. 26.

¹⁹⁵ *Id.* para. 27. In *Hedley*, the claimant, an Irish company, initiated a proceeding when the Ministry of Agriculture, Fisheries and Good for England and Wales refused to issue the plaintiff a license for export of live sheep to Spain. *Id.* para. 17. The administrative authority refused the license on the ground that Spain's slaughterhouses treatment of animals was contrary to an EU directive. *Id.* paras. 2, 3. Spain has implemented the directive into its national law and after complaints from the U.K and negotiation with the EU Commission; Spain strengthened its compliance with the directive. *Id.* paras. 6, 8. The Court held that the decision of an administrative authority was is non-compliant with the directive constitute a quantitative restriction on export, contrary to the primary legislation, Article 34 of the Treaty. *Id.* para. 17.

5. *Post Facto* Cases

Several modern cases expanded the Principle of State Liability including liability of public bodies. In *Haim*, the Court held that “[c]ommunity law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law.”¹⁹⁶ The Court opined that where conditions for state liability are met, the Member State must compensate private individuals for breach of Community law by a public-law body.¹⁹⁷

PART III: APPLY EU LAW PRINCIPLES TO *NOVARTIS v. UOI*

The *Novartis v. UOI* case provides an excellent fact pattern to apply the Principles of Direct Effect and State Liability to enforce the rights of private individuals against a Member State in breach of its WTO obligations.

A. *Options Available for Novartis*

In applying the principle of EU law, *Novartis* would have two options.

First, *Novartis* could rely on the Principle of Direct Effect to set aside section 3(d) of the Patent Act 1970 that bars its patent application. Second, *Novartis* could also rely on the Principle of State Liability and require compensation for damages resulting from the Patent Office decision that rejected the Beta patent. In relying on the principle of State Liability, *Novartis* would assert that the breach is due to either (i) failure of the state to implement TRIPS correctly or (ii) the Patent Office, which is a public office, infringed its rights granted by the Patent (Amendment) Act, 2005, implementing the TRIPS agreement into the Indian legal order.

For the sake of brevity, this comment only considers the *Novartis v. UOI* case in light of the Principle of Direct Effect.

B. *Applying the Principle of Direct Effect to the Novartis v. UOI Fact Pattern*

In paralleling the EU procedure and applying the principle of Direct Effect discussed above to the *Novartis v. UOI* case, the Member State would be India, the directive-like law is the TRIPS agreement,

¹⁹⁶ C-429/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, 2000 E.C.R. I-5168.

¹⁹⁷ *Id.* paras. 31-33. The claimant in *Haim* was a dental practitioner who raised a proceeding against Member State public body in order to obtain compensation for financial losses by breach of EU law by the public body. *Id.* para. 2

the national law is the India's Patent Act, 1970 as amended by Patent Amendment of 2005, and the private litigant would Novartis. Novartis would also claim the direct effect of TRIPS to set aside national Indian law that is contrary to TRIPS. The requirements of EU Direct Effect in light of the TRIPS agreements are as follow:

1. *The Member State, India, failed to implement TRIPS or incorrectly implemented TRIPS.*¹⁹⁸ India did not fail to implement the TRIPS agreement¹⁹⁹ but Novartis could claim that India failed to implement the directive correctly. Just like *Marshall*,²⁰⁰ Novartis could claim that Indian national law conflicted with TRIPS and the appellant may rely on TRIPS directly to set aside the national law.
2. *The deadline to implement TRIPS has expired.*²⁰¹ This element is satisfied because in *Novartis v. UOI* the patent was rejected in 2006 after the implementation of TRIPS into the Indian legal order in 2005.
3. *The obligation in question is unconditional and sufficiently precise.*²⁰² Certainly this would probably be the most contested element. On the precision of the directive, the ECJ in *Francovich* considered the terms of the agreement and considered factors such as the identity of the person entitled to the guarantee, the content of the minimum guarantee, and the identity of the person liable to provide the guarantee.²⁰³ With regard to the person entitled to the guarantee in TRIPS, the agreement states that “[m]embers shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.”²⁰⁴ The terms of the agreement specifically state that the people entitled to the guarantee are the holders of the rights.²⁰⁵ Additionally, the content of the minimum guarantee is all intellectual property covered by the agreement. Finally, the party responsible to provide the guarantee are the Member State. By

¹⁹⁸ Case 152/84, *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, para. 46.

¹⁹⁹ *Novartis v. UOI* (Ind.), *supra* note 14, para. 59.

²⁰⁰ *See supra* note 167 and accompanying text.

²⁰¹ Case 148/78, *Criminal Proceeding Against Tullio Ratti.*, 1979 E.C.R. 1629, para. 43.

²⁰² *Id.* para 23.

²⁰³ S Joint Cases C-6 & 9/90, *Francovich & Bonifaci v. Italy* 1991 E.C.R. I-5357, para. 12

²⁰⁴ TRIPS, *supra* note 9, art. 40.

²⁰⁵ *See, e.g., Id* art. 3 (“Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals . . .”).

contrast this element is undermined by provisions in TRIPS that give the Member State discretion in implementing the TRIPS obligation to take into consideration measures that “promote the public interest in sectors of vital importance to their socio-economic.”²⁰⁶

4. *The State or an organ of the state is a party against which enforcement is claimed.*²⁰⁷

Novartis would initiate the action against the Controller of Patents.²⁰⁸ Just like *Marshall* where the plaintiff relied on the directive against a public health employer, Novartis may rely on TRIPS against India’s Patent Office.

CONCLUSION

This comment proposes a mechanism for private enforcement of TRIPS against signatory Member States of the WTO. The proposal is feasible because of the special nature of the TRIPS agreement. The agreement requires Member States to promulgate national laws that provide minimum protection for intellectual property rights. Unlike its sister agreements, GAAT and GATS, the TRIPS requirement of national implementation renders it more flexible for private enforcement. This is because a private individual could challenge the national laws implementing TRIPS as opposed to relying directly on TRIPS. Nevertheless, even if the Member State does not promulgate national laws, the proposal suggests that private enforcement is still possible. This is because the requirement of national implementation of an international agreement makes TRIPS very similar in nature to EU directives (and, in certain cases, treaties). EU directives are binding on their result but give Member States freedom in their local implementation. Hence, it is possible to rely on the EU jurisprudence to provide complete protection for individuals under the TRIPS agreement.

Under EU laws, a private citizen can enforce a directive or an EU treaty against a Member State that fails to honor its EU obligation. Private enforcement procedures are based on the Principles of Direct Effect and State Liability under the EU jurisprudence. The proposal in this comment parallels these procedures to propose a potential mechanism where private citizens can enforce TRIPS against Member States of the WTO.

²⁰⁶ *Id.* art. 8.1.; *see, e.g.*, *Novartis v. UOI*, *supra* note 14, para. 65.

²⁰⁷ Criminal Proceeding Against Kolpinghuis Nijmegen BV, C-80/86, 1987 E.C.R. 3982, ¶10 (“A national authority may not rely, as against an individual, upon a provision of a directive whose necessary implementation in national law has not yet taken place.”).

²⁰⁸ *See supra* note 105 and accompanying text.

An emerging trend towards private enforcement of TRIPS is noticeable internationally. The *Novartis* case shows the shift towards the direct effect of WTO laws within a Member State's national order. In this case, the claimant challenged India's national laws that implemented TRIPS on a constitutional basis. Additionally, they challenged India's compliance with its international obligations. In rendering its decision, the courts of India relied directly on TRIPS to analyze the adopted national legislation. The Madras High Court decided that India's Patent Act, 1970 was constitutional. The Supreme Court of India decided that the act was fully compliant with TRIPS. This significance of the *Novartis* case is actually how the claim gained access to the courts of India in the first place. The outcome of the case is probably a secondary issue to the proposal of this comment. Nevertheless, the outcome of the case could be significant if India's national law clearly infringes the Member State's obligation under TRIPS or if the DSU panels encounter a similar case and decides that product improvement patents are protected under TRIPS.

