VOLUME 41 SPRING 2014 NO. 2

SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

SYRACUSE UNIVERSITY COLLEGE OF LAW

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Cite as: 41 SYRACUSE J. INT'L L. & COM.

ISSN 0093-0709

The *Syracuse Journal of International Law and Commerce* is owned, published and printed bi-annually by Syracuse University, Syracuse, New York 13244-1030, U.S.A. The *Journal* is one of the oldest student-produced international law journals in the United States and celebrated forty years of student-production in the Spring of 2013. Editorial and business offices are located at: Syracuse University College of Law, MacNaughton Hall, Suite No. 410, Syracuse, New York 13244-1030 U.S.A.

The *Syracuse Journal of International Law and Commerce* actively seeks and accepts article submissions from scholars and practitioners in the field of public and private international law. The *Journal*, on occasion, holds international law symposia and publishes the papers presented therein in addition to its bi-annual volume of submissions.

Issue subscription rates, payable in advance, are: United States, $25.00; foreign, $30.00. Subscriptions are automatically renewed unless a request for discontinuance is received. Back issues may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, N.Y. 14068. To ensure prompt delivery, notification should be received one month in advance.

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"SOFTNESS" IN INTERNATIONAL INSTRUMENTS— THE CASE OF TRANSNATIONAL CORPORATIONS

Harri Kalimo & Tim Staal†

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I. INTRODUCTION

A. Prelude: Chevron Case and the Challenge of Governing Transnational Corporations Through "Soft Law"

After 18 years of litigation, on February 14, 2011 an Ecuadorian judge ordered the oil conglomerate Chevron to pay 18 billion dollars in damages, "the largest judgment ever awarded in an environmental lawsuit,"[1] in the oil contamination case *Afectados* ('the Affected') *v.*

1. *See* Patrick R. Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012),

Chevron.[2] The judgment was affirmed on appeal a year later,[3] yet the case is far from over. The liable parties remain to be called to account and the environmental damage is still to be remedied. Chevron no longer has considerable assets in Ecuador,[4] it has lodged an appeal with the Ecuadorian Supreme Court, and an UNCITRAL arbitration before the Permanent Court of Arbitration (PCA) in The Hague has witnessed a number of interim awards in favor of Chevron.[5] In the media the case has been described as a local plaintiffs' apparently fruitless legal struggle in a society with a corrupt judiciary and political and economic dependence on foreign oil companies.[6]

The *Chevron* case evidences the difficulties in properly governing transnational corporations (TNCs), sometimes even to prevent the most egregious of abuses. Multiple international and domestic laws may be applicable, but that often seems detrimental rather than helpful. Weaknesses in the content, implementation and enforcement of laws may allow the politically and economically powerful parties to dominate the situation. Thus, in cases such as *Chevron,* alternative means of governance are desperately needed to address the failures of classic international and domestic law in protecting the environment and human rights. "Soft law" is then often hailed as the remedy. Chevron, for example, is indeed an active participant in several voluntary initiatives and schemes, such as the Social Responsibility Group of the International Petroleum Industry Environmental Conservation Association (IPIECA).[7] Chevron was also one of the companies consulted during the drafting of UN Special Representative John

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available at http://www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe (last visited Mar. 26, 2014).

2. Aguinda y Otros v. Chevron Corp., (2011) Trial No. 2003-0002, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf (last visited Mar. 26, 2014).

3. Aguinda y Otros v. Chevron Corp., (2012) Case No. 2011-0106, Provincial Court of Justice of Sucumbios (Ecuador), *available at* http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf (last visited Mar. 26, 2014).

4. *See* Patrick R. Keefe, *Why Chevron will Settle in Ecuador*, THE NEW YORKER (Jan. 4, 2012), *available at* http://www.newyorker.com/online/blogs/newsdesk/2012/01/why-chevron-will-settle-in-ecuador.html (last visited Mar. 26, 2014).

5. Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), 2009-23 (Perm. Ct. Arb. 2013) ("Fourth Interim Award on Interim Measures"); Chevron Corp. & Texaco Petroleum Corp. v. Republic of Ecuador (U.S. v. Ecuador), 2009-23 (Perm. Ct. Arb. 2012) ("Third Interim Award on Jurisdiction and Admissibility").

6. *Reversal of Fortune*, *supra* note 1, at 2.

7. *See* International Petroleum Industry Environmental Conservation Association (IPIECA), *available at* http://www.ipieca.org/ (last visited Feb. 3, 2014).

Ruggie's UN Guiding Principles on Business and Human Rights.[8]

Proposing "soft law" as the solution in more effectively governing transnational giants such as Chevron leads, however, to a fundamental conundrum: it remains quite unclear what the notion of "soft law" entails, and why and how it could be able to provide an adequate policy response. The objective of this paper therefore is to clarify the discussion through a detailed theoretical analysis of "soft law", and to test the findings in the practically pivotal area of the environmental and human rights conduct of TNCs.

B. The Thesis and the Objectives

This paper claims, using the fields of environmental protection and human rights as examples, that *"soft law" is conceptually and substantively inadequate and misleading in filling the voids left by classic "hard law" in governing TNCs. A reconceptualization of, and a more systematic approach to, soft instruments is required if they are to play a constructive part in filling the void.*

The paper proceeds in five steps to prove its thesis and to propose remedies to the identified shortcomings. The first objective is to show that what has been called classic "hard law" – state laws and the formal sources of international law – seems to fail in adequately governing transnational corporations (TNCs). Second, the paper explains why other, "soft law" instruments are believed to address the void, but reveals as the third step that the current way of understanding such other, "soft law" instruments is inadequate and too general for assessing the successes or failures of such a very diverse group of instruments. The paper therefore seeks as its fourth objective to create and assess better methods for approaching the void, and proposes to that account a tool that re-conceptualizes and systemizes the soft law discourse. Fifth, preliminary tests of such a new tool are conducted by applying it to practical case studies of TNC behavior in the fields of environmental and human rights protection. The paper concludes by showing how the notion of "soft law" is not only obscure and inadequate, as has been previously contended by other scholars, but that it also is conceptually deceptive in ways that risk leading towards ineffective policy instruments. "Softness" on the other hand does seem instructive for better understanding and reacting to the challenges of managing transnational corporations.

8. Obviously, the "soft law" instruments cited here date from after the relevant facts of the *Chevron* case.

II. THE CHALLENGE OF GOVERNING TRANSNATIONAL CORPORATIONS (TNCS)

A. Business Across the Borders

The first objective of this paper is to show how classic "hard law" seems to fail in adequately governing transnational corporations (TNCs). The UN's Special Representative on business and human rights has stated that TNCs come in many varieties on a scale from little to almost complete reliance on transnational activities.[9] The qualification of a company as a TNC is thus not based on its legal personality; corporations of various legal forms can be included in the category of TNCs. More important than an undisputable definition of a TNC is, however, that there are important factual and regulatory problems that arise as a consequence of corporations pursuing activities in multiple jurisdictions. Globalization of the marketplace has driven companies to operate across borders. Many companies have become TNCs, and many TNCs have become global actors. This is no longer limited to developed country based businesses; numerous TNCs are Asian or South American companies. With the emergence of multiple trade areas (such as ASEAN in South-East Asia or the Andean Community in Latin-America) the TNC has truly 'gone global.'

B. The Sanctuary of Multiple Jurisdictions

The activities of TNCs are spread among the territories of many so-called *host* states. In the majority of cases, and often due to requirements in domestic laws, they are nonetheless *based* in a single *home* state. In contrast to domestically operating businesses, however, they do not fall under the complete control of a single jurisdiction, not even that of their home state. They are partially subject to the *domestic* legal systems of their home state and of all the host states in which parts of their fragmented, networked activities take place or have effects.

Domestic laws are to an increasing extent harmonized by international law, such as customary law and conventions. On many issues, however, domestic legal systems still vary considerably, in particular in the implementation and enforcement of law. This variance may create a void: activities in a particular jurisdiction risk escaping the (legal) consequences that would and should have followed. A hazardous part of waste treatment activities may be located in a country

9. *See* Rep. of the Special Representative of the Secretary General of the U.N. Human Rights Council, 8th Sess., *Protect, Respect and Remedy*, ¶¶ 6-7, 15, U.N. Doc. A/HRC/8/5 (2008) (by John G. Ruggie).

where such activities are not subject to (stringent) standards, for example, or labor-intensive work in the textile sector is set up in a country where labor laws permit longer working hours, or the part of operations that is subject to high taxes in the company's *de facto* home state is formally relocated to a tax haven.

Innovative judges may find ways around the issue of multiple jurisdictions with different substantive standards. In some of the recent judgments from the lower court and the court of appeals in the *Chevron* case, for example, the judges were not held back by the fact that neither environmental standards nor legal protection of the areas belonging to indigenous people existed in Ecuador at the time of the tort. Yet the judges reasoned that it was enough that "the existence of damages has been verified," combined with "the right to obtain compensation for damages suffered in its various forms, which was recognized by the Civil Code well before the start of Texpet [Texaco, predecessor of Chevron] activities in the Amazon."[10] Thus, a specific prohibition of an environmental harm was not deemed necessary to establish a tort. In various Western jurisdictions, arguments are being forwarded that the home state standards should apply to 'their' TNCs' activities in the host states as well.[11]

C. *Resistance Towards the Implementation and Reform of Domestic Law and International Law*

The opportunities of globalization have made many transnationally operating companies extremely wealthy, superseding in economic terms many nation states. The largest TNCs have become especially influential economic and political players, both in the various domestic jurisdictions where they operate, as well as on the global level. For example, many developing countries rely on TNCs to use their resources. The TNCs may thereby have a clear advantage over local actors in influencing the creation or implementation of law by domestic authorities, although this will vary case by case. Unlike local companies, TNCs can often rather easily shift their activities from one country to another, should a local government advocate for instance to

10. *Aguinda*, Case No. 2011-0106 at para. 9 (further arguing by the Appeals Court found "the fact that there is no express mention of environmental damages in references to contingent damages in the Civil Code does not mean that environmental damages cannot be contingent damages, nor does it mean that the legislature wished to exclude the possibility that environmental damages could be considered to be contingent damages.").

11. *See* Jonathan Verschuuren, *Overcoming the Limitations of Environmental Law in a Globalised World* (Tilburg Univ. Legal Studies Working Paper Series, Paper No. 20, 2010), *available at* http://dx.doi.org/10.2139/ssrn.1582857 (last visited Mar. 26, 2014).

more stringently enforce costly environmental standards. TNCs are also often backed by Bilateral Investment Treaties (BITs), concluded between their home state and their host state. The BITs may allow the TNCs to threaten to sue the host state for expropriation, should the enforcement of laws risk harming the company economically. Such a BIT is also the basis for Chevron's claim before the PCA in the *Chevron* case.[12]

TNCs—especially when acting together through sectorial global business associations or high-profile events such as the World Economic Forum in Davos[13] — are also a powerful force influencing the decisions made in international organizations and diplomatic negotiations. The scope of the TNCs' organizations gives them a global overview and a strategic grip of the policy discourse that particularly the developing states may struggle to match. This power may allow the TNCs to create or sustain a void on the global level, which moves or keeps parts of the corporations' operations beyond the reach of the domestic and international legal orders.

D. Domestic Law and the Legal Void in Regulating TNCs – Host State and Home State Dimensions

The ability of the TNCs to escape full regulatory control and to exert political pressure on decision makers clearly creates the risk of a legal void.[14] This paper defines a legal void as *a regulatory situation in which a TNC behavior, permitted in a host state, would have been in violation of the laws of the TNC home state or of international law*. The legal void may be viewed as part of a (wider) policy void, whereby the public policy objective on the particular question is not reached.

The legal void reveals itself in a slightly different fashion in the home states (where the company is incorporated) than in the host states (where the TNCs operate). As De Feyter submits, "developing and transition countries [i.e. often the '*host states*'] compete to attract

12. Ecuador Bilateral Investment Treaty, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15.

13. The publicly visible tip of the proverbial iceberg of this political influence occurred at the yearly World Economic Forum in Davos, Switzerland. *See* Ellen Payne, *The Road to the Global Compact: Corporate Power And The Battle Over Global Public Policy at The United Nations*, GLOBAL POL'Y FORUM (Oct. 2000), *available at* http://www.globalpolicy.org/images/pdfs/GPF_The_road_to_the_global_compact_October_2000.pdf (last visited Mar. 23, 2014). Incidentally, the 1999 Forum was also one of the earliest occasions where the UN Global Compact was formally and informally discussed. *Id.*

14. The UN Guiding Principles on Business and Human Rights speak of "governance gaps created by globalization." *See* Ruggie, *supra* note 9, at 3.

foreign investment and technology to exploit natural resources, and are often reluctant to impose human rights and other conditions on foreign companies."[15] In the case of developing country host states, there thus may be a system of laws that is applicable—the problem is that it either sets very low standards (in which case the legal void is qualitative) or it does not properly apply the higher standards (in which case the legal void is one of enforcement).

On the other hand, De Feyter continues, "[t]he *home state* is faced with the difficulty that, in principle, the reach of domestic law is limited to its own territory."[16] To overcome the limits of home country jurisdiction, some states exceptionally recognize universal or extra-territorial civil jurisdiction over torts outside their territory.[17] However, the potential of such extra-territorial jurisdiction is for various reasons quite limited.[18] Suffice it to say here that international law allows extra-territorial (or universal) jurisdiction only for a few crimes under international customary law. These offenses may be enforced by any state(s) regardless of their ties with the offense.[19]

Another possibility to overcome the home state problem is the active nationality principle, which allows a state to exercise prescriptive and adjudicative jurisdiction over its nationals for offenses they commit abroad. In practice, however, states are not likely to use this option more than sparsely, and have done so in the past only for a limited number of crimes. An important reason for this is that it conflicts with competing jurisdictional claims of other states, primarily the territoriality principle. Another reason is that international law does not allow states to enforce such jurisdiction abroad, for example to collect evidence or to make arrests.

E. International Law and the Legal Void in Regulating TNCs

If there is a void in domestic law regulating TNC activities, one might assume that *international* law could better succeed in addressing this distinct group of actors. Surely international law, which can

15. Koen De Feyter, *Globalisation and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN A GLOBAL CONTEXT 68, 81-82 (Felipe Gómez Isa & Koen de Feiter eds., 2009).

16. *Id.* at 82 (emphasis added).

17. *See* United States' Alien Tort Statute, 28 U.S.C. § 1350 (2011).

18. *See also* Donald F. Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142-63 (2006).

19. Universal civil jurisdiction of U.S. courts remains nonetheless a tool of at least some usefulness for the most gruesome abuses that remain unprosecuted in the states where they occur.

potentially contain universal or near-universal rules,[20] could help in filling the void left by domestic law. In addition, it could be argued that the international legal order is positioned 'close' to the transnational sphere, where TNCs themselves operate.

There are four ways in which international *human rights* law may apply or be applied to TNCs:[21] (1) it can be applied directly, (2) almost directly, (3) transposed into national law or (4) applied indirectly. In international *environmental* law, the picture is somewhat different, because directly and almost directly applicable international law is practically non-existent. The application of most international law to individuals depends on transposition or indirect application. Particularly those two means of application do not overcome a number of obstacles to effectively regulating TNCs through international law. As noted earlier, the matter is elaborated here through the examples of international environmental and human rights law.

1. Lack of International Law (Almost) Directly and Specifically Applicable to TNCs

In contrast to states and intergovernmental organizations, TNCs are generally not considered subjects of international law, and are as such not directly bound by most of it.[22] TNCs entertain only certain rights and have a limited set of obligations[23] on the basis on international law directly. These rights and obligations are similar to those directly applicable to all private actors.[24] Direct applicability of international law entails that both national judicial organs of home, host and potentially other states, as well as international tribunals, enforce the international law obligations directly, even without such provisions being transposed into national law.[25] The direct applicability of international law to the conduct[26] of TNCs as private actors is limited to a few international human rights related crimes, such as genocide and

20. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

21. This section uses the taxonomy suggested by J. Knox. J. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1 (2008).

22. P.A. NOLLKAEMPER, KERN VAN HET INTERNATIONAL PUBLIEKRECHT 58-59 (5th ed. 2011). For human rights specifically *see* e.g. R. McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385 (2009).

23. If a legal provision requires an action or inaction from an actor, it is a legal obligation.

24. *See* Knox, *supra* note 21, at 2 (speaking generally of *private duties*).

25. The question of extraterritoriality arises in the context of applying it in home states, however. *See infra* Section 2.5.2.

26. The present paper does not focus on the *rights* of TNCs.

crimes against humanity, based on customary international law.[27] As mentioned above, universal jurisdiction to enforce such obligations is the least controversial.

There is another set of obligations that, in Knox's terminology, is applied "almost directly" to private actors. These obligations are not directly applicable, but they specifically instruct states—including dualist states—how to place requirements on private actors and how to enforce them through domestic laws. The transposition of such provisions is thus strictly predetermined.[28] The Convention Against Torture[29] as well as the Convention on Child Labor[30] contain examples of such "almost directly applicable international law." However, the limited number of these kinds of provisions leave many parts of the legal void uncovered. Another reason for the void is that the provisions do not tend to address the behavior of TNCs specifically.[31]

As far as the international obligations that are placed "almost directly" upon the individuals are specific, they *de facto* create quasi-universal domestic criminal law. In other words, the global application is decentralized, so that the direct applicability, and almost direct applicability, approaches can make good use of domestic courts' enforcement capacities, which are far superior to those of international judicial institutions. Political will permitting, this seems the most promising international law track to pursue in governing TNCs. It could in theory combine a universal and precise prescription of

27. In the words of the human rights scholar John Knox, "virtually all of these duties are found in international criminal law. The paradigmatic example is the Genocide Convention, which states that 'genocide . . . is a crime under international law' that the parties 'undertake to prevent and to punish,' through both domestic tribunals and 'such international penal tribunal as may have jurisdiction.'" Knox, *supra* note 21, at 28. These provisions are not only directly targeted at, but also internationally enforced upon individual parties, including TNCs. *Id.* Direct applicability to companies is sometimes seen to be contrary to the basic *consensual* premise of international law. *Id.* How can TNCs have obligations on the basis of international law to which they have not consented?

28. *Id.* at 28-29. The obligations concern duties such as the prohibitions on slavery (Supplementary Convention on the Abolition of Slavery the Slave Trade, and Institutions and Practices Similar to Slavery, April 30, 1956) and torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984). The states parties to these conventions are obliged to make slavery and torture criminal offences under their domestic laws, and to enforce them upon private parties. *Id.*

29. Knox, *supra* note 21, at 28-29

30. Worst Forms of Child Labour Convention, June 17, 1999, 87 I.L.C. 182.

31. An example of the latter is arguably the International Convention on Civil Liability for Oil Pollution Damage ('CLC'), *1992 International Convention on Civil Liability for Oil Pollution Damage (Cosilidated Text of the 1969 Convention, Incorporating the Amendments of 1976, 1992, and 2000)*, November 29, 1969, INT'L MARITIME ORG., *available at* http://www.iopcfund.org/npdf/Conventions%20English.pdf (last visited Mar. 25, 2014).

obligations specifically for transnational commercial activities with the high enforcement capacities of domestic authorities. A contracting state would not fulfill its own international obligations, should it not enforce the provisions against TNCs under its jurisdiction.

2. *Poor Domestic Implementation and Enforcement of International Law – Back to Square One?*

The third and fourth types of international law that deal with the internal policies of developed western states, including international human rights law and international environmental law, are not directly applicable to TNCs.[32] International treaty provisions need to be properly transposed into the domestic legal system in order to create the intended legal effect on the TNCs. The states often retain a large measure of freedom in this respect. For example, many environmental treaty provisions, such as the provisions in the Montreal Protocol on the downscaling of the production of ozone depleting substances, must be first transposed into domestic law and then properly implemented if a state is to meet its obligations under the treaty. The treaty will in this way become binding, not only on the state in question, but also in the form of national law on those operating a production facility of ozone depleting substances within the jurisdictions.

The obligation to incorporate and enforce the international norm rests on the states and it is left to the state in question to decide exactly how it will incorporate and enforce the international law provisions. This is problematic if the content of the international norm is too vague to establish clearly whether a state has failed to discharge its duties or not. This is often the case in international human rights law and international environmental law.

Finally, international law may also be indirectly applicable on TNCs. Indirect applicability means that the (existing) laws of the domestic legal system are construed, i.e. interpreted in a manner that is as much in conformity with international law as possible.[33] Most of the international human rights law and international environmental law can be considered indirectly applicable.[34]

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32. On indirect applicability, see *infra* note 33.

33. André Nollkaemper & Gerrit Betlem, *Giving Effect to Public International Law and European Community Law Before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT'L L. 569 (2003).

34. The two general international human rights conventions—the International Covenant on Civil and Political Rights, December 16, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, December 16, 1966 (ICESCR)—are prominent examples of such international law obligations that apply indirectly to TNCs. The

For example, state parties must take the above noted provisions of the Montreal Protocol on the down-scaling of the production of ozone depleting substances duly into consideration in interpreting their relevant domestic norms, to be consistent with their obligations under the treaty. The interpretation will affect also the TNCs operating within the jurisdiction.

There is certain hierarchy in the way that domestic courts rely on direct and indirect applicability of international law. In striving to achieve conformity with the international norm, the courts give priority to consistent interpretation, i.e. indirect applicability. Only if the domestic law is so inconsistent with international law that it is not reconcilable by favorably interpreting domestic law, will the courts rely on international law directly.[35] Indirect applicability of international law is thus the primary means of trying to fill in the gaps of domestic law on TNCs.

However, the value added of all the not-directly-applicable provisions of international law in diminishing the void left by domestic law is often quite limited. The very same "host state problem" that was explained for law of purely domestic origin resurfaces, unsurprisingly, in the transposition, implementation and interpretation of international obligations in domestic law.[36] The broad and generic language of international agreements often leaves states ample room for discretion in incorporating international law into domestic legislation, and even more in enforcing it. The TNCs are able to exert their clout as with any other domestic law. The *in*direct application of interpreting international law by courts would be in a better position, should the courts be more resilient to (external political) pressure than the legislature. This is not necessarily the case in practice, however. Yet even where free from external pressures, the fragmented, transboundary nature of TNC activities may in the end preclude any nation state—or multiple states—from effectively enforcing an international obligation.[37]

The international law obligations are thus rarely globally *directly* and specifically *applicable* to TNCs. The policy void of TNCs cannot

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same goes for international obligations on states in the realm of environmental protection: they have ultimately some impact upon the legality of natural and legal persons' behavior. This is true for both monist and dualist states.

35. R.H. LAUWAARS & C.W.A. TIMMERMANS, EUROPEES GEMEENSCHAPSRECHT IN KORT BESTEK 100 (4th ed. 1997); *see also* Nollkaemper & Betlem, *supra* note 33, at 569.

36. Questions relating to the monistic versus dualistic systems in transposing international law are left aside here.

37. De Feyter, *supra* note 15, at 81-82.

be fully and effectively addressed through present international law.

3. *Nigerian Farmers v. Shell – the Absence of International Law in 'Home State' Cases*

The *Nigerian Farmers v. Shell* case is a good example of how international law is still absent in 'home state' court cases that involve 'home state' TNCs. In that case, four inhabitants of Oruma (Nigeria) sued Shell and its subsidiary companies before a civil court in the Netherlands, *i.e.* the 'home state' of Shell.[38] The case concerned an oil leakage from a Shell pipeline that had, according to the plaintiffs, caused damage to the local environment and to the incomes of fishermen and farmers. The domestic court in The Hague[39] decided that according to Dutch conflict of laws rules on tort cases, it had to apply Nigerian law to the dispute. Indeed, the case is a classic attestation of the home state problem, where only the below-par developing country standards are applied to TNCs.

Having decided that Nigerian law was applicable, the Dutch court took another important procedural decision: it denied the plaintiffs access to documents solely in possession of Shell *cum suis*, even though the documents could have given further insight into the causes and consequences of the oil leakage. The court concluded that Shell and its Nigerian daughter company had, on the face of the evidence already available to the court, not acted in violation of any obligations under Nigerian law.

In making its decision, the court did not check whether Nigerian law was in accordance with international environmental, human rights or labor law. For example, the court concluded that under Nigerian law, an oil company does not seem to be under an obligation to replace deteriorated pipelines. Yet, the court did not examine whether there were international rules that would have forced Nigeria to enact such an obligation, or that would have mandated it to interpret Nigerian law in accordance with international law. The obligation would have existed in the legal system of The Netherlands and other developed countries. The court also disregarded all potential violations of international law in concluding that under Nigerian law, only the owner of a polluted fishing pond or property was able to claim losses, and that future losses could not be claimed.

The stance taken by the Dutch court seems understandable from

38. Milieudefensie v. Royal Dutch Sell PLC and Shell Petroleum Development Company, Merits Decision of 30 January 2013 (LJN: BU3535) [Language: Dutch].

39. To be clear, this is not one of the Hague international courts and tribunals.

the viewpoint of sovereignty. It would be quite far-reaching if a court were to rule on the compatibility of another country's law with international standards. It is also doubtful whether any international standards were sufficiently precise so as to enable a meaningful conformity check. Still, it seems somewhat illogical that as soon as a foreign law becomes applicable, international law will no longer be of relevance. And what would be the difference between applying foreign law and applying international norms to which the foreign state has consented? Whatever the merits of the above considerations, it seems unlikely both in practice and in legal theory that international law will fill the legal void in cases like this.

F. "Hard Law" As an Insufficient Means to Address TNCs

To summarize, the current framework of domestic law and international law appears incapable of fully managing the effects of globalization, in particular the global nature of commercial activities. The variation in domestic laws, together with the TNCs' economic and political power and ability to partially avoid falling under the laws of a specific state, allows the corporations to operate to some degree in a legal void. As defined above, a legal void is a regulatory situation in which a TNC behavior in a host state would have been in violation of the laws of the TNC home state or of international law. There is very limited directly applicable international law, and the transposition, implementation and enforcement of international law usually leave the several state institutions/branches with (considerable) room for maneuver. International law is therefore unable to improve the situation.

As a result of the problems that both national and international law have in controlling TNCs, there is room for misconduct. In the words of the UN Special Representative:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.

The *Chevron* case, introduced at the outset of this paper, is a case in point on these challenges. The Ecuadorian government had been in a joint venture with the oil company at the time of the pollution. It thus appears to have been at least silently complicit in the abuses. The whole of the Ecuadorian economy had been dependent on the exploitation of oil resources, so there was a counter-incentive to faithfully implement

national legislation or international rules. The Ecuadorian judicial system offered no remedy, either, as it proved to be extremely weak and corrupt. Several judges had to step down during the long process amidst accusations of corruption, while others were seen to have a clear allegiance with either side of the conflict.[40]

In terms of environmental law, Chevron did acknowledge the environmental pollution to some degree, but argued that its predecessor Texaco had acted "completely in line with the standards of the day" and that "[t]he practices did not directly violate Ecuadoran law; in fact, the country had no meaningful environmental regulations at the time."[41] In other words, behavior that presumably would have been illegal in the United States at the time,[42] was in all earnestness claimed to be perfectly legitimate in Ecuador. However, the courts in the United States, where the case had originally been brought in 1993, found in 2001 that the case had "everything to do with Ecuador and very little to do with the United States."[43] It thereby refused an extra-territorial application of U.S. law, affirming that a U.S. company did not have to live up to U.S. standards as long as it acted abroad and the judicial system there did not take issue with the activities.

It is telling that probably the clearest invocation of international law in the *Chevron* case was on the part of the TNC-defendant Chevron. The legal representatives of the company moved the forum to the Permanent Court of Arbitration on the basis of the Bilateral Investment Treaty between the U.S. and Ecuador. All in all, the *Chevron* case is a tangible illustration of the failures of domestic, extraterritorial and international law in governing TNCs in a global environment.

It has so far proven impossible to come to a formal international agreement, or a treaty specifically addressing TNCs or transnational commercial activities to alleviate the void. Perhaps such a treaty even could not alleviate the matter, as it too may be bound to suffer from many of the structural problems previously explained. It appears very unlikely that the causes behind the void will disappear any time soon. The governance of TNCs (or transnational commercial activities more generally) clearly appears to require responses beyond classic "hard law".

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40. *Reversal of Fortune*, *supra note* 1, at 4.

41. *Id.* at 5.

42. "In the United States, it is standard practice, once the oil has been isolated from this mixture, to 're-inject' the produced water, pumping it deep underground into dedicated wells, in order to prevent damage to the local habitat." *Id.* at 5.

43. *Id.* at 6.

III. FILLING WITH "SOFT LAW" THE VOID LEFT BY "HARD LAW"?

The last two decades have witnessed a continuous proliferation of instruments—public, private and any combination thereof—that specifically address TNCs, but seem to do so by expanding beyond the notion of classic "hard law". Strictly speaking, instruments that fall outside the category of "law" cannot perhaps alleviate a *legal* void. But they may, in more general terms, address the practical problem at stake, which is abusive company behavior. Instruments other than legal ones can, in other words, alleviate the *policy* void in question.

The term "soft law" has often been used to denote these types of instruments. The multiplicity, volume and variance of such soft instruments, as well as their coexistence with the "hard law" framework has created a regulatory situation that is much more difficult to understand than the 'straight-forward' formal agreements.[44] Scholarly and practical attention seems necessary to better understand the possibilities and shortcomings of using "soft law" instruments in filling the void left by "hard law."

The reasons that are often presented for using "soft law"[45] may be divided into three generic groups.

Necessity—there exists only limited binding and effective hard now and in the foreseeable future;

Uniqueness—the coverage of "soft law" instruments is extensive, and may influence TNCs in ways that "hard law" does not. They can be much more specific to TNC behavior, and their adoption and adaptation may be more flexible and quicker; and

Inevitability—the emerging transnational space renders it inevitable that a separate transnational normative order emerges as well. It inevitably consists of other types of instruments, as the non-state actors who operate in this space cannot make "hard law."

A more careful look into these three, partly overlapping groups appears instructive for properly understanding the reasons that have been proposed to explain the emergence "soft law" (Sections A and B, *infra*). It is important to shortly describe also the views of those more pessimistic about the use of "soft law" as an alternative or a complement to classic "hard law". Some authors see "soft law" rather as working antagonistically against "hard law" (see Section C, *infra*).

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44. The normativity of "hard law" also remains to a large extent a mystery. *See* Martti Koskenniemi, *The Mystery of Legal Obligation*, 3 INT'L THEORY 319 (2011).

45. *See also* Jean d'Aspremont, *The Politics of Deformalization in International Law* 3 Goettingen J. INT'L L. 503 (2011).

A. Turning a Political Necessity into a Virtue – "Soft Law" as an Alternative or Precursor to "Hard Law"

First of all, non-binding instruments appear to be in many cases a sheer necessity. As long as no directly applicable, legally binding instruments specifically aimed at the behavior or TNCs will be adopted by states, nor existing international and national laws reformed to this effect, the rationalist perspective is to see "soft law" as the alternative.[46] The large and diverse array of non-legal instruments may simply be the best attainable means to govern TNCs. A binding international agreement to govern TNCs directly is indeed unlikely in the foreseeable future,[47] as many states and much of the private sector continue to resist the idea for the reasons and with the means explained below. At the same time, however, a certain willingness to adopt instruments of a voluntary character can be observed.

A related point is to see soft instruments as precursors to formal agreements. In a situation where an outright formal agreement is politically unattainable, other types of instruments can be used as intermediate steps towards it. These alternative instruments may be used to, for example, experiment with a new rule or to innovatively encourage changes in the behavior of relevant actors. Exposure to the new ideas will, the theory assumes, prepare the regulators and regulatees up to a point where they are ready to take the ultimate step towards "hard law".[48] This is relatively common in areas with considerable (scientific) uncertainty regarding the optimal contents and effects of the policies in tackling a particular problem.[49] However, this

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46. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 722 (2010).

47. The last attempt, the 'Norms on Responsibility' did not make it above the level of a sub-commission of the Human Rights Council. *See, e.g.*, De Feyter, *supra* note 15, at 81-82. And the more recent UN Guiding Principles make explicit that they are not intended as the precursor to a binding international agreement. *See* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises & Report from the Special Representative of the Secretary General to the U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (last visited Feb. 12, 2014).

48. JOHN J. KIRTON & MICHAEL J. TREBILCOCK (eds.), HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 28 (Ashgate, ed. 2004).

49. *See, e.g.*, Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008).

type of precursory role for soft instruments is relatively weak in areas where the obstacles to "hard law" are political, rather than relate to uncertainty.

Finally, soft law instruments may be seen as a necessity also from the perspective of non-state actors, in case they themselves act as regulators: these parties obviously do not even have the direct means to develop classic "hard law".

B. Unique Qualities of "Soft Law" – A Complement to "Hard Law"

Soft law instruments often are unique in terms of their versatility, scope and/or "depth." The large number of different kinds of soft instruments means that they are many times aimed much more specifically at the problems caused by the activities of TNCs than are formally binding instruments. They may be used to address TNC behavior in more elaborate detail than, for instance, international human rights conventions, which have an evident legacy as acts aimed primarily at *state* behavior and rarely are very specific as to what amounts to proper or improper behavior. It seems important also for these reasons to gauge whether and how this large body of instruments may actually alleviate the policy void on TNCs.

Another, interlinked argument is that soft instruments possess *different qualities* than formal international law. Many policy tools work in ways that are not dependent upon the core characteristic of "hard law", which is to create legally binding rights and obligations on parties. Constructivists in particular argue that soft law can promote discursive, experimentalist processes that can transform the way norms are perceived and created.[50] Such means may even be preferable from the perspective of responsive governance.[51] In comparison with rules that need to go through the entire legislative or treaty-making process, they may also be much faster to set up and to flexibly change afterwards. But whether and how exactly such "soft law" could complement "hard law" is precisely the question that deserves further clarification. This is all the more so, considering that soft instruments may even be *inevitable* or *inherent* in the phenomenon of globalization. According to Nijman and Nollkaemper, "[o]ne of the challenges that globalization poses to legal theory is precisely the emergence of 'non-State' legal orders, and the resulting need for a conceptual framework

50. Shaffer & Pollack, *supra* note 46, at 722.

51. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1019-20 (2004).

which enables our discipline to accommodate different legal cultures."[52] In other words, these instruments may correctly reflect the fact that the activities of TNCs are of such a special kind that they warrant a unique approach. As noted, if TNCs, NGOs and other non-state parties act themselves in these transnational normative orders as rule makers, then there may not even be any other choice but to resort to soft instruments. TNCs and NGOs simply do not have the capacity under international law to make legal instruments, nor are they directly subjects of international law.

C. Counter-Productive Uses of Soft Law – the Antagonist Approach

Shaffer and Pollack claim that all three principle schools of thought that address the strengths and weaknesses of soft law and "hard law"—positivists[53], rationalists[54] and constructivists[55]—tend to see them as alternatives or mutually supporting complements.[56] These authors raise doubts about the proposition that new soft instruments are always adopted with a view to decreasing the policy void. More attention should be paid to "soft law" as an *antagonist* to "hard law",[57] because it frequently leads to inconsistencies and conflicts among norms. Or

52. JAMES NIJMAN & ANDRE NOLLKAEMPER, NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL AND NATIONAL LAW 349 (Oxford University Press, ed. 2007) (paraphrasing WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 51 (Butterworths 2000)) ("Today, a picture of law in the world must deal with a much more complex picture involving established, resurgent, developing, nascent and potential forms of legal ordering." *Id.* Twining furthermore asks: "[c]an public international law, as traditionally conceived, cope adequately with such problems as environment, international crime, and basic human needs or rights at the global level?"); *see also* Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power* (Osgoode CLPE, Working Paper No. 45, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185031 (last visited Apr. 1, 2014).

53. *See, e.g.*, Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L. 381 (1998); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983).

54. *See, e.g.*, Charles Lipson, *Why Are Some International Agreements Informal?*, INT'L ORGS. 495 (1991); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONALIST CHOICE THEORY (Oxford University Press 2010); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

55. *See, e.g.*, David Trubek, Patrick Cottrell & Mark Nance, *"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity*, *available at* http://eucenter.wisc.edu/OMC/Papers/EUC/trubeketal.pdf (last visited Apr. 1, 2014).

56. Shaffer & Pollack, *supra* note 46, at 707-08.

57. This argument has been made by others before, albeit in a less comprehensive way. For example, NGOs, who have long held this position, oppose voluntary instruments in part because they tend to bring hard law" negotiations to a standstill.

worse, this may have been the aim from the outset. The antagonistic behavior has specific implications in a fragmented legal system, resulting in a "strategic hardening of "soft law" regimes and softening of hard-law regimes, or in a pre-emption of "hard law" through "soft law." These kinds of situations arise under conditions of distributive conflicts between states and in regime complexes, in particular.[58] They also fit well the notion of legal pluralism, where numerous heterogeneous legal orders coexist, interact and compete without clear hierarchies.[59] "Soft law" in this sense is inevitably a part of globalization.

D. Interactions Between "Soft Law" and "Hard Law"

The last-mentioned, antagonistic perspectives on "soft law" are not at the core of this paper, which focuses on the ability of "soft law" to fill the void left by "hard law". It is nevertheless important to realize, following Shaffer and Pollack, that "hard law" and soft law are not in a binary either/or relationship. Rather, their interaction is rather one where specific conditions are conducive to making the actors employ them as alternatives, complements or antagonists.[60] This paper strives to contribute to the discourse by exploring the notion of softness and how that characteristic may reflect in the choice of the instrument in each individual case. The analysis leads to observations about how on occasion, *neither a* hard *nor* soft type of an instrument is able to fill a policy void, and that a focus on "soft law" may in fact only be leading the attempts astray.

IV. FROM THE DEFICIENT NOTION OF "SOFT LAW" TOWARDS AN ACCURATE CONCEPTUALIZATION OF SOFTNESS

In order to understand whether "soft law" instruments may succeed in alleviating the *policy* void in governing TNCs, and if so, how, it is next pertinent to define in more detail what "soft law" actually means. As the analysis below will reveal, the term "soft law" is rather problematic: there seem to be more suitable terms than "soft law" to

58. Shaffer & Pollack, *supra* note 46, at 709, 728.

59. *See, e.g.*, Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT. L. 553 (2002); Roderick A. MacDonald, *Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism*, 69 ARIZ. J. INT. & COMP. L. 75 (1998).

60. Shaffer & Pollack, *supra* note 46, at 709.

describe instruments that are not part of "hard law" in the classic sense of the term. The terminological analysis will lead to a conceptualization of instruments, which is believed to be more instructive for understanding their key characteristics in terms of "softness." With the tool, the suitability of a number of leading human rights and environmental instruments that govern TNCs may then be analyzed in the ensuing Section 5.

A. Definitional Deficiencies of "Soft Law"

1. An Incorrect Concept

The instruments looked at in this paper have often been grouped together under a single concept: 'soft law.' 'Soft law' is widely used as a concept to denote all normative instruments that do not amount to classic "hard law". As Jan Klabbers, a staunch critic of the concept, has submitted

> "[w]e tend to use the term soft law in order to describe things which are difficult to describe as "hard law". Thus, guidelines, codes of conduct, resolutions, recommendations and action programs, indeterminate provisions of treaties, unratified conventions, perhaps even the opinions of advocates general or dissenting opinions of individual judges of the ICJ or the various human rights courts, they may all perhaps be qualified as 'soft law.' Clearly they are not "hard law"; clearly they are not totally irrelevant either, so *voilà*: soft law it must be."[61]

Klabbers and some other international legal scholars denounce the idea that law can be "soft." "As soon as soft law is to be applied to any specific set of circumstances, it collapses into either "hard law", or no law at all."[62] In a binary world of law and non-law, soft law as an in-between is incorrect: there either are or are not normative obligations that are created when the law is applied *ex post*. The 'soft' part of the concept creates confusion from another perspective. It glosses over the fact that many 'soft instruments' have direct effects on the behavior of states, TNCs and other actors, and they have indirect legal effects by transforming subsequently into formal international law. Mechanisms often employed by "soft law", such as economic incentives and reputational costs, can be much more compulsory than the term soft would indicate. They may be more effective than "hard law" itself, as some of the authors noted in Section 3 have suggested.

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61. Klabbers, *supra* note 53, at 385.
62. *Id.* at 382.

As for the 'law' part of the concept, it seems rather odd to use it where states or international organizations have usually quite purposefully chosen "an instrument that lies *outside* the realm of law," and have thus indicated their specific intention "not to legally commit themselves."[63] Using the term "law" for something that is adopted explicitly as something other than law threatens to blur the "normativity threshold." This is so in particular if and when there is a point of transition between law and non-law, between what does and does not constitute a legal norm.[64]

2. Too Generic a Concept

While soft law may be inaccurate as a concept, it also seems much too generic to properly guide our understanding regarding the very different nature, properties and normativity of the various instruments relating to TNCs and their behavior. As long as there are the soft and hard ends to the spectrum of instruments, it seems inevitable that there are also shades of softness and hardness in between. At the very least, there must be such spectrums from softer to harder within the two binary categories of law and other instruments. A sharp binary categorization seems unlikely to be helpful in explaining all the legal as well as non-legal instruments, each with their different characteristics. This is so especially for legal instruments with soft dimensions and for non-legal instruments with hard dimensions. There is no denying the growing disaggregation of power into myriad spheres of authority, which may not (fully) be public authorities and that deliver formal and informal rules and norms of various kinds.[65] There is considerable variance, whichever way one may wish to create categories.[66] This is certainly so with respect to instruments addressing the behavior of TNCs.

Although it is thus not possible to describe all such variance with a single term "soft law," it would seem equally unadvisable to limit the use of the term to only a clear but narrow sub-group among the variance. In this latter case, there is likely to exist a more accurate

63. Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials* 19 EUR. J. INT. L. 1075, 1081-82 (2008) (emphasis added).

64. BLACK'S LAW DICTIONARY (7th ed. 2000); WEIL, *supra* note 51, at 415.

65. Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 MOD. L. REV. 1 (2007); James Rosenau, *Governing the Ungovernable: The Challenge of Global Disaggregation of Authority*, 1 REGULATION & GOVERNANCE 88, 88 (2007).

66. S. Karlsson-Vinkhuyzen & A. Vihma, *Comparing the Legitimacy and Effectiveness of Global Hard and Soft Power: An Analytical Framework*, 3 REGULATION AND GOVERNANCE 400, 401 (2009).

descriptive term than "soft law" to explain the instruments in question.

Therefore, a simple dichotomy between "hard law" and soft law (and also between law and "non-law") *alone* seems too stiff and inaccurate to be useful for fully understanding the instruments, which the terms intend to cover.[67] It remains important to maintain that binary distinction, because in some contexts—such as domestic or international adjudication—the legal status of an instrument continues to be relevant for its softness or hardness. Yet it *also* seems vital to understand norms to be on a continuum with a lot of diversity along numerous other variables.[68]

One may thus agree with for example d'Aspremont that a binary approach to law is not in conflict with the growing complexity of regulatory tools in contemporary international relations.[69] A binary division may be maintained, but while distinguishing *e.g.* the different regulatory choices and the gradations of normativity in the language that are available for *both* legal and non-legal norms. The nuance and the binary approach are not mutually exclusive.[70]

B. The Lay of the Land in the Theory of "Soft Law"

Numerous attempts have been made to make sense of "soft law." Problematic in these approaches has been the disregard for the idea of maintaining the binary distinction in parallel with the more fluid characterizations. The empirical basis of the attempts has also often been wanting.[71] This Section highlights the views of authors that appear the most insightful, and which therefore have served as the basis in this paper for developing the methodology for assessing "soft law."

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67. László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L. Q. 605, 611 (2010); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L. J. 1865, 1869 (2008) (Goldmann remarked that the term "soft law" is not much more than a slightly more elegant way of saying "underconceptualized law." Accordingly, he continues, we should use formal criteria to divide it into subspecies, each with its own characteristics).

68. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 402. *See also* Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010), 100-01, 106-07 (emphasizing the importance of both legal status, as well as various other characteristics).

69. d'Aspremont, *supra* note 63, at 1075.

70. *Cf.* Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 180 (1996) ("law itself, for all its binariness, is capable of reflecting a whole spectre of subtleties and nuances; . . . law itself can accommodate various shades of grey without losing its binary character").

71. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 401.

1. The Three Dimensions of Softness

Amongst the most quoted authors in describing "soft law" are Abbott et al., who have proposed a continuum of legalization,[72] where the softness or hardness of legalization may be measured in terms of the "*obligation*, *precision* and *delegation*" of the measure. Obligation means the (legally or otherwise) binding nature of the rule, precision reflects the ability of the rule to unambiguously define conduct and delegation refers to the extent to which an implementing and interpretive authority has been defined.[73] Taking these three dimensions seriously, *most* international instruments, including those on the 'law' side of the binary distinction, seem soft in many respects.[74] This is certainly true of global environmental and human rights treaties with their many indeterminate provisions and limited delegation to third parties.

To be more specific, the dimension of "*obligation*" is dependent on the mandatory, normative—Abbott et al. use "binding"—nature of the rule. Obligation seems to be a concept with multiple meanings. It may indicate especially the mandatory quality of the language of the instrument. The authority of the actors that adopted the instrument, or a more general sentiment of obligation caused by the legitimacy of the instrument is also central. Obligation thus can be linked to the concept *author*, which Neil Komesar finds important from an institutional perspective.[75] As he has suggested, the implications of a policy may differ greatly according to the author.

"*Precision*", the second dimension proposed by Abbott et al., measures the extent that "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[76] The third dimension, "*delegation*", reminds us that not only the authority of the *adopting* entities matters. The instrument's *implementation*, *enforcement* and *interpretation* are quite relevant.[77] It needs to be determined who, if

72. These authors define legalization as "global regulation through diverse types of norms."

73. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

74. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000).

75. N. KOMESAR, 'IMPERFECT ALTERNATIVES': CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 4-5 (Univ. of Chi. Press 1997).

76. Abbott et al., *supra* note 73, at 402.

77. The relevance of delegation to the normativity of international norms was already stressed in Lauterpacht's critical analysis of the auto-interpretive character of international law, or what he called "self-judging obligations." *See* HERSCH LAUTERPACHT, THE FUNCTION OF INTERNATIONAL LAW IN THE INTERNATIONAL COMMUNITY (Oxford Univ. Press

anyone, is in charge, and how much authority is being delegated.

The approach of Abbott and Snidal to instrument choice, which builds on these three dimensions of legalization, emphasizes the role of different types of legalization in the instrumentalist hands of powerful states.[78] For example, Chinkin's categories of "soft law" reflect these three dimensions.[79] Weakening one or more of the dimensions turns legal arrangements conveniently into "soft law" or vice versa. This is essential from the perspective of governance, because TNCs may be able to exert pressure towards the governing authorities on the types of instruments that will be created.

2. Softness v. Effectiveness

It may be noted that Abbott et al. deliberately avoid assessing the instruments' effects, as that would conflate delegation with effective action.[80] Also in the analysis of this paper effectiveness is understood as conceptually distinct from softness; the two must be evaluated separately. While softness refers to low levels of obligation, precision and delegation seems to correlate negatively with effectiveness, the interrelationship between the two appears rather complex and case-specific.[81] There are many intervening external factors, such as the degree of stakeholder agreement on the issue, reputational risks and potential fringe benefits of compliance. Softness is not a *conditio sine qua non* of ineffectiveness, nor is hardness a prerequisite of effectiveness, even if the former usually increases the latter.[82] Indeed, soft measures can be effective, otherwise the prospect of them acting as alternatives to "hard law" would not materialize. Similarly, there would be no need to complement or replace "hard law", if it could not be

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1933).

78. Abbott & Snidal, *supra* note 74, at 421.

79. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850 (1989). The degree of legalization (as defined by Abbot et al.'s obligation, precision and delegation) is the independent variable, effectiveness and legitimacy the dependent variables in determining softness. Abbott et al., *supra* note 73.

80. Abbott et al., *supra* note 73, at 402.

81. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 414. *See, e.g.*, Jean-Marie Kamatali, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it Time for an ICJ Advisory Opinion?*, 20 CARDOZO J. INT'L & COMP. L. 437, 449-50 (2012); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 43-45 (2012); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the /Soft Law Continuum*, 12 THEO. INQ. L. 581, 594-95 (2011).

82. *See* Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 414.

ineffective. Thus, by *not* conflating softness and effectiveness, the analysis of the instruments of governance remains more detailed and transparent on the surface. The focus of this paper is precisely on this softness aspect.

Karlsson-Vinkhyuzen and Vihma take a similar view in their comparison of international norms: softness is the independent variable, while *effectiveness*, together with *legitimacy,* emerge as the central, overarching dependent variables.[83]

3. Instrumentum and Negotium

d'Aspremont proposes on the basis of the *theory of legal acts* that in contemporary international law, it is either the *instrumentum* ("the container") or the *negotium* (the "content") that can be softened.[84] The softness of the *instrumentum* thus pertains to the choice of an instrument outside the realm of law, defined as formal treaties or binding unilateral declarations.[85] A soft *instrumentum* can also produce legal effects, such as interpretative guidelines of other legal acts, or even customary law in the long run. However, being such *legal fact,* capable of creating *legal effects,* is according to d'Aspremont not sufficient to qualify it as a *legal act.* The latter creates effects only at the explicit will of its authors, hence the distinction to "hard law".[86]

As for the *negotium* (the content) of a legal act, it can also be softer or harder. Soft, non-normative content does not produce rules that would commit the subjects. The *negotium* of a *legal act* can be softened without invalidating it or transforming it to a *legal fact*.[87] The softness of the *negotium* will not affect the status of the instrument as law. It will, however, reduce law's ability to oblige the parties, reflecting on the obligation and precision dimensions of Abbot et al.

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83. *Id.* at 401. Their approach thus is wide as it relies on both rationalist and constructivist theories to cover, respectively, the utilitarian political economy aspects and the culturo-anthropological aspects of the issue. Effectiveness is for these authors interdependent with legitimacy, and they both consist of numerous components. Effectiveness can be understood as the degree to which the set policy objective is achieved as a consequence of the measure. Note the difference between effectiveness and compliance. K. Raustiala & D. Victor, *Conclusions*, *in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 659-708 (K. Raustiala, D. Victor & E. Skolnikoff eds., 1998). Note also the difference between behavioural effectiveness and problem-solving effectiveness. Ariel Underdal, *One Question, Two Answers, in* ENVIRONMENTAL REGIME EFFECTIVENESS 3-45, at 6-7(E. L. Miles et al. eds., 2001).

84. d'Aspremont, *supra* note 63, at 1084.

85. *Id.* at 1084-85.

86. *Id.* at 1084-87.

87. *Id.* at 1084.

Blutman takes a similar approach using the notions of legal (formal) source and the substance of the norm.[88] He further notes that current studies group "soft law" into three: (1) *non-binding* decisions of *international organisations* (2) *non-obligatory* agreements of *states* and (3) recommendations of *non-state parties* (NGOs).[89] In the first two groups, the softness emanates from what d'Aspremont called the *negotium* – the lack of *obligation* of the non-binding content of the norm. In the third group, softness is caused by the *instrumentum* and the legislating *party*. Blutman does not consider the authority of the author, and indeed probably not the *delegation* or the *instrumentum* either. Moreover, neither precision, effectiveness nor legitimacy, are directly relevant in this type of categorization. The strength of categorizations such as Blutman's, lies in their simplicity and ease of application, as well as the direct link to existing types of instruments.

C. Making Use of the "Soft Law Theories"

It would seem that the above selection of approaches to "soft law" have varying degrees of explanatory power. Many of them consist of dimensions that from the perspective of softness constitute continuums rather than either or type binary choices. A careful combination of the dimensions, whether continuums or not, appears a useful way to better conceptualize "soft law" and to understand specific cases of instruments' softness in international governance.

It seems possible to combine the assessments of softness along many such dimensions onto a single, summarizing scale. A summary value of softness may be useful in providing an overview of the characteristics of the instrument that one is dealing with. It might even be possible to define a point, a dividing line between soft and hard, similar to that which we recognize between law and "non-law". One may wonder, however, to what extent such a point is actually relevant. First of all, all instruments, be they soft or hard in the end, are in any event analyzed along the same dimensions of softness, just as water may be measured for its coldness/hotness. But like water, is there a metaphysical "melting point" where the definition of an instrument changes from hard to soft in a way that would represent a drastic change in its qualities, like (solid, hard) ice changes into (liquid, soft) water? Most of the instruments are likely to have some degree of softness/hardness anyway; only at the extremes are instruments entirely hard or soft.

88. Blutman, *supra* note 67, at 606.
89. *Id.* at 607-08.

Second, it seems important to perceive that any such dichotomy between soft and hard is indeed only a summary of many aspects. It appears more relevant to understand what the constitutive dimensions of each summary value of softness in a particular case may be, in particular on those dimensions that are close to the extreme ends of the scales. This is so especially as regards the "*instrumentum*". On the one hand, there are legal instruments, which in the context of international governance consist of the formal sources of international law; conventions, customary law and binding decisions of international organizations. On the other hand, there are non-legal instruments, which are all the other international or transnational public or private instruments that are not formal sources of international law.[90] A hard *instrumentum* thus refers to formal "law", while a soft *instrumentum* means that one is not dealing with law. This in turn implies that to qualify as soft an instrument that in terms of its *instrumentum* dimension is "hard (law)", it would need to rank quite low (soft) on many if not all other dimensions. Conversely, to consider as hard[91] a non-legal (and thus *prima facie* soft) instrument, it would need to rank high across many, if not all, dimensions beyond the *instrumentum*. A precise obligation by an authoritative NGO with strong oversight on the implementation could perhaps achieve such hardness in a soft *instrumentum*.

Third, an understanding of softness as relative and measured against the same criteria for all kinds of instruments, whether formal law or something else, is important. As could be seen in the discussion in Section 2 on the voids left by (international) "hard law" in governing TNCs, various types of instruments may have important roles to play. Perhaps an instrument is not just a second best solution in a particular case - or for particular ends within that case - but indeed the best, or even the only means of achieving a policy outcome?[92] The situation for which the instrument is intended needs to be analyzed along the same dimensions to know what type of an instrument is required.

Finally, there is still an important aspect from the viewpoint of the instruments' functioning that could be called *systemic coherence*. It relates closely to the above points noted by Shaffer and Pollack: all legal and non-legal instruments, whether hard or soft, also affect one

90. According to Guzman a categorical difference between harder and softer types of governance is created here. Guzman, *supra* note 54, at 580.

91. Blutman describes that it is a common misconception that non-binding "soft law" would influence less the actions of a state than a binding norm. Blutman, *supra* note 67, at 612.

92. For further explanation look to the arguments made in Section 3.

another. Indeed, as was described above, soft instruments are often seen as an alternative or complement to international "hard law". Treaties can generate secondary (delegated) rules that may be non-legal. Treaties can harden existing non-legal instruments, and non-legal instruments may not only be an alternative or complement to legal instruments, but also soften them. Non-legal instruments may even become antagonists that work directly against treaties, as Shaffer and Pollack have pointed out.[93]

The types of conceptualizations portrayed in this Section can be useful when the hardness/softness of multiple instruments, both legal and non-legal, is assessed comparatively against one another. As Karlsson-Vinkhuyzen and Vihma point out,[94] the development of a legal or non-legal instrument, and subsequently its qualities as a "harder" or "softer" instrument in global governance, is only one variable in the evolution that determines the long-term policy outcome. Moreover, the choice as explained often involves a highly complex set of interrelated, time- and place-specific variables and impacts. This touches the very core of modern politics that struggles to address the dynamics of globalism.

D. Towards a More Accurate Conceptualization of Softness in Instruments

Linguistic conventions such as "soft law" are difficult to fight against.[95] Political scientists make the observation that "[a] few international institutions and issue-areas approach the theoretical ideal of hard legalization, but most international law is soft in distinct

93. Shaffer & Pollack, *supra* note 46, at 788-96. This would seem to imply that the effectiveness of an instrument can even be negative from the perspective of the policy objective: it decreases rather than increases the ability to reach the set policy goal. This is an important aspect explaining the reasons behind the existence of a legal void in TNC governance. As was explained earlier, the void on TNCs is in part created by their ability to influence law-making at various levels of governance. An important way to do so is to swap from the role of a subject of international norms to that of an author of international (private) norms by creating alternative (non-legal) norms that are *antagonistic* to the objectives of prevailing legal instruments, or to other public instruments such as decisions of international organizations or joint declarations of states. In other words, if we were to measure the effectiveness of antagonistic instruments, a scale would need to continue from "weekly positive" and "none" onto a "negative," when the point of reference are the prevailing policy objectives rather than the alternative or direct objective of the law or other instrument in question. Because this paper focuses on ways to fill in the voids left by "hard law", the antagonistic aspects of non-legal instruments are however, not discussed further. *Id.*

94. Karlsson-Vinkhuyzen & Vihma, *supra* note 66, at 400, 401.

95. Blutman, *supra* note 67, at 605.

ways."[96] The proposal here is to take the above-noted dimensions of softness, fine-tune them, and use them to describe the instruments more accurately. The assumption is that such a systemization/categorization may be helpful to the understanding of policy instruments, distinguishing for example between their softness and effectiveness. [97]

It is further proposed here that each of these dimensions of softness of Abbott et al. (obligation, precision and delegation) be specified a step further into a few more accurate, particularly significant sub-dimensions. The proposed sub-dimensions improve the tool, because their values seem especially instructive for the processes being studied in this paper: the behavior of TNCs.[98]

The 'obligation' dimension is perhaps the most ambiguous. As indicated above, it seems that Abbott et al.[99] equate 'obligation' with 'legal obligation'. Such a definition of obligation would, however, not clearly distinguish the dimension from (*i.e.* would limit it to) the concept of *instrumentum.* The hard v. soft *instrumentum* distinction in this paper makes a difference between two types of public instruments: those that are and those that are not (formal) law. Only formal sources of law oblige in the hardest sense of *legally binding* the parties and being capable of *enforcement through judicial* means. These qualities could be qualified as sub-dimensions of obligation, but because of the importance of the either-or type *binary* distinction between what is or is not a legally binding formal source of law, it seems appropriate to turn them into a dimension of their own. *Instrumentum* must therefore be lifted out of the obligation dimension.

The obligatory nature of the instrument however also appears to depend on the authority of the 'author' of the instrument and on its mandatory quality. These should be the focus of the obligation dimension. First, the authority sub-dimension of obligation reflects the authority of the author over the addressees of the instrument. Some institutions that adopt instruments on TNC behavior have more authority over TNC behavior than others. There are various factors on which such authority may be based. Authority will depend upon whether there has been some grant of authority from the addressees of the instrument to the author. It also turns on the involvement of experts during the drafting, the perceived quality of the instrument, and whether

96. Abbott et al., *supra* note 73, at 421.

97. Obviously, there is likely to be overlap between the dimensions. A similar pragmatic approach is taken by Shaffer and Pollack. Shaffer & Pollack, *supra* note 46, at 714.

98. *See* Abbott et al., *supra* note 73, at 403.

99. *Id.* at 401.

the process leading to the text has allowed for consultations with the addressees. In other words, the relationship between the authors and the constituency of the instrument matters. This also explains why a single institution ("author") may have authority in one specific case, but less so in another. A higher level of authority will make the instrument more obliging, and hence harder, regardless of its public or private character.

Instruments created by the addressees themselves are usually referred to as self-regulation, distinguishing them from other private rule making by third parties. It is difficult to generalize whether a rule to which specific private parties (such as TNCs) have committed themselves is more obligatory or less obligatory than that created by some other private parties without the involvement and/or assent of the former (i.e. TNCs). Some NGOs are more highly regarded by TNCs than others in terms of their expertise or trustworthiness, whereas others may be more feared because of their effective publicity campaigns. All such factors influence whether TNCs regard instruments to be authoritative. It would also seem important to extend the obligation dimension to the *negotium*, the contents of the instrument. A legal *instrumentum* can contain a *negotium* devoid of any obligatory language, such as 'shall'. At the same time, a non-legal *instrumentum* can contain a *negotium* that is worded in unmistakably mandatory terms.[100] The provisions of both legal and non-legal instruments can attempt to guide the behavior of their addressees "in a stronger or weaker fashion."[101] The obligation dimension hence would seem to consist of two sub-dimensions: *authority* and the *mandatory nature* of the instrument.

Also the precision dimension would, at least with regard to the particular subject-matter of TNCs, seem to be improved if divided into two sub-dimensions. Abbott et al.'s concept of precision related to the object of the rule *ratione materiae*: "that rules unambiguously define *the conduct* they require, authorize, or proscribe."[102] This is the *accuracy* of the instrument. But precision would also seem to include the *specificity* of an instrument towards certain actors or issues. Softness or hardness of an instrument in terms of a certain group of actors such as TNCs, also depends on whether the rules specifically address *that*

100. *See* A. Aust, *Alternatives to Treaty-Making: MOUs as Political Commitments*, *in* THE OXFORD GUIDE TO TREATIES 46-72 (D. B. Hollis ed., Oxford University Press 2012).

101. D. BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 103 (Harvard Univ. Press 2010).

102. Abbott et al., *supra* note 73, at 401.

group. The softness in other words is influenced also by the scope of the instrument *ratione personae*. A narrow, specific scope increases hardness especially in the international context, where the absence of an institutional framework moves the *ex post* interpretation and application of general rules to the hands of the actors to be governed—the TNCs, in this case, and also states within whose jurisdiction the TNCs act.[103] The precision dimension therefore is enhanced by including the sub-dimension of "specificity" in addition to what could be redefined as its "accuracy".

Delegation,[104] finally, concerns primarily the question of how much authority to implement and enforce the instrument is delegated to others, how much is retained by the author of the instrument, and how much simply remains undetermined. Delegation to third parties increases hardness, and is vital where precision in terms of specificity is low.[105] Delegation of interpretive authority is a variety of delegation that links back directly to accuracy, i.e. precision *ratione materiae*.

Furthermore, the softness of the delegation also appears to depend on to whom exactly the authority is delegated, *i.e.* the authorship of the delegated acts. Close ties, even a shared identity amongst those authorized to implement the instrument and those addressed by it soften the delegation dimension. Delegation is harder when an auditor or NGOs enforce the instrument, than where the TNCs, as the subjects of the instrument, enforce their own rules. It is also important to distinguish between delegation in rule-making and dispute settlement (*i.e.* judicial) functions.[106]

To sum up, the tool proposed here incorporates the following dimensions of softness:

- the *instrumentum* (formal source of law v. other instruments);
- obligation (authority and mandatory nature of the language);
- precision (accuracy and specificity); and
- delegation (extent and authority of delegation).

These softness-related dimensions measure only specific qualities of the instrument. They may be combined and may interact with numerous other qualities of the instruments, such as how quickly they

103. *Id.* at 414.

104. "*Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules." *Id.* at 401.

105. *Id.* at 451.

106. *Id.* at 408.

can be enacted, how representative they are, etc. A discussion on the qualities of the instrument itself also easily merges into a discussion on the impacts that the instruments have. International lawyers and legal scholars often concentrate on compliance, while political scientists assess e.g. the effectiveness, dynamic and static efficiency, legitimacy and administrative burden of the instrument, with a clear emphasis on effectiveness.[107] Mitchell convincingly argues that compliance is only a subset of effectiveness, and indeed from the perspective of this paper it is the final policy outcome—a change in the environmental and human rights behavior of TNCs—that is relevant.[108] As this paper specifically addresses the question of the aptness of "soft law" instruments to govern TNCs, the effectiveness of instruments thus is a relevant, yet limited part of the analysis. It is worth repeating that softness and effectiveness are separate but interrelated issues, and that only softness-related qualities are analyzed in this article; the other qualities of the instruments are not assessed.[109]

The following tool emerges:

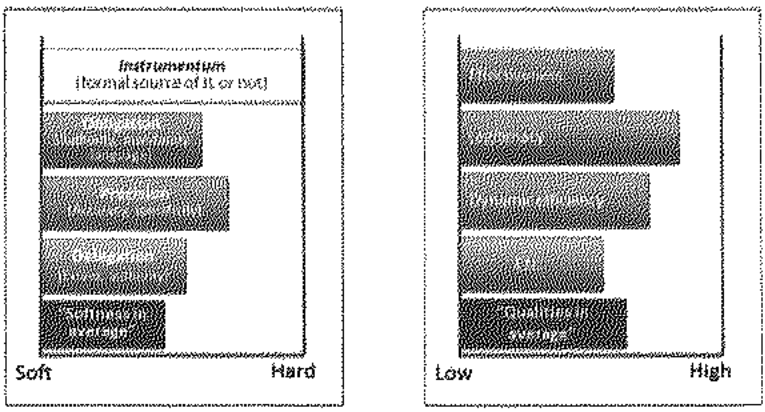

Figure 1. Assessing "softness" and other characteristics of instruments.

107. R.B. MITCHELL, INTERNATIONAL POLITICS AND THE ENVIRONMENT 146-80 (Sage 2010).

108. *Id.*; Karlsson-Vinkhuyzen & Vihma, *supra* note 66.

109. Qualities such as static and dynamic efficiency, and administrative burden, are typically assessed.

The aspect of systemic coherence—the complementing, replacing, precursory or antagonistic impacts that the instruments have against each—seems worth bringing forth in some examples in view of the earlier discussion. The coherence may be depicted as follows:

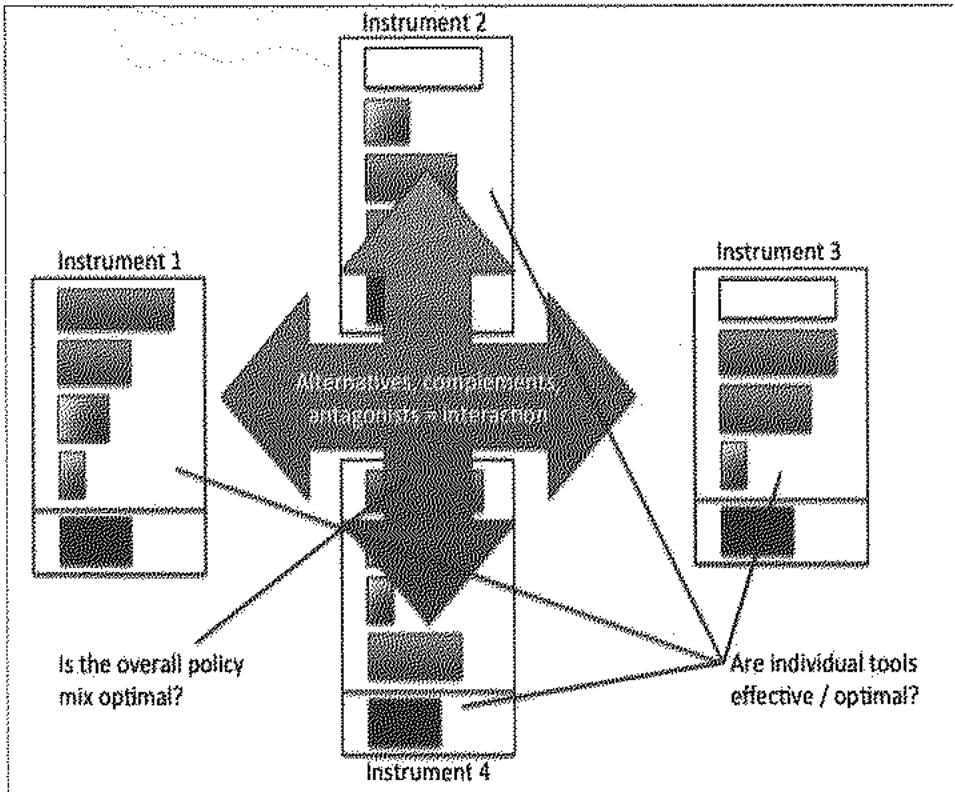

Figure 2. Systemic coherence of soft law instruments.

E. Applying the Tool on Public Legal Instruments, Public Non-Legal Instruments and Private Instruments

In order to structure the application of the tool to particular environmental and human rights instruments in Section V, it is useful to categorize the instruments in a preliminary fashion. First, as was indicated in Section IV.A., it is possible to distinguish between the formal sources of international law (legal instrumentum) and the non-legal or "soft" instrumentum. It is not implied that non-legal instruments cannot bind actors politically, nor that they cannot be successful in addressing a policy problem. The distinction simply reflects that such

instruments cannot legally bind states and can in most cases not be enforced through judicial means. Therefore, there are some good reasons why non-legal instruments cannot operate in the same way as legal instruments.

Second, the broad non-legal category can be further sharpened[110] by separating public instruments from private instruments.[111] Three broad categories of instruments can thus be identified:[112]

- Public Legal Instruments are the formal sources of international law – i.e. the legal instrumentum within the context of the international legal order – consist primarily of conventions, customary law and binding decisions of international organizations. These instruments are in the left column of Table 1, while non-legal instruments form the right column.
- Public Non-Legal Instruments include the output of international organizations, two or more states collectively, or even more loose gatherings of public officials (such as collaborative networks), that are however not laid down as formal international law.[113] 'Public' thus denotes the centrality of public actors: state representatives, intergovernmental organizations, other public officials.
- Private Instruments[114] in contrast include the output of private or primarily private transnational initiatives, such as guidelines or standards. A few instruments, such as the UN Global Compact and other public-private partnerships, partly fit under either category, public or private. The distinction public/private may be particularly relevant in the area of TNCs, where the private authorship of an instrument

110. Cf. *Id.*

111. Compare the IN-LAW project which leaves private formal instruments outside of its ambit. JOOST PAUWELYN, RAMSES WESSEL & JAN WOUTERS (eds.), INFORMAL INTERNATIONAL LAWMAKING (Oxford University Press 2012).

112. These three groups are different from those distinguished by Blutman: the output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society which is per definition non-binding. Blutman, *supra* note 67, at 607.

113. Blutman distinguishes more categorically between state instruments and instruments adopted by international organizations. However, because the adoption of instruments within international organizations is heavily influenced by states a further distinction would not seem useful or justifiable.

114. The type of private instruments that this article analyses are never legal instruments, so that the addition 'non-legal' is superfluous. Private actors are of course perfectly capable of adopting legal instruments in the form of private law contracts, but those are outside the scope of this research.

usually points to the involvement of either the regulated TNCs themselves or their staunchest critics, NGOs. The difference between the Public Non-Legal and Private (Non-Legal) Instruments (as well as the overlap between them) is highlighted with background shadings in the right-hand column of Table 1 below.

The most noteworthy environmental and human rights instruments can be grouped into these three categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments as shown in Figure 3 below.

	LEGAL INSTRUMENTUM (Formal Sources of International Law)	NON-LEGAL INSTRUMENTUM (Other than formal sources of international law)
PUBLIC (States and IOs)	V.A. Public Legal Instruments • ICCPR, ICESCR, other human rights treaties; • Multilateral Environmental Agreements-Security Council Decisions	V.B. Public Non-Legal Instruments • UN Guiding Principles on Business and Human Rights • OECD Principles on Multinational Enterprises • UNEP Guidelines[115]

115. *E.g.*, Charles Thomas, Tessa Tennant & Jon Rolls, *The GHG Indicator: UNEP Guidelines for Calculating Greenhouse Gas Emissions for Businesses and Non Commercial Organizations* (2000), *available at* http://www.unepfi.org/fileadmin/documents/ghg_indicator_2000.pdf (last visited Mar. 25, 2014).

PUBLIC-PRIVATE (Mix of States/ IOs and TNCs/ NGOs)	—	• UN Global Compact • UN Business Partnerships • Equator Principles • Voluntary Principles on Security and Human Rights
PRIVATE (TNCs)	—	V.C. Private Instruments • Corporate Codes of Conduct • Extractive Industries Transparency Initiative
PRIVATE (NGOs)	—	• Forest Stewardship Council's Forest Principles • ISEAL Alliance-labels • Social Accountability International Standards

Figure 3. Categories of environmental and human rights instruments.

It seems that instruments belonging to different categories are likely to denote certain recurring combinations of dimensions of softness. These dimensions are marked in Figure 4 below, although there may also of course be other soft characteristics as the analysis further below will clearly show.

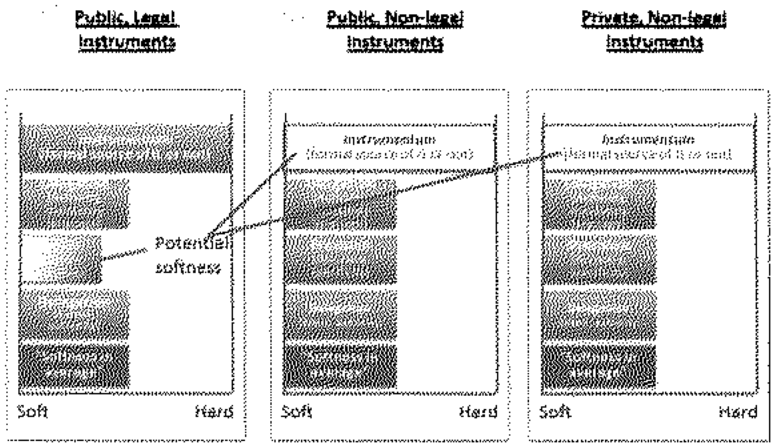

Figure 4. Hypothetical Illustration of the "softness" of instruments.

The possibility of such different dynamics of softness, as well as different underlying explanations, justify a separate analysis of instruments from each of the three categories. The categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments thus constitute Sections V.A., V.B. and V.C. in the discussion that follows below.

V. APPLYING THE CONCEPTUAL TOOL ON SOFTNESS TO PRACTICAL CASES

In this Section, the conceptual tool created in the preceding Section is applied to practical case examples on human rights and environmental instruments that deal with TNCs. The approach has two objectives. First, the tool's scores along the dimensions of softness enable a sharper differentiation of the numerous instruments that apply to TNCs. Second, the application of the tool will allow for observations of potential connections between the instrument's softness (both along individual dimensions and overall) and how it operates. Ultimately, this

enables preliminary reflections on the relationship between (categories of) instruments' softness and their effectiveness. It might even enable the grouping of measures into some type of sub-categories on the basis of their softness, as measured along the dimensions.

The instruments that are to be analyzed have been selected for their central place in the legal system for this area (Human Rights Covenants), for their high profile (UN Guiding Principles, OECD Guidelines) or their visibility towards the public (UN Global Compact, Forest Stewardship Council). In the TNC context, instruments often combine human rights with environmental protection.

As may be recalled from the previous Section, the preliminary application of the tool grouped instruments into three general categories, that are each discussed in the Sections that follow: Public Legal Instruments (Section A), Public Non-Legal Instruments (Section B) and Private Instruments (Section C).[116] The instruments have been chosen so as to provide case examples that are representative of each of those categories.[117] The selected instruments for each category will be scrutinized along the (sub)dimensions of softness of the conceptual tool—obligation (authority and mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation)—to add further nuance to the analysis.

A. Public Legal Instruments

1. Preliminary Observations

Instruments that are formal sources of international law—treaties and binding decisions of international organizations—possess a legal instrumentum, and have thereby specific characteristics compared to non-legal instruments: only formal sources of law are capable of creating obligations that are hard in the sense of being legally binding and capable of enforcement through judicial means.

Most international law, aside from a few obligations under customary law, is nonetheless not applicable to TNCs directly[118] as was explained in Section II. Treaties and binding decisions of international organizations also usually do not specifically address TNC behavior.

116. A few of the examples amount to such an important participation of both private and public actors that they may also be considered to constitute a separate public-private category.

117. The first group, Public Legal Instruments, were already discussed in Section 2 to establish the existence of a legal void. The observations in the following section on them will therefore build upon the previous analysis in Section 2.

118. NOLLKAEMPER, *supra* note 22, at 58-59.

The hardness of the instrumentum of Public Legal Instruments is therefore in the particular context of international governance not equaled in the negotium part when measured along the dimensions of creating obligations on TNCs and being specific in doing so.

Authority as a sub-dimension of "obligation" emanates in this category of instruments from public authors, states and, to a much lesser extent, international organizations. However, a state as a public authority is not always authoritative as a rule maker, when it adopts instruments to address its own behavior, the obliging authority of the instrument is at the state's own discretion, and thus lower than when it is set by a binding Security Council Chapter VII resolution. States also do not have much authority over activities that take place outside their jurisdictions, which is very relevant in the context of TNCs. This type of exception therefore limits public authorities' power in terms of the obligatory nature of the enacted instrument.

On the other (sub-)dimensions in the tool, the softness of Public Legal Instruments may in principle vary like it varies in all other types of instruments. In the absence of direct obligations and likely poor specificity, the tool places special emphasis on the delegation dimension of international public law instruments. Are the implementing tasks comprehensively delegated, and do the delegatee bodies possess the necessary authority to oversee the process? It should be kept in mind that because the states in any event need to act in-between the international requirements and TNCs, there already are two steps in applying international public law instruments. The delegation dimension of the tool shows how there is one further step to be taken into account.

The state's implementing authority and responsibility to apply the international provisions is often delegated to a public body such as a ministry or agency. Although an actor other than the TNCs themselves, the authority of the delegation is limited by the fact that it was these very states that adopted the instruments in question, and they are addressed to these very same states. The implementing and interpretive authorities are in this sense not delegated to a truly independent actor. The state's independent authority in the delegation will depend on many factors, but there is often little in the instruments to guarantee it, and much to restrain it. For example, the interests of the state may be too close to that of the TNCs for it to exercise 'independent' delegated authority over the corporations. This holds true for host states, as the Chevron case vividly illustrated, but also for home states, which may be unwilling to constrain the operations of 'their' corporations abroad.

Another problem is that international jurisdictional laws limit the authority that is legally delegated to the home state. Home state organs enforcing or adjudicating on 'their' corporations may rightly fear that such extensive exercises of jurisdiction are for the most part prohibited by international law. The Shell Nigeria case showed that even where a home state judge declares itself competent, it may only be able to apply the law of the host state, which in that case was far below the standards prescribed by the home state.[119] Third, a state may be unlikely to proactively enforce the rules, and will often only intervene if the victims or their representatives bring a case against the state authorities. Local inhabitants or vigilant NGOs may be required to force the state to assume its role as the delegatee. An example is again the Chevron case, where only a decades-long effort by interest groups was able to move the case forward.

Truly relevant delegation would mean third party oversight over the states' performance of their delegated tasks with regard to TNCs. The following sections will show that such oversight is nevertheless often deficient on all levels: national, regional as well as international. In conclusion, also the delegation sub-dimension seems therefore rather soft for many Public Legal Instruments on TNCs.

A tentative picture can thus already be envisaged before applying the tool to provisions of particular Public Legal Instruments in areas of human rights covenants and multilateral environmental agreements. Public Legal Instruments are formally binding upon states that are parties to them, but not upon TNCs nor do they generally contain mandatory and precise requirements specifically about their behavior, or delegation of oversight regarding state actions vis-à-vis TNCs. Public Legal Instruments thus appear soft along all dimensions in their application to TNCs. The conclusion seems almost counter-intuitive. 'Hard law' could leave a void in terms of TNCs because it is in fact not hard at all.

2. The Human Rights Covenants

The human rights covenants ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social and Cultural Rights) illustrate the softness that may plague Public Legal Instruments in the field of human rights. The Covenants amount only to what Knox calls a due diligence obligation,

119. *See supra* Section 2.5.3; *Milieudefensie v. Dutch Royal Shell* (LJN: BU3535) (2013).

"an obligation of conduct and effort, not of result,"[120] regarding human rights violations between private actors such as TNCs and individual citizens. It is sufficient for the state governments to satisfy their obligations to just take "reasonable steps" in trying to prevent violations. Individual states and national legal orders retain rather large discretion to determine appropriate measures.

Admittedly, the Human Rights Committee has commented that states must protect individuals "also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private parties or entities."[121] But how exactly the rights apply to private actors, and which actions are required of states in particular situations is left to the states themselves to determine. Moreover, the General Comments of the Covenant's bodies are not legally binding. Research conducted under the UN Special Representative for business and human rights' mandate shows that in practice, very few states actually have "special policies, programs, or tools designed specifically to deal with corporate human rights challenges."[122] The conclusion is that the "due diligence" standard leads to a low level of obligation, and that the lack of accurate guidance on which actions are a part of that due diligence standard amounts to a low level of precision, both in terms of accuracy and specificity.

As for the duties of home states to oversee that corporations based within their jurisdiction respect human rights extra-territorially, the Covenants are even more ambiguous: "The committees have not expressly interpreted the treaties as requiring states to exercise extraterritorial jurisdiction over abuses committed abroad by corporations domiciled in their territory. Nor however, do they seem to regard the treaties as prohibiting such action, and in some situations they have encouraged it." For example, the Committee on Economic, Social and Cultural Rights has suggested that state parties take steps to "prevent their own citizens and companies" from violating rights in other countries.[123] Thus, the dimensions of obligation and precision appear to be for home states even softer than for host states.

120. Knox, *supra* note 21, at 22.

121. Human Rights Comm., General Comment No. 31, ¶ 8, UN Doc. CCPR/21/Rev.1/Add.13 (May 26, 2004).

122. *See* Human Rights Council, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and the Fortune Global 500 Firms, UN Doc. A/HRC/4/35/Add. 3 (Feb. 28, 2007).

123. Ruggie, *supra* note 9, at 830.

Is the softness of such low levels of obligation and precision mitigated through oversight by third parties, delegation? The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (the Human Rights Bodies) may be considered as a kind of 'secondary' delegatee: they monitor whether the states complete their delegated task of providing horizontal protection. Such interventions by the Human Rights Bodies will not be able to strengthen the delegation much in practice, however, as it is widely acknowledged that these UN bodies have only very limited powers. The so-called 'views' the HRC adopt in specific cases are non-binding as are the General Comments of both committees.

Regional courts such as the European Court of Human Rights have declared themselves incompetent to assert jurisdiction outside the territory of the member states of the European Convention on Human Rights, except where a member state exercises effective control, but this is only possible in cases of either full occupation[124] or military action on the ground.[125] In the developing regions, where the consequences of the void are felt most, oversight mechanisms are much weaker. They are practically absent in Asia,[126] while the African Court of Human and Peoples' Rights is slowly starting to make use of its competences.[127] The Inter-American Court of Human Rights seems in this respect most promising in the short term. However, the primary focus of all these courts often is, or at least should be, in scrutinizing government's own inappropriate conduct. Scrutiny of governmental oversight of corporate conduct would seem a second-tier priority.

The Shell-Nigeria case implies that home state courts will at most oversee that the state applies to national corporations the domestic law of the host state, but not that it applies the ECHR or the ICCPR. The OECD National Contact Points are a very modest attempt to oversee human rights violations outside ECHR territory. The Contact Points fall in this paper under the next category of Public Non-Legal Instruments.

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124. *Cyprus v. Turkey*, A. 25781/94, 35 Eur. Ct. H.R. 731, ¶ 76, (2001); *Loizidou v. Turkey*, App. 15318/89, 20 Eur. H.R. Rep. 99, ¶ 62, (1995).

125. *See Al-Skeini v. United Kingdom*, A. 55721/07, 53 E.H.R.R. 18, (2011); *Bankovic & others v. Belgium*, A. 52207/99, 12 December 2001, para. 82.

126. The ASEAN Intergovernmental Commission on Human Rights (AICHR) has as of yet no real judicial powers. *See* James Munro, *The Relationship Between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, 15 INT'L J. HUM. RTS., (2011).

127. A first decision was issued on 15 December 2009, in the matter of *Michelot Yogogombaye v. The Republic of Senegal*. *See* Chacha Bhoke Murungu, *Judgment in the First Case Before the African Court of Human and Peoples' Rights: A Missed Opportunity or a Mockery of International Law in Africa?*, 3 J. AFRICAN & INT'L L. 187 (2010).

These examples are well aligned with the conclusions of the UN Special Rapporteur. States seem to escape effective oversight by other delegated bodies, irrespective of the level of governance.

3. Environmental Agreements

The previous discussion on Public Legal Instruments in the field of human rights indicated that these tools often lack in terms of their obligation, precision and delegation. International environmental agreements may however be used to illustrate that such deficiencies are not an unavoidable characteristic of Public Legal Instruments, but rather a consequence of more or less deliberate choices in constructing the instruments. In other words, hardness is possible to achieve, also in international law. The International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention) 1992,[128] provides an instructive example. The CLC Convention is an international maritime treaty that was adopted to ensure that adequate compensation is available for oil pollution damage caused by accidents of oil tankers.[129] Article IX of the Convention states that "[e]ach Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation."

The convention is extremely precise and framed in mandatory terms. It reads almost like an insurance contract.[130] Paradoxically, as the

128. International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention, (CLC)), International Maritime Organization (Nov. 29, 1969), *available at* http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx (last visited Mar. 27, 2014).

129. *See* International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 14097, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf (last visited Mar. 30, 2014).

130. For example, paragraphs 1-3 of Article V state:

> The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
> 4,510,000 units of account for a ship not exceeding 5,000 units of tonnage;
> for a ship with a tonnage in excess thereof, for each additional unit of tonnage, 631 units of account in addition to the amount mentioned in sub-paragraph (a);
> provided, however, that this aggregate amount shall not in any event exceed 89,770,000 units of account
> The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.
> For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum

text of for example the Preamble and Articles III and V of the Convention show, a central aim of the Convention is in fact to limit the liability of the ship owners. A number of scholars indeed criticize the way in which a regime, which was meant to establish a balance between the needs of the victims of oil spills (compensation for the harm) and the needs of the economic actors (continuation of activities), favors the latter.[131] The victims of a recent oil spill, caused by the tanker Erika, have for that reason sought to escape the limitations of the international civil liability regime. They try to rely on the more protective provisions of national criminal law or EU waste legislation,[132] instead.[133] All other public law instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("HR Convention") also seem incapable of alleviating the victims' concerns. The precision and delegation of the HR Convention is low and much inferior to that of the CLC Convention.

The example demonstrates how a Public Legal Instrument can be very hard in terms of its obligations, precision and delegation, and that

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representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority. *Id.*

131. *Cf.* A.E. Boyle, *Globalising Environmental Liability: The Interplay of National and International Law*, 17 OXFORD J. ENV. L. 3 (2005); EDWARD H. P. BRANS, LIABILITY FOR DAMAGES TO PUBLIC NATURAL RESOURCES: STANDING, DAMAGE, AND DAMAGE ASSESSMENT (2001); LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT (Colin M. De la Rue ed., 1993); Gotthard M. Gauci, *Protection of the Marine Environment Through the International Ship-Source Oil Pollution Compensation Regimes*, 8 REV. EUR. COMP. & INT'L ENVT. L. 29 (1999); Magnus Göransson, *Liability for Damage To The Marine Environment*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 345, 345-58 (Alan Boyle & David Freestone eds., 1999); David Wilkinson, *Moving The Boundaries of Compensable Environmental Damage Caused by Marine Oil Spills: The Effect of two New International Protocols*, 5 OXFORD J. ENVTL. L. 71 (1993). For more critical approaches, *see* Anne Daniel, *Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?*, 12 REV. EUR. COMP. & INT'L ENVT. L. 225 (2003); Michael Faure & Wang Hui, *The International Regimes for the Compensation of Oil-Pollution Damage: Are They Effective?*, 12 REV. EUR. COMP. & INT'L ENVT. L. 242 (2003); Armelle Gouritin, *The International Regime for the Compensation of Oil-Pollution Damage. A Good Candidate to Have a Human Rights Approach?*, 20 REV. EUR. COMP. & INT'L ENVT. L.194 (2011); and Dramé Ibrahima, *Recovering Damage to the Environment per se Following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992*, 14 REV. EUR. COMP. & INT'L ENVT. L. 63 (2005).

132. *See* Case C-188/07, Commune de Mesquer v. Total Fr. SA, 2008 E.C.R. I-4501.

133. *See* Gouritin, *supra* note 132, at 194-207.

it may then tend to be working to shield rather than to govern the specific powerful group of TNCs, in the quoted example the shipping companies.

4. Concluding Perspectives on Public Legal Instruments

The application of the softness tool on Public Legal Instruments reveals that they tend to score low on the mandatory language, precision and specificity in terms of managing TNCs and other private actors. The level of obligation for states in fulfilling their tasks as delegatees also remains ambiguous. Especially the extra-territorial enforcement of home state laws against national corporations is rare. In many respects, the 'hard law' turns out not to be hard at all, even if there clearly is potential for it be so.

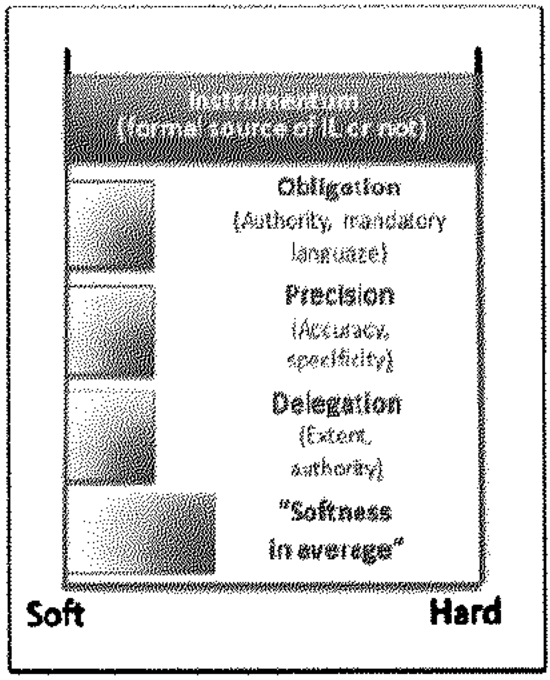

Figure 5. Softness of TNC related Public Legal Instruments in human rights and environmental protection.

B. Public Non-Legal Instruments

1. Preliminary Observations

The second group, Public Non-Legal Instruments contains agreements between state parties, state-centric institutions or even

looser gatherings of public officials. The proliferation of international organizations has increased the importance of public yet non-legal instruments,[134] and this is also true for the governance of TNCs. Such instruments are therefore not a new phenomenon in international governance, and their longstanding role has been described by scholars such as Schachter, Lipson and Aust.[135]

The obvious observation on the softness of the entire category of Public Non-Legal Instruments is what distinguishes them from formal law: that governments and international organizations (IOs) have opted for a non-legal instrumentum, that is not formal law. The non-legal nature of the instrumentum is often reflected in the denominations of the instruments, such as 'recommendations' or 'guidelines'. Sometimes a closer analysis of the IO's constitutive instrument, or of the content of the agreement, is necessary to establish that one is indeed dealing with a non-legal instrumentum.

Many Public Non-Legal Instruments that relate to TNC behaviour are adopted through, or by, IOs such as the Organization for Economic Cooperation in Europe (OECD), the United Nations (UN) and the United Nations Environment Programme (UNEP). Their authority tends to vary on a case-by-case basis: the UN as an eminent organization can assert great moral authority on state and TNC activities, while the OECD is regarded highly by TNCs for its competence and expertise on economic issues. The obligations created by the authority of other IOs, for instance UNEP, towards TNCs are in many cases softer. What is relatively new in Public Non-Legal Instruments is that increasingly they contain a mixture of provisions that are intended to directly cover the behaviour of non-state actors, even though the non-state actors have no official part in the adoption of such instruments. This increases the obligatory nature of the instruments towards TNCs. On the other hand, the member states of international

134. JOSÉ E. Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005). *See, e.g.*, CHRISTIAN BRUTSCH & DIRK LEHMKUHL, *Complex Legalization and the Many Moves to Law*, *in* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 9, 9-27 (Christian Brutsch & Dirk Lehmkuhl eds., 2007) (discussing the increase in international law making and legalization of transnational relations); Kal Raustiala, *Institutional Proliferation and the International Legal Order*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 293, 293-316 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (referring to institutional proliferation and the rise of institutional density).

135. *See* Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 INT'L & COMP. L.Q. 787 (1986); Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

organizations voting in favor of such instruments tend to equate them with political agreements. The language of the instruments is not mandatory, and hence does not create obligations: not on the TNCs, the states, nor on the IOs adopting them. The member states rather tend to share the idea that the TNCs' behaviour needs to change in certain ways, and wish to point each other's actions into that direction. The instruments that are directly addressed to TNCs only encourage them to act in a certain way.

The sub-dimensions of precision—the accuracy and specificity of the instruments — appear to vary widely in Public Non-Legal Instruments. Specificity perhaps tends to be the 'harder' sub-dimension of the two, as the instruments occasionally address specific kinds of businesses and specific types of TNC behavior, but are less often very accurate about what exactly the states and TNCs are in practice expected to do.

Finally, the delegation dimension tends to be low across Public Non-Legal Instruments, as the implementation and interpretation of the instruments is mostly left to the enacting states and IOs themselves.

2. The OECD Guidelines and National Contact Points

The Organization for Economic Cooperation and Development (OECD) adopted the OECD Guidelines for Multinational Enterprises in 1976, and revised them in 2000 and 2011. The OECD Guidelines are "recommendations addressed by governments to multinational enterprises operating in or from" OECD Member States adhering to the Guidelines.[136] They "provide non-binding principles and standards for responsible business conduct in a global context,"[137] thus apparently aiming to fill the void left by the Human Rights Covenants with their unclear stance on extra-territoriality. The Guidelines encourage companies to "[r]espect the internationally recognised human rights of those affected by their activities,"[138] "wherever they operate."[139]

In terms of precision, the OECD Guidelines are thus specifically addressed at multinational enterprises and are quite accurate as to what is expected from them. For example, the Guidelines state that

136. Org. for Econ. Co-operation and Dev., *OECD Guidelines on Multinational Enterprises* 3 (2011), *available at* http://www.oecd.org/corporate/mne/48004323.pdf (last visited Feb. 11, 2014) [hereinafter *OECD Guidelines*].

137. *Id.*

138. *Id.* at 19.

139. *Id.* at 17.

[a] State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights.[140]

However, much of the language is not phrased as obligations. In most provisions, 'should', 'seek ways to' or 'does not diminish the expectation' in the provisions just quoted above prevail over 'shall',[141] It remains unclear where in the Guidelines an obligation for the TNCs[142] to actually act in accordance with them is really created. Perhaps it flows from the 'procedural' obligations that are phrased in more mandatory terms.[143] For instance, TNCs—if acting in accordance with the Guidelines—must have an internal policy on human rights, carry out human rights due diligence and "provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts."[144] Yet the Guidelines do not mention any sanctions on transnational corporations that do not carry out such tasks. It should be recalled that for the TNCs, the Guidelines indeed only establish non-binding principles. The ability of the procedural provisions of the Guidelines to set obligations that amount to a high level of hardness in the sense of the tool will hence depend on the authority of the instrument, and the OECD more generally. As was noted above, the corporate community would seem to regard the organization rather highly.[145]

A further dimension along which to measure the hardness of the Guidelines is the delegation of their implementation and enforcement. The Guidelines do set legally binding obligations on the OECD member states in this respect. The states must, amongst other things, establish "National Contact Points" ("NCPs") to assist companies and their stakeholders in complying with the Guidelines.[146] This obligation finds a legal backrest in Article 5(a) of the OECD Convention, which specifically mandates state parties to follow the OECD Guidelines' procedural and institutional rules regarding the setting up of NCPs and

140. *Id.* at 38.

141. *See e.g.*, *OECD Guidelines*, *supra* note 137, art. IV.1-IV.3.

142. The OECD Guidelines uses the terminology "MNEs." *Id.*

143. *Id.* art. IV.4-IV.6.

144. *Id.*

145. For an example of a critical approach to the authority of the OECD Guidelines, *see* Oldenziel & Wilde-Ramsing, *OECD Guidelines lack teeth, influence*, OECD WATCH (Sept. 25, 2009), *available at* http://oecdwatch.org/news-en/oecd-guidelines-lack-teeth-influence (last visited Mar. 25, 2014).

146. *OECD Guidelines*, *supra* note 137, Part II.1.

the proceedings that they are to follow. [147] However, it is doubtful whether the NCPs may be considered independent from the executive branch of the states that establish them. As noted, this triggers problems on the role of the state as a delegatee.[148] This problem is slightly less serious in OECD Guidelines than in many Public Legal Instruments, because the state is implementing standards that apply directly to the TNCs instead of relying on their indirect application through the duty to protect. It has been argued that the NGOs also play the role of a delegatee, next to the NCPs themselves, because the procedure allows NGOs to bring cases to the attention of the NCPs.[149] In practice, this is the way in which a case usually reaches an NCP.

A more serious problem is the limited extent of delegation. The ultimate power of the NCPs resides in their ability to make public statements. While the power of negative publicity in inducing changes in TNC behavior (or at least in the image it wishes to promote) should not be underestimated, it usually still falls short of the obligatory force of for instance monetary fines or the judicial prosecution of individuals. There are nevertheless good reasons to doubt the extent to which the NCPs are, or can be expected to be, performing their tasks as effective implementers and interpret of the Guidelines. In fact, there is no sign that TNCs would actually have been publically reproached in more cases than the odd one out. For example, in the eleven cases over a period of ten years—a low figure in itself—on which the NCP of the Netherlands so far has reached a Final Report, not once did it find a reason to publicize the violations of substantive rights.[150] In but a few cases did it find that transparency, communication and other such more

147. *Convention on the Organisation for Economic Co-operation and Development*, art. 5(a), OECD (Dec. 14, 1960), *available at* http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm (last visited Mar. 25, 2014) [hereinafter *COECD*].

148. The Netherlands tried to mitigate this problem by making its NCP a more independent body, but the OECD Guidelines require at least some measure of government involvement, so that independence could only partially be achieved. For instance, the Minister of Foreign Affairs can still make a statement before a report is made public. *See Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team* (2010), *available at* http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/final_peer_review_report_dutch_ncp_with_annexes_17_march_2010.pdf (last visited Mar. 25, 2014).

149. *COECD*, *supra* note 148, at 1774. According to Schuler, another possible role of *delegatee* is reserved for the OECD Investment Committee, but its role is limited to posting clarifications of a general nature and it cannot overrule statements by NCPs in specific cases.

150. *OECD Guidelines for Responsible Business Conduct*, MINISTRY OF FOREIGN AFFAIRS, *available at* http://www.oecdguidelines.nl/ncp/closedcomplaints/ (last visited Mar. 25, 2014).

secondary issues were below the OECD standard.[151] It urged the companies in question to improve those particular points, or only congratulated them for having already done so. In the remainder of the cases, the NCP concluded that no 'investment context' or 'nexus' existed, so that the situation fell outside the scope of the OECD Guidelines,[152] or that bilateral talks between the NGO complainant and the company had already brought the issue to a close.[153] The figures on the Dutch NCP reflect those on other OECD member states.[154]

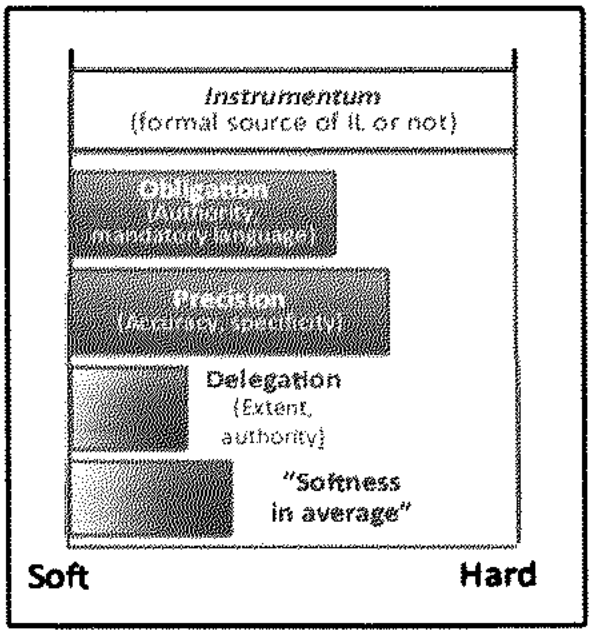

Figure 6. "Softness" of OECD Guidelines.

151. *See e.g.,* Neth. Nat'l Contact Point, Final Statement of the Dutch NCP on the "Complaint (May 15, 2006) on the Violations of Pilipinas Shell Petroleum Corporation (PSPC), Pursuant to the OECD Guidelines for Multinational Enterprises" (July 14, 2009), *available at* http://www.oecd.org/corporate/mne/43663730.pdf. (last visited Mar. 30, 2014).

152. *See* Neth. Nat'l Contact Point, Final Statement of the Dutch NCP on the Specific Instance Raised by Shehri-CBE Concerning Makro-Habib Pakistan Limited, Raised on 9 October 2008 (Feb. 2010), *available at*: http://www.oecd.org/daf/inv/mne/46085466.pdf (last visited Mar. 30, 2014).

153. *See* Neth. Nat'l Contact Point, Final Report of the National Contact Point for the OECD Guidelines in the Netherlands on the Specific Instance Notified by CEDHA, INCASUR Foundation, SOMO and Oxfam Novib Concerning Nidera Holding B.V. (Feb. 3 2012), *available at*: http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/final_statement_nidera.pdf (last visited Mar. 30, 2014).

154. *See* J. OLDENZIEL, J.WILDE-RAMSING AND P. FEENEY, OECD WATCH 10 YEARS ON - ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 10-11 (OECD Pub. 2010).

3. The United Nations Guiding Principles on Business and Human Rights ("UN Guiding Principles")

The UN Guiding Principles are the result of a UN Human Rights Council mandate to the Special Representative of the UN Secretary-General, John Ruggie. On the basis of the mandate, Ruggie was to develop such principles within the framework proposed in his Report to "Protect, Respect and Remedy".[155] The Principles rest accordingly on the Report's three pillars of protection, respect and remedy:

The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.[156]

The text of the UN Guiding Principles was consulted extensively with a wide variety of relevant actors ranging from governments to businesses and NGOs.[157] The substantive principles of the UN Guiding Principles are quite similar to the OECD Guidelines, which in their 2011 version were aligned with the former.[158] Yet, the UN Guiding Principles have a broader scope ratione personae, because they include TNCs from all UN member states, rather than from the industrialized OECD countries only. Ratione materiae, the UN Guiding principles are not limited to investment settings, as are the OECD Guidelines. In other words, the UN Principles apply to a larger number of states and TNCs, and to a wider array of situations.

The UN Guiding Principles were adopted by the geographically representative UN Human Rights Council. The Principles' hardness along the obligation dimension of the tool is likely to benefit from the rather strong systemic coherence with the human rights Covenants. As explained previously, systemic coherence denotes the influence that one instrument may have on the performance of another along the

155. Ruggie, *supra* note 9.

156. UN Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights*, Intro., ¶ 6 A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Mar. 30, 2014).

157. *Id.* ¶ 12.

158. This is understandable since the most recent version of the OECD Guidelines (2011) explicitly states that they are in line with the UN Guiding Principles. *OECD Guidelines*, *supra* note 137, at 3.

dimensions of the tool. The interaction between a similarly aligned Public Legal Instrument, such as a human rights Covenant, and a Public Non-Legal Instrument, such as the UN Guiding Principles, could mutually increase the hardness of both instruments. In this case both instruments are even a part of the UN human rights system. The Principles could lead judiciaries to interpret more specifically the obligations of states as delegatees vis-à-vis TNC conduct under the Covenants.[159] Since all parties to the human rights Covenants are also parties to the UN, the UN Guiding Principles could be argued to constitute a subsequent agreement or practice that contributes to the interpretation of the pre-existing international human rights obligations of states.[160] Alternatively, the UN Guiding Principles could be considered a part of the opinio juris in the formation of new customary rules.[161] Most relevant in this respect is that Part I of the UN Guiding Principles deals with what the state "duty to protect" amounts to for companies. The notion of systemic coherence thus provides insights in how one instrument may have a high level of obligation but lack in precision, while for another one the situation is the other way around. Taken together, the instruments may alleviate each other's softness.
The obligations created by the UN Guiding Principles could therefore be harder than the principled, non-legal nature of their form would lead to assume, if they are 'hardened' by their close links to existing "hard law" instruments. Conversely, the UN Guiding Principles could oblige states, and consequently TNCs, by further 'hardening' the obligations that the states have earlier agreed to as delegatees under human rights Covenants.

This line of reasoning nevertheless holds in practice only where the Public Non-Legal Instrument in question is actually hard comprehensively, i.e. is also precise and uses mandatory language. It is questionable whether this is the case for the UN Guiding Principles. First, the duties of states in the Principles are not phrased in a mandatory or particularly accurate fashion. The duty of the states towards 'abuses by private actors' is in the Principles defined by using wordings such as 'appropriate steps', 'discretion' and 'should

159. Arguably, there is no reason why this would not be true as well to some extent for the OECD Guidelines, just as for all other Public Non-Legal Instruments, which may influence the development of the law through interpretation or the development of customary international law.

160. UN Office of the High Commissioner of Human Rights, *supra* note 157; *see also* Vienna Convention on the Law of Treaties, art. 31(2)(b) (1969).

161. This is what happened to some of the principles established in the famous Rio Declaration on Environment and Development (1992).

consider'.[162] Compared with how state duties have developed in the jurisprudence of the international human rights bodies, the UN Guiding Principles may therefore be a step backwards in terms of accuracy. The vagueness about what the duty to protect amounts to leaves the states a wider margin of discretion on what is acceptable TNC behavior.[163] A closer analysis of the Principles thus reveals evidence of systemic incoherence, or antagonism, in contrast to what initially seemed like a case of coherence.

Moreover, the express emphasis in the Principles that no international obligations are set on the corporations directly, only on the states, obviously dilutes the obligatory character of the Principles on TNCs. In the period before the drafting of the Principles, the idea of setting legal obligations for companies was still taken seriously.[164] The 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'[165] were however dismissed, after which the appointment of the Special Representative followed. The part that directly applies to companies speaks only of responsibilities to respect, but not of obligations in the same more explicit sense as the duties laid on states. The concept of 'responsibility' is not defined any further than that a certain standard of conduct is "expected" of the businesses.[166] Moreover, the UN Guiding Principles do not state on what basis this responsibility arises. Clearly, it is not on the basis of a legal instrumentum. Since TNCs are not legally bound by the Principles, the Principles represent to the TNCs, a mere reiteration of pre-existing legal obligations, and a consensually agreed moral obligation to reach beyond such legal obligations. The hardness of such a moral obligation would depend on the authority of the instrument.[167]

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162. UN Office of the High Commissioner of Human Rights, *supra* note 157, Commentary on Foundational Principle 1, 3-4 (emphasis added).

163. Nicola Jägers, *UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Accountability?*, 29 NETH. Q. HUM. RTS. 159, 161 (2011).

164. *Id.* at 160 ("From the very beginning professor Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as the sole duty-bearer."). *See also* De Feyter *supra* note 15, at 78.

165. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

166. U.N. Office of the High Commissioner of Human Rights, *supra* note 157, Commentary to Principle 11.

167. Special Representative Ruggie notes quite positively the numerous consultations he had with companies in establishing the Principles. *See* UN Guiding Principles, Introduction, ¶ 7, ¶12. It is difficult to assess whether the consultations have truly supported the authority of the Principles, or were merely something that TNCs participated in to maintain a constructive image and to influence any obligations they could be subjected to.

In terms of precision, the UN Guiding Principles represent the high end in this paper's examples of instruments. They are slightly less specific than the OECD Guidelines, because the drafters broadened their scope of application to all businesses rather than to TNCs alone. Also accuracy is reasonably high, with elaborate commentaries to each of the 'Operational Principles'. The part that sets out the desired scope and content of the companies' human rights due diligence processes seems to some extent comparable to an environmental impact assessment.[168] The focus of the Principles is on prevention, which the TNCs have direct influence on, and which is often more effective than remediation.

However, although precise, much is laid out in descriptive and explanatory concepts that do not amount to new mandatory requirements from the perspective of the dimension of obligation. So while accurate, the Principles and their Commentaries at most reiterate existing legal requirements. They, for example, note that in many jurisdictions, complicity in committing a crime can lead to criminal liability, even on TNCs, but they do not in any way expand the scope of such liability.[169]

Even precise obligations on companies need to be interpreted when they are implemented into practice. The implementation is optimally delegated to separate authorities. Yet on delegation, the UN Guiding Principles are considerably softer than, for example, the OECD Guidelines. An earlier version of the Principles envisaged an Ombudsperson,[170] but this role was apparently removed. The Principles in the part on the state Duty to Protect probably confused rather than clarified the role of states as delegatees in the implementation and enforcement of international human rights law on TNCs.[171] The part on Access to Remedy calls for various kinds of national and company-based non-judicial grievance mechanisms to complement the state-based judiciaries. In other words, the Principles neither strengthen the role of home states nor do they create a centralized authority to coordinate the implementation. They only advocate a very soft form of delegation that excludes the power to take decisions. Moreover, such mechanisms are only encouraged, rather than made mandatory. The contrast to the National Contact Points (NCPs), mandated by the OECD Guidelines, is clear.

168. *Id.* at Principles 17-21.
169. *Id.* at Principle 17.
170. Ruggie, *supra note* 9, ¶103.
171. Jägers, *supra* note 164.

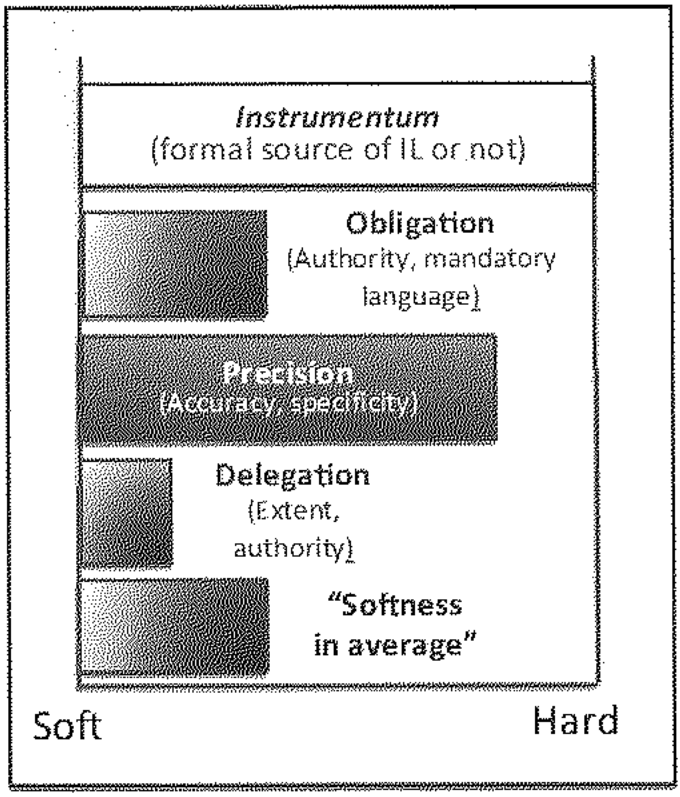

Figure 7. Softness of UN Guiding Principles

4. Concluding Perspectives on Public Non-Legal Instruments

Public Non-Legal Instruments score around the average on several dimensions of softness in the tool. While scoring rather high on the dimension of precision, the Public Non-Legal Instruments in this paper score low on the scale of delegation. They are low on the scale of obligation as well, because the two sub-dimensions of obligation—authority and the mandatory nature of the language—give contradictory results. The language used is often overtly non-mandatory, and this fact cannot be fully compensated by the respectability of the IOs involved, which is likely to reinforce the authority of the instruments. Public Non-Legal Instruments, such as the OECD Guidelines and the UN Guiding Principles, by definition lack the legally binding character of their counterparts in formal treaties. Unless they are considered

interpretive agreements, they cannot be invoked before a judge as directly applicable to a dispute. Systemic coherence therefore could influence the softness or hardness of a non-legal instrument. However, unless that dynamic clearly increases the level of obligation and delegation, the softness along these two dimensions only appears to permit average levels of hardness in this category of instruments.

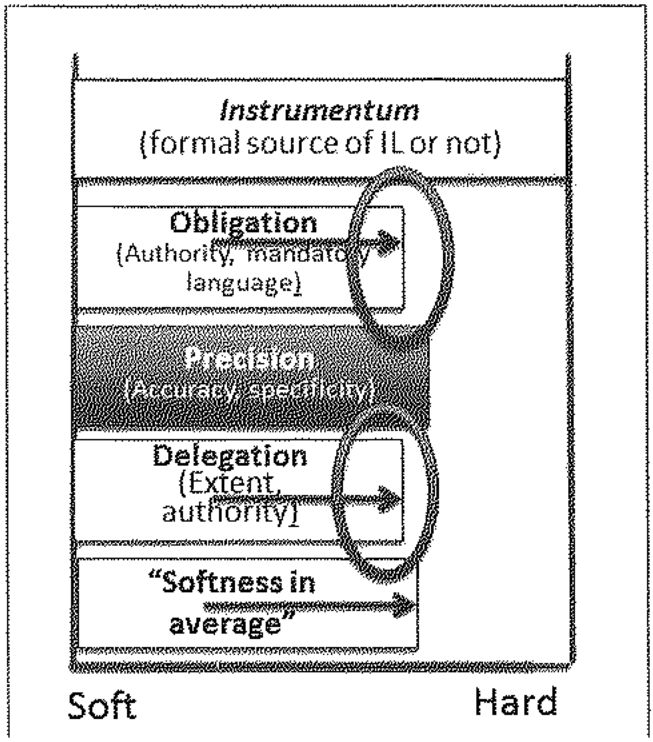

Figure 8. Effects of systemic coherence – hardening Public Non-Legal Instruments through hard law.

C. Private Instruments

1. Preliminary Observations

There are a great number of instruments that belong to the third group: private instruments with direct relevance to TNC behavior. Despite the variance among the instruments in this category, it is possible to make some general assumptions on how they score on the dimensions of the tool.

Private instruments, as explained above in Section IV, derive their denomination from the fact that their dominant authors are neither states nor state-centric international organizations. These types of

organizations do not have the capacity to adopt instruments that qualify as formal sources of international law, i.e. as Public Legal Instruments. None of these instruments in other words has a legal instrumentum. At the same time, however, such authors do have the capacity to agree among themselves on instruments that are of private kind.

Private instruments vary significantly by the (combinations of) authors adopting them. These authors are principally businesses or their associations, as well as national and international non-governmental organizations (NGOs). In many fields TNCs and NGOs have even entered into a veritable contest to set the applicable standards. Sometimes a single instrument is ultimately agreed upon by TNCs and NGOs together, such as the much discussed Forest Stewardship Principles and Criteria. Some private instruments are adopted together with or without the support of states or international organizations that result in some cases in so-called public-private partnerships (PPPs).[172] It is for that reason not always easy to distinguish between private and public instruments, although in most cases either the public or the private actors will be in a dominant role. The Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI) are, respectively, examples of a venture purely among TNCs and a venture between TNCs and a few states. In some cases, such as the UN Global Compact, NGOs have heavily criticized PPPs for being dominated from the outset by business interests under the umbrella of what was formally a state or IO initiative.[173]

It is difficult to make generalizations along the tool's dimension of authority with so many different author-addressee combinations. Public authors are generally, but not always, more authoritative than private parties, and the views on the authority of self-regulation vary greatly. Low authority indicates low obligation, and hence softness. Mandatory nature of the language differs widely as well: the Forest Stewardship Council confronts a TNC with mandatory language, while the UN Global Compact does not. It is voluntary to sign up for either instrument.

Generally, the dimension of delegation is very soft across the board, in particular where private instruments are a form of self-

172. Peter Utting & Ann Zammitt, *United Nations-Business Partnerships: Good Intentions and Contradictory Agendas*, 90 J. BUS. ETHICS 39 (2009).

173. Payne, *supra* note 13, at 13-14. *See also* J. Martens, *Precarious Partnerships: Six problems of the Global Compact between Business and the UN*, GLOBAL POL'Y FORUM, *available at* http://www.globalpolicy.org/component/content/article/225/32252.html (last visited Mar. 20, 2014).

regulation. The role of the state as delegatee is absent in the context of private instruments. In the NGO-led schemes, there may be some delegation to the NGOs, and the TNC schemes sometimes rely on external firms that perform corporate social accountability audits. Yet neither of them wields the investigative and prosecutorial power of the state.

Specificity is often high, not only ratione personae, but also ratione materiae, as companies are the only addressees. The used language may range from the very accurate and mandatory expressions of, technical standards to the very open and loosely formulated texts that are predominant in the human rights and environmental context, such as the Corporate Social Responsibility declarations of TNCs. Finally, on precision there is again much variance. The NGO principles usually score higher on this dimension than their TNC counterparts.

2. *The United Nations Global Compact ("UN Global Compact")*[174]

The United Nations Global Compact is a cooperative initiative of the UN and businesses, based on the multi-stakeholder ideology of UN-Business Partnerships that became prevalent in the UN in the 1990's.[175] The Global Compact is based on the voluntary incorporation by TNCs of a set of ten principles on human and labor rights, environmental rights and fight against corruption into all their activities. The companies also undertake to actively defend these values within their 'sphere of influence'.[176] The Global Compact is completely voluntary, both in regards to the initial registration as well as the subsequent adherence to the rules. In earlier versions, the principles were quite vague, but recently they refer to the UN Guiding Principles' chapter on the responsibilities of businesses. The link subjects companies to the more elaborate set of principles. They give more accurate, yet clearly non-mandatory guidance about the steps that TNCs can take not to violate existing legal rules. One may clearly notice the effects of positive systemic coherence between the Compact and the Principles. For example:

> Principle 2: "Businesses should make sure they are not complicit in human rights abuses," or

174. The content of this section is derived partly from Tim Staal, *The Roles of Hard Law and Soft Law in the Regulation of Global Business Conduct* (2010) (unpublished Master's Thesis, Vrije Universiteit Brussels).

175. Utting & Zammitt, *supra* note 173, at 39-40.

176. *See* U.N GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Mar. 20, 2014).

Principle 9: "Businesses should encourage the development and diffusion of environmentally friendly technologies."

The Global Compact awards companies who report their efforts on a regular basis the right to sport the Global Compact Logo. A sanction exists in the form of 'de-listing' a company that does not report on its efforts over three consecutive one-year periods.[177] But in order to remain listed, a company need not do anything substantive. This TNC-favorable overall set-up attests to the private sector dominance in the Compact, and speaks for analyzing this public-private arrangement under the category of Private Instruments.

The Global Compact is based on the idea of forming a "community among the participants in which each individual actor strives to appear as appropriate in relation to other members of the network and to their stakeholders at large, a stance that should drive them to act according to the articulated principles."[178] Thus, the success of the Global Compact seems to depend on the plausibility of this relation between (superficial) peer accountability, the attractiveness of the Logo, and a TNC improved human rights and environmental record. This outcome seems quite case specific: what for a diligent TNC with high brand recognition and many aggressive competitors may create a hard instrument, may for a low profile free rider appear completely soft. The difficulty in even measuring such attributes against the tool illustrates well in fact the uncertainties and vagueness inherent in this type of an instrument.

In terms of softness, the drafters of the Compact seem to expect that the lack of mandatory and precise wording, as well as the emphasis on the Compact's voluntary nature, are compensated through the hardness of other dimensions. The primary means here is the delegation of the supervision over self-implementation to 'other members of the network and to their stakeholders at large'. These groups include other TNCs and NGOs. This has, however, arguably remained an empty promise. First of all, a single group of actors, the TNCs themselves, "appear[s] as rule setters, rule enforcers, rule followers and rule monitors."[179] This is at odds with the very idea of delegation. Second, the delegation of authority to 'stakeholders at large' points to two

177. *Integrity Measures*, U.N. GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html (last visited Feb. 18, 2014).

178. K. Sahlin-Andersson, *Emergent Cross-sectional Soft Regulations: Dynamics at play in the Global Compact Initiative*, *in* SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS 140 (U. Mörth ed., Edward Elgar Pub 2004).

179. *Id.* at 141.

groups of actors: the general public and NGOs. The former may be expected to react at press stories about serious violations, but will not actively compare company behavior to the principles. So in that sense the general public has a limited, if any task at all, in the governance of the Global Compact. The most visible part of the public, NGOs, have from the beginning played an ambivalent role in the Compact. NGOs can be members, just like TNCs, and can therefore present a matter of alleged 'egregious abuse' to the Global Compact Board. However, the ultimate sanction is the 'de-listing' of the TNC. Such an outcome seems superficial at best, and thus makes for a very unsatisfactory route for NGOs. Compared to the OECD Guidelines' National Contact Points or to the human rights treaty bodies, one may conclude that barely any delegation of authority takes place under the Global Compact.

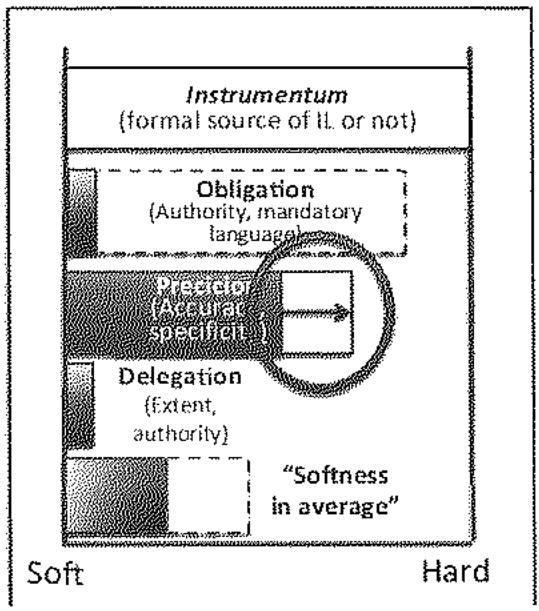

Figure 9. "Softness" of the UN Global Compact, with the impact of systemic coherence highlighted.

3. *The Forest Principles of the Forest Stewardship Council (FSC)*

Forestry is an area where nation states have consistently failed to reach a global legally binding agreement. Negotiations on a global forest convention were called off already at the Rio Earth Summit of 1992.[180] The International Tropical Timber Agreement (ITTA) is

180. B. Cashore et al., *Can Non-state Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector*, 16 RECIEL 158, 160 (2007).

criticized for focusing on trade issues and leaving environmental protection practically entirely at domestic discretion. What is left are a number of initiatives that in the course of the 1990's resulted in non-binding instruments with weak substance.[181] Possibly for these very reasons, forestry was one of the first fields where a new form of private transnational regulation appeared: the NGO-based certification scheme of the Forest Stewardship Council (FSC) aims directly at changing the behavior of large forestry companies,[182] often TNCs.

The FSC stands both for a governance scheme, the Forest Stewardship Council, and for a set of principles on forestry.[183] These "Forest Principles and Criteria" are further "elaborated through more specific global standards, which are adapted to local conditions by national or regional chapters."[184] FSC-certified forests must have a continuously updated management plan, the implementation of which is to be monitored and periodically verified by an accredited third-party auditor.[185] Participating companies may actually be obliged to change their policies, even in ways that are not necessarily cost-effective.[186] The Principles are specific in that they refer to one particular sector with its own demands, and they are also quite accurate. There are detailed

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All substantive provisions of the ITTA 2006, which entered into force 7 December 2011, are indeed formulated as 'objectives' (Article 1), that are to be implemented through 'policy work and projects' (Article 24) and funding (Article 21) and the conduct of 'studies (Article 27). *See* International Tropical Timber Agreement, Jan.27, 2006, U.N. Doc. TD/TIMBER.3.12 (Jan. 27, 2006).

181. Intergovernmental Panel on Forests; Intergovernmental Forum on Forests; United Nations Forum on Forests, which produced the "Plan of Action" and the "Programme of Work", contained in E/CN.18/2001/3/Rev.1, which Dimitrov describes as "masterpieces of Machiavellian diplomacy". R.S. Dimitrov, *Hostage to Norms?: States, Institutions and Global Forest Politics*, 5 GLOBAL ENVIRONMENTAL POLITICS 11 (2005).

182. The high intensity of research on the FSC shows that if any private regulatory instrument is taken seriously and seen as a forerunner, it is the FSC. Interestingly, this literature has also ventured into the complement-substitute-or-antagonist debate referred to above. *See* E. Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 75-76 (2006); Cashore et al., *supra* note 181; J. Zeitlin, *Pragmatic Transnationalism: Governance Across Borders in the Global Economy*, 9 SOCIO-ECON. REV 196-97(2010); T. Bartley, *Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia*, 12 BUS. & POL. 7-8 (2010); T. Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517 (2011) [hereinafter *Transnational Governance*].

183. *Principles and Criteria for Forest Stewardship FSC-STD-01-001 (version 4-0)*, FSC INTERNATIONAL (1996), *available at* http://ic.fsc.org/principles-and-criteria.34.htm (last visited Feb. 10, 2014).

184. Zeitlin, *supra* note 183, at 196-97.

185. *Id.*

186. Cashore et al., *supra* note 181, at 161.

provisions on tenure and use rights (Principle 2), indigenous peoples' rights (Principle 3), community relations (Principles 4) and environmental impacts (Principle 6). Moreover, all the mentioned principles are phrased in clearly mandatory terms with every provision using the verb "shall".

On the macro level, the hardness of the obligation will depend on how many producers have been willing to join the scheme. Participation is in principle voluntary, but the pressure to join is nowadays rather high due to the strong developed country industry buy-in and increasing consumer awareness. In 2012, it was estimated that 168.364 million hectares,[187] compared to over 4 billion hectares in total forest coverage,[188] are FSC-certified. Overall, the high authority of the scheme and its mandatory language render the scheme quite hard in terms of the created obligation.

Delegation seems at first sight to be quite far reaching as well, although ultimately it is the softest link in the FSC. The governance of the FSC is in the hands of the tripartite Board of Directors, with members representing Environmental, Social and Economic (i.e. business) constituencies, and an equal participation from the global North and South.[189] This multi-stakeholder set-up has arguably boosted the authority of implementing the FSC. The interpretation of the Forest Principles, discussed above, is in the hands of the FSC's organs, not in that of the timber producing participants. The Board of Directors has indeed from time-to-time issued interpretive decisions on TNC activities.[190] Moreover, fulfillment by a timber producer of the FSC Principles is validated by independent certification bodies, which have in turn been accredited by the FSC.[191]

However, there are at least two reasons why the FSC and the certification bodies as delegatees do not reach a high level of delegation. First, it is quite impossible for the certification bodies to regularly check the companies' adherence with the principles. Its executive capacities fall far short of those of public authorities, even in

187. Forest Stewardship Council, *Facts & Figures*, FSC INTERNATIONAL (2014), *available at* https://ic.fsc.org/facts-figures.19.htm (last visited Feb. 10, 2014).

188. Food and Agric. Org. of the U.N., *State of the World's Forests 2012*, 15, FAO (2012), *available at* http://www.fao.org/docrep/016/i3010e/i3010e.pdf (last visited Feb. 10, 2014). In other words, about 4.2 % of total global forest coverage is certified by FSC.

189. Forest Stewardship Council, *Governance*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/governance.14.htm (last visited Mar. 26, 2014).

190. *See id.*

191. Forest Stewardship Council, *Accreditation*, FSC INTERNATIONAL (2014), *available at* http://ic.fsc.org/accreditation.28.htm (last visited Mar. 26, 2014).

developing countries. Its knowledge of 'local dynamics' is often inadequate to really assess compliance with the FSC Principles' criteria.[192] Second, and also connected to the lack of government resources and the authority involved, the only sanction available is the suspension of a forest's certification. As in most timber exporting developing states, FSC certified forests still amount to only a fraction of total production, this can hardly be called an effective sanction. To summarize, a private, non-local authority without effective means of enforcement makes for a 'softer' delegatee than a public, local authority.

The weaknesses in delegation are further aggravated by the FSC's lack of legal instrumentum. FSC is a telling example of how the softness of the dimensions of precision and obligation is quite limited, yet the scheme still will have to yield in case of conflict with other, formal rules such as domestic laws on forestry. As Bartley has insightfully hypothesized and empirically researched with Indonesia as case study, the design of private instruments such as the FSC and its criteria disregard the domestic regulatory setting in which the rules are expected to operate. For example, FSC Principle 2 requires that the exploitation of certified local forests respects "the tenure and use rights to the land and forest resources", and that such rights may only be given up through the "free and informed consent" of the involved communities. However, in the large forestry industry country Indonesia, the FSC requirements conflict with the domestic Forestry Act. The Act has "affirmed state control over forest land", and although the Forestry Act does protect local rights, "roughly ninety percent of the twelve million hectares of state forest land in Indonesia has not been properly defined".[193] The FSC certifications have added another layer of rules, with requirements that are in part contradictory to domestic laws. Yet in case of conflict, the local formal law obviously prevails, as is even explicitly stated in FSC Principle 1.1.[194] This problem may lead the FSC to "crumble under its own contradictions": a company must, to

192. *Transnational Governance*, *supra* note 183, at 533 (in the context of the community land use rights demanded by Principle 2.2) ("One former auditor suggested that assessment teams generally do not spend enough time on the ground to understand community dynamics, explaining that you are 'lucky if there's an NGO there,' or it can be difficult to learn the real situation.").

193. *Id.* at 532.

194. *Revised FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 (V5-0)*, FSC INTERNATIONAL 12 (Rev. 2012), *available at* https://ic.fsc.org/principles-and-criteria.34.htm (last visited Feb. 19, 2014) ("Principle 1: Compliance with Laws: The Organization shall comply with all applicable laws, regulations and nationally-ratified international treaties, conventions and agreements.").

be in conformity with the Forest Principles, both act in accordance with local law, as well as in contravention of it.[195] Had the FSC's Principles been laid down by states in a formal source of international law, it would have been much less clear that domestic forestry law would have prevailed in case of a conflict. The example shows well how the instrumentum dimension is fundamentally important.

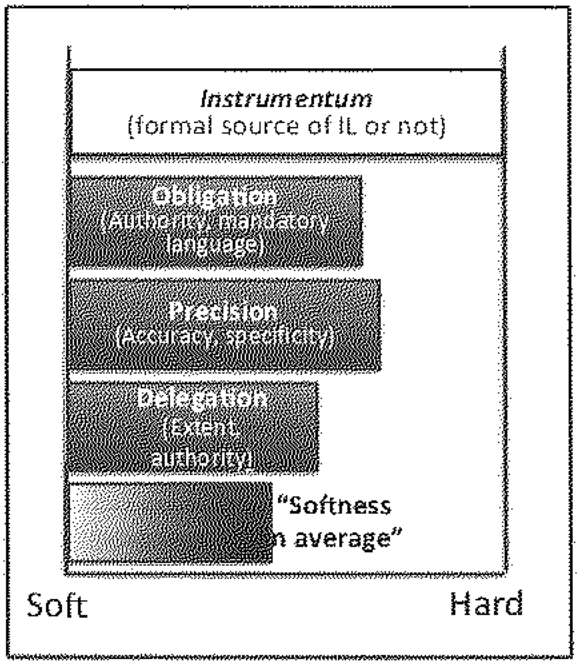

Figure 10. "Softness" of FSC.

4. Concluding Perspectives on Private Instruments

There are many labeling initiatives such as the FSC,[196] and many voluntary standards with an approach similar to the UN Global Compact. Some of them are even aimed at more specific sectors, problems or groups of TNCs, such as the Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI).

195. *Transnational Governance*, *supra* note 183, at 534. Compare the above stated umbrella to Principle 1 with Principle 1.8: "The Organization shall demonstrate a long-term commitment to adhere to the FSC Principles and Criteria in the Management Unit, and to related FSC Policies and Standards. A statement of this commitment shall be contained in a publicly available document made freely available." *Id.* at 13.

196. Many of these are assembled under the ISEAL alliance. *See generally About Us*, ISEAL ALLIANCE, *available at* http://www.isealalliance.org/ (last visited Mar. 26, 2014).

Two main problems became apparent from the analysis of these much-discussed private instruments. First, the great weakness in terms of delegation is, in the words of Sahlin-Andersson, that "it is not so clear who is governing whom."[197] Are NGOs governing TNCs? Or are TNCs governing themselves—or even each other? What role remains for governments? Second, it is unclear where obligation in these instruments really comes from. They often refer to 'international human rights standards', and stress that lower local standards, local government abuses, or lack of government enforcement do not impede what companies 'should' do. Yet it is not clear what exactly leads to raise the requirements above the level of a mere moral obligation, beyond a bare exclusion from a voluntary scheme. Is the marketplace already sophisticated enough to create such an impact?

It was apparent that even an instrument that on the surface seems to have a relatively high level of delegation, the FSC, in practice has rather limited implementation resources. It moreover has to recede where it conflicts with formal legal instruments that often maintain a lower environmental or human rights standard. Although the implementing authority is clearly delegated, its reach remains limited.

VI. CONCLUSIONS—THE MYRIAD EFFECTS OF SOFTNESS

The tool developed in this paper has two aims. First, it aims to contribute to the "soft law discourse" by promoting a move beyond the inaccurate and overly generic term "soft law".[198] This term appears problematic in the global governance of TNCs. It is proposed here, on the one hand, because it is more accurate and useful in the legal and political discourse to describe instruments on the basis of the three general categories introduced in the previous Section: Public Legal Instruments, Public Non-Legal Instruments and Private Instruments.[199] The categories build on the work of for example d'Aspremont[200] and

197. Sahlin-Andersson, *supra* note 179, at 130.

198. *See generally* Abbott et al., *supra* note 73. With international law, they mean to include explicitly formal sources of international law such as conventions/treaties. *Id.* at 402.

199. Compare these three groups with those distinguished by Blutman, who noted output of international organizations; non-binding output of states directly other than what is part of the formal sources of international law; and the output of civil society which is per definition non-binding. Blutman, *supra* note 67, at 607.

200. d'Aspremont, *supra* note 63, at 1082-87.

Blutman.[201] The basic distinction lies in the dimension of instrumentum: the "container" of the instrument as opposed to its negotium, the "contents."

On the other hand, it would add further, important nuance to the understanding of the instruments to perceive them along four dimensions of softness: the softness of the instrumentum, and of three aspects of the negotium, namely obligation (authority and the mandatory nature of the language); precision (accuracy and specificity); and delegation (extent and authority of delegation). These dimensions of softness, proposed originally by Abbott et al.[202], and developed further here, fine-tune the analysis by bringing forth key characteristics of the instruments.

Second, through the tool the paper explores how such re-systemization of instruments functions in the specific framework of the TNCs, taking into account the challenge of finding solutions to the void in their governance. The paper focuses in particular on how softness as a characteristic manifests itself in different types of TNC related instruments, and how this may link to the perceived void, and further to the instruments' effectiveness. It may even be possible to contemplate certain dimensions of softness, and combinations of thereof, that are necessary in reaching effectiveness in different circumstances. Finally, the utility and potential weaknesses of the conceptual tool itself may be elaborated upon during its application to practical case examples on the global governance of TNCs.

A. Effective Softness?

The application of the tool to various TNC related instruments, including legal public instruments, illustrates well how an analysis of softness is by no means limited to what is incorrectly called "soft law" instruments. All kinds of hard and soft instruments can, and indeed should, be scrutinized for their softness.

From the practical perspective of applying the instruments, the essential question is whether, and to what extent, the observed softness of an instrument correlates with its effectiveness. While the research in this paper is not geared to answer this question with any definitiveness, it is designed to prop exploratory insights onto what such a relationships might be. The first observation along this trajectory is the usual claim that "soft law" might be able to act as a supplement or a complement, or

201. Blutman, *supra* note 67, at 607.

202. Abbott et al., *supra* note 73, at 401.

even an alternative, to "hard law."[203] The claim assumes that somehow an instrument that is soft along one or more of the depicted dimensions can be effective in reaching a policy outcome. It can even potentially be more effective in doing so than a "hard law" instrument would be.

The effectiveness in other words may link to softness—but how exactly? At least two options appear to arise. In the first option, the softness of one (or more) dimension(s) directly contributes to the fact that the policy outcome is reached. This would reflect the scenario of "soft law" acting as an alternative to "hard law": it is because of its hardness along all the dimensions that a "hard law" instrument would not able to reach the desired outcome. Softness would under this assumption correlate positively with effectiveness.

The second option is that softness along one (or more) of the dimension(s) is unavoidable for an instrument to be legally, politically, technically, and/or in some other manner possible. Softness is the critical prerequisite for a policy instrument to be created, yet it is the other, hard dimension(s) of the instrument that in fact directly determines the instrument's effectiveness. Soft instruments are in this scenario a complement to "hard law". Softness as a characteristic only has an indirect role. Without the subtlety the instrument would not exist, and hence its qualities could not have an impact. The unique quality of 'soft' instruments as complements is their achievability.[204] They are, as explained in Section III, a necessity if "hard law" options are not at all, or not initially, available. But softness in itself will rather work against, than for, the effectiveness of the instrument. Softness is in these instruments just limited enough not to impede reaching the policy objective in a sufficient manner. The perceptions on what is considered sufficient may be quite subjective and, as the examples of using soft instruments to govern TNCs implied, not always representative of the reality.

The first option, i.e. the direct role and relevance of softness in an instrument's performance, can be tested through a number of propositions. The most different case approach would lead one to ask whether there are instruments that are soft on all the dimensions, yet still perform effectively. A positive answer would point towards effective instruments that are already quite removed from classic command-and-control law. Although the limited scope of the research does not exclude the possibility, the TNC case studies conducted in this

203. "Soft law" may also be seen in some cases as an antagonist to "hard law", but these questions are beyond the focus of this piece.

204. Abbott et al., *supra* note 73, at 401-03.

paper did not offer support for this hypothesis. Rather, the observations on the case studies seemed to point to the opposite direction: when defined along the dimensions used in this paper, there seems to be a negative correlation between softness and effectiveness. A negative correlation would hence perceive soft instruments in a paradoxical way: one should seek for the vital aspects of hardness in defining effective soft instruments. If the hypothesis on a positive correlation held, the ensuing question would then be whether an instrument's effectiveness could be associated with a particular aspect of softness.

B. Effective Hardness?

Indeed, looking back at the three categories of instruments and the empirical examples within them, the observations would appear to point into the opposite direction: some measure of hardness may be required on at least one, if not most, of the dimensions also for instruments to be effective. Turning this around, even the absence of hardness on one or two dimensions beyond the instrumentum—for instance lack of precision and specificity in the human rights treaties, or the incomplete delegation in the case of the FSC—may be fatal for its effectiveness. The conclusion of the case studies was that none of the instruments in any of the categories of Public Legal Instruments, Public Non-Legal Instruments and Private Instruments seemed to satisfactorily achieve the set human rights and environmental governance objectives regarding TNCs. The disappointing observation could hence have an explanation: each one of the TNC related instruments—even the "hard law" instruments—lacked one or more crucial hard dimensions that would have allowed them to be effective in that particular instance.

1. Over-Reaching

One may wonder, however, if the need to consider hard dimensions in soft instruments is already a sign of "over-reaching": have the soft instruments been set to achieve objectives that only instruments that are hard on all dimensions can achieve? Are they surpassing the limits of what soft instruments in directly filling a policy void can reach, even theoretically? In cases of over-reaching, soft instruments cannot act as complements nor as alternatives to "hard law"—except perhaps in some narrow respects.

As may be remembered from the development of the tool, the instrumentum is a core dimension of classic "hard law" instruments. Soft instruments lack this key characteristic; only in the first group, which consists of the formal sources of international law, are the instruments formally speaking law. Private instruments as defined in

this paper are adopted by private actors, either amongst themselves or in collaboration with public authorities. Because private actors completely lack the capacity to legislate, they cannot create formal instruments of international law. The instrumentum is not legal. A logical reaction would be to seek to increase hardness on the other dimensions of obligation, precision and delegation—potentially even all of them. The OECD Guidelines from the group of Public Non-Legal Instruments and Forest Stewardship Council (FSC) from the group of Private Instruments served as examples. As noted above, while perhaps practically possible, such across-the-board hardness would mean that the instrument measures hard in average, so much so as start to conceptually changing its nature from soft to hard, and even from non-law to law, if hardened along the instrumentum to a legislative act. In other words, the soft instrument has been "over-reaching", if the aim had been in policy objectives that can in fact only be reached with formal legal instruments that are hard on all accounts. It does not seem justified, or even possible, to contemplate Public Non-Legal Instruments or Private Instruments as effective alternatives or complements to "hard law" in these types of situations. Their role would remain partial, at best.

2. Under-Reaching

The fact that an instrument's effectiveness is tied to more hardness on a particular dimension does not have to imply that all effective instruments be considered "hard law". In practice, the relevance of such labels of hardness or softness is linked to the ability of the tool to help in creating the impetus to amend (i.e. to harden) an existing instrument in a tailored and adequate manner so as to reach the set objective. The situation may be different to the above examples of over-reaching. In cases of "under-reaching", the soft instrument is not fulfilling its complete promise, which would still be within the boundaries of what under the three categories and the four dimensions still constitute soft instruments. Hardening a particular aspect of an under-reaching instrument not would not always require pushing it beyond the boundaries of what conceptually are soft instruments. Understanding that the level of obligation and precision in the OECD Guidelines is sufficient, but that it is mainly the delegation aspect of the instrument that is lacking, could lead to amend the instrument in the correct fashion. This would point towards amending the practice of NCPs to become considerably more aggressive in publically reproaching the companies for their violations of human rights law.

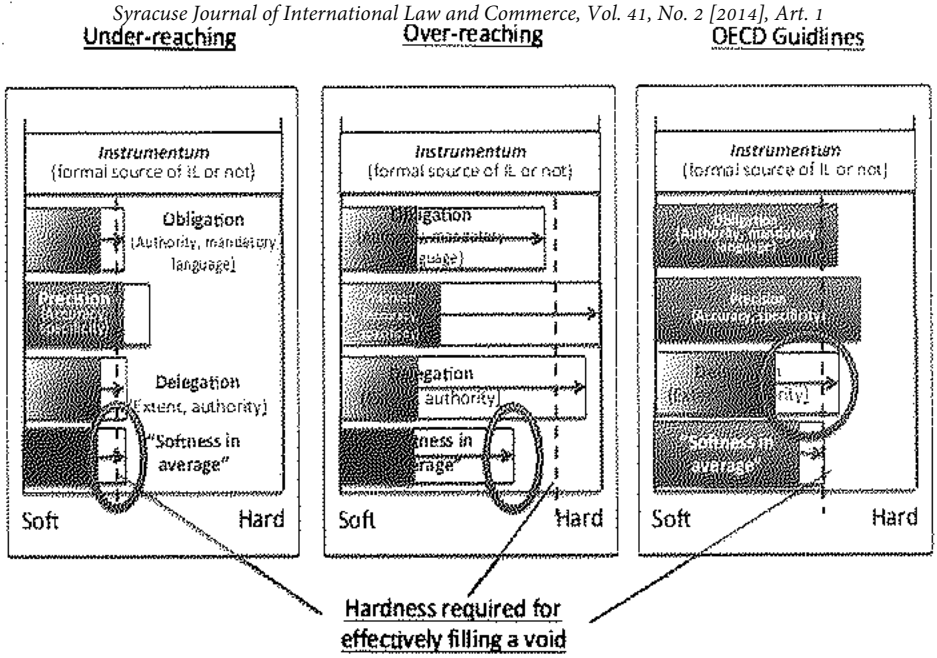

Figure 11. Instrument's achieved v. potential hardness in cases of under-reaching and over-reaching instruments.

Indeed, delegation appears to be a dimension on which practically all of the TNC-instruments that were used as case examples measured on the soft end of the scale. This implies an almost structural deficiency in delegating the implementation of the instruments. The observation finds clear parallels in the discourse on the deficiencies of "hard law": poor implementation and enforcement is also often cited as the weak point of hard international environmental and human rights law. In this important respect "soft law" therefore appears to offer very limited remedies. To state this differently: non-legal instruments could most fundamentally remedy the deficiencies of "hard law" if their unique characteristics could innovatively improve enforcement. To reiterate the above example: the impact of negative media coverage on TNCs image can be drastic, and hence prompt sweeping changes in company behavior. For example, heavy media attention led the company Chiquita (formerly United Fruit) to completely overhaul in the early 1990s its dreadful corporate social responsibility policies on exotic fruit business. Chiquita outsourced for example the corporate environmental and social audits to an external NGO, the Rainforest Alliance.[205] Yet to actually create such an impact, the application of this instrument needs to be delegated to a party that is prepared and equipped to publicize it

205. DANIEL ESTY & ANDREW WINSTON, FROM GREEN TO GOLD. HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE AND BUILD COMPETITIVE ADVANTAGE 88, 183 (Yale University Press 2006).

without hesitation and delay —not just in theory, but in practice. This is a far cry from the current state of affairs, should the application of the media provisions of the OECD Guidelines offer a representative example in this respect.

It appears possible to give examples of under-reaching "soft law" also in terms of all other dimensions of softness. The UN Guiding Principles were an example of an instrument where the wording on what is really expected is both ambiguous and drafted in non-mandatory terms. More precise use of words that are clearly obligating would harden this instrument in a way that would appear to be vital for increasing its effectiveness in filling the policy void. Precision is a dimension on which the non-legal instruments may score quite well, because the tools can contain quite accurate provisions specifically targeted at TNCs. It is in fact the legal instruments that may be under-reaching on this aspect. The systemic coherence between soft and hard instruments could in a useful way combine the precision of the soft instruments with e.g. the hard instrumentum of for instance the Human Rights treaties.

C. Softness – A Combination of Multiple Dimensions

It seems possible with the help of the developed conceptual tool to synthesize the findings regarding the over-reaching and under-reaching soft instruments a few steps further, still. The values of all the dimensions of an instrument may be combined into a single value of "average softness," as was explained in Section IV.D. above. The softness/hardness of an instrument is only a single variable amongst many other time- and space-specific, inter-related variables that affect the overall policy outcomes in a globalized environment.[206] Yet a summary value may be useful in having an overview on the characteristics of the instrument that one is dealing with, even if the line between soft and hard is a subjective continuum, not a "metaphysical border" where the overall characteristics of an instrument would suddenly drastically change like the qualities of water change in the melting and boiling points. This may be exactly the point of using the model proposed here: the fact that any instrument consists of four dimensions with their "sub-dimensions" should quickly lead to a realization that the denomination of an instrument as "hard law" or "soft law" actually reveals very little of its characteristics. It is the constitutive dimensions of the instrument that matter. Instrumentum is

206. Karlsson-Vinkhuyzen & Vihma, *supra* note 66.

central, and admittedly the distinction of the formal sources of international law implies a binary dimension.

But its binary nature and importance are tempered by the other, continuum-type dimensions. They too can be crucial, depending on such factors as the instrument's objectives and addressees. The case studies on Public Legal Instruments showed how "hard law" may be quite soft. Case studies across the groups of instruments seemed to suggest that weak delegation of implementing tasks in some cases 'softens' the instrument more than a low measure of precision or obligation. The continuums are therefore useful; they make an analysis of the instruments more flexible and accurate, and facilitate detailed comparisons between them. As Abbot et al. noted[207] while developing these three dimensions, they can also serve to trace an instrument's evolution over time. The dimensions were used here as a means to understand, explain and to propose nuanced improvements to various kinds of TNC related instruments.

One might also speculate whether there are specific combinations of these dimensions of softness that are particularly well or poorly adapted for certain kinds of policy objectives and/or circumstances. Such "pairing" could support the policy making process. The case studies gave anecdotal evidence of such interconnections. For example, in the case of FSC, the hardness of the instrument along the dimensions of precision and delegation considerably alleviated the need to have fully hard obligations. Market pressures on TNCs also contributed to a lesser emphasis on delegation in this particular example.

States and IOs often seem to enforce international law upon TNCs in a rather lenient fashion: the delegation dimension was soft on virtually all the analysed instruments. Only very limited delegation to more independent, international bodies seems likely in the near future as well. Hardness along the other dimensions may alleviate that shortcoming only in some cases, such as the example of FSCs above. More precise and specific provisions will make it harder for states to argue that they are not under an obligation to act in a given situation.

D. Systemic coherence

Many authors have highlighted the importance of the systemic coherence between different instruments. Soft instruments may, according to these views, act either as complements, alternatives or antagonists to "hard law". This paper does not have as its objective to

207. Abbott, et al., *supra* note 73, at 405.

delve into the systemic coherence of instruments. It does shed some light on some of the interrelationships that were noticeable between the UN Global Compact, UN Guiding Principles, the OECD Guidelines, the Forest Stewardship Council, the human rights Covenants and domestic law. In particular, the systemic inconsistencies and antagonistic relations deserve further research particularly in order to better understand the prospects of governing TNCs. The discussion merges here with themes such as the fragmentation and integration of international law[208] and the management of institutional complexity in global governance.[209]

E. Prospects of Governing TNCs with "Soft Law"

1. "Soft Law" as a Misnomer – But Softness as an Asset

The analysis above has elaborated on whether "soft law" may help in filling the policy void left by "hard law" in governing transnational corporations in the areas of environmental protection and human rights. Softness may indeed be a quality that explains the characteristics of policy instruments in a manner that is useful. However, this benefit has often gone undetected or has been overshadowed by misunderstandings.[210] The softness of an instrument tends to correlate negatively with its effectiveness—if any straightforward relationship between the two is even verifiable. Softness as an overarching conceptual construct might end up not only correlating with ineffectiveness, but being defined by it. The notion of soft instruments, let alone "soft law", as an optimal gap filler for legal voids appears in this sense fundamentally flawed. Soft instruments may remedy policy problems, but in most cases exactly despite of their softness.

Gearing the policy strategy towards "soft law" without properly defining it could hence essentially threaten to misguide the entire effort. Perhaps the clearest example is the UN Global Compact, which relies

208. *See* Koskenniemi & Leino, *supra* note 59, at 553; *see also* Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

209. For institutional interaction, *see generally* Thomas Gehring & Sebastian Oberthür, *The Causal Mechanisms of Interaction between International Institutions*, 15 EUR. J. INT'L REL. 125 (2009).

210. *See* d'Aspremont, *supra* note 63, at 1083; *See also* d'Aspremont's recent introduction in the Leiden Journal of International Law where he apologizes for devoting a whole issue of the journal to such an oft-debated theme. Jean d'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 LEIDEN J. INT'L L. 309 (2012).

on softness quite explicitly.[211] "Soft law" is therefore not only a vague and overly generic concept—it may be a precarious misnomer. The case studies on the governance of TNCs gave insights into how "soft law" approaches may create false assumptions, and might lead to skewed policy pathways and meager outcomes.[212] The conceptualisation of the instruments and of the issue at stake, as well as the definition of the desired policy objectives, need to take place in much more accurate and authentic terms.

2. *Soft Instruments as Complements and Alternatives to "Hard Law"*

While "soft law" may be a misnomer, softness as a characteristic that is first properly defined may prove to be quite useful. It helps in explaining the characteristics of individual instruments. The notion of softness may also be useful in more correctly understanding the general characteristics that are commonly associated with soft instruments as we noted them in Section III: their necessity, uniqueness and unavoidability;[213] and their role as complements or alternatives[214] to "hard law". The uniqueness of soft instruments can mean a number of things. It can refer either to the instrument as a whole or to some of its particular characteristics. This observation prompts us to rethink the categories of Shaffer and Pollack, soft instruments as complements or alternatives to "hard law". A unique instrument would seem to mean that it combines softness and hardness in a different way along the dimensions of obligation, precision and delegation. Unique soft instruments are soft enough to be achievable—unlike a fully hard and legal instrument—yet hard enough to be effective. Thus, they are able to complement "hard law" in the narrow sense of addressing policy questions that "hard law" simply could not address at this moment. This is different from the occasional misconception that soft instruments are unique and effective for their softness only. The notion of a soft

211. "The initiative seeks to combine the best properties of the UN, such as moral authority and convening power, with the private sector's solution-finding strengths and the expertise and capacities of a range of key stakeholders. The Global Compact is global and local; private and public; voluntary yet accountable." *Overview of the UN Global Compact*, UNITED NATIONS GLOBAL COMPACT (Apr. 22, 2013), *available at* http://www.unglobalcompact.org/AboutTheGC/index.html (last visited Mar. 26, 2014).

212. *See* Utting & Zammitt, *supra* note 173, at 44, 47 (showing the wide belief within the UN in the late 1990's that soft approaches are preferable, because of lack of UN implementation powers).

213. *See* Section 3, *supra*.

214. The role of soft instruments as antagonists to hard law were excluded from the scope of this paper.

instrument constituting in these cases an "alternative"[215] also seems misleading: it hints at the existence of a choice—yet if the soft instrument is unique in this narrow sense, there is none.

If the uniqueness of the entire instrument refers to its distinctiveness from a "hard law" instrument, yet does not entail the filling of policy gaps beyond what "hard law" can do, it seems to offer an alternative to reaching a policy objective. Because certain softness on some dimensions is "permissible" in terms of reaching adequate effectiveness, a soft instrument can be the preferred alternative for other reasons, such as for being less costly to negotiate, lighter to administer or quicker to adapt to the evolving circumstances.

The uniqueness of certain (combinations of) characteristics, instead of the entire soft instrument, leads to a different kind of complementarity—the type Shaffer and Pollack described.[216] The differences in the softness of a soft and a hard instrument lead them to interact in a way that, together, creates a complementary result. The complementary characteristics may make up for certain soft dimensions in legal instruments—on which the complementing instrument is in fact harder—and result in even harder combinations. Some non-legal instrument may in this way prove harder on important dimensions than many existing legal instruments, particularly on precision, even though they are soft on others.

As for the unavoidability of soft instruments as a consequence of globalization, the nuance that can be identified in the softness of instruments calls for a similarly delicate attention in managing such instruments. To the extent that globalization implies the predominance of instruments without a hard instrumentum, it may imply doubtful effectiveness. Yet this is not at all self-evident, and can only be determined on a context-specific instrument-by-instrument analysis. The complication would offer one explanation to why it is so difficult to create clear-cut theories and approaches about the global governance of TNCs, or governance through regime complexes more generally speaking.

F. Epilogue: Revisiting the Chevron Case

While the Chevron case dragged on in the Ecuadorian judiciary and now continues in the arbitration bodies, Chevron has aligned itself with the Voluntary Principles on Security and Human Rights (VPSHR) and the Extractive Industries Transparency Initiative (EITI). Will these

215. Shaffer & Pollack, *supra* note 46, at 717-21.

216. *Id.* at 721-22.

soft instruments offer a remedy to address the considerable environmental degradation? Could they prevent similar cases from taking place in the future? The EITI aims at transparent financial flows between the extractive industry and their host governments. VPSHR aims to prevent human rights abuses that would be a consequence of companies' private security operations. Already in terms of the subject matter, these instruments do not present comprehensive solutions to address issues of environmental protection or human rights protection. Regrettably, when assessed through the tool developed in this paper, they appear moreover to be of the softest type. Both are predominantly private, non-legal instruments, with some involvement of governments in the VPSHR. The rather vague and non-mandatory principles are quite soft in terms of precision and obligation, and auditing as the only measure of delegation leaves this dimension soft as well. In fact, the principal aim of both instruments may rather be to shield companies from further liability rather than addressing fundamental aspects of human rights or environmental protection related conduct. In other words, a closer analysis of softness reveals there to be little hope for these particular soft instruments preventing, let alone remedying, the situation in cases such as Chevron.

More promising, at least for future cases, could be the National Contact Points under the revised 2000 OECD Guidelines for Multinational Enterprises. Especially insofar as the damage can be qualified as (environmental) human rights or labor rights violations, a 'specific procedure' can be commenced before the United States NCP.[217] As was discussed above in section V.C., such procedures may lead to public statements by the NCP, or to a settlement of the dispute between the parties. However, due to the very limited delegation dimension, an NCP cannot order damages; it can primarily be useful in ceasing the TNC conduct.

217. *See U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, U.S. DEPARTMENT OF STATE, *available at* http://www.state.gov/e/eb/oecd/usncp/index.htm (last visited Mar. 26, 2014).

EFFICIENT BREACH IN THE COMMON EUROPEAN SALES LAW

Wenqing Liao[†]

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† Wenqing Liao is present at the Maastricht European Institute for Transnational Legal Research (METRO) of the Law Faculty of Maastricht University in the Netherlands. Her research is supported through a scholarship of the China Scholarship Council (CSC). I am grateful to participants at the METRO seminar for their useful comments on an earlier version of this paper.

INTRODUCTION

Against a background where trade is growing and becoming more complicated in modern society, private parties are appealing for more flexibility and freedom in making decisions rather than strictly abiding by the documents they have signed. Correspondingly, the traditional study of contract law has embraced more theoretical resources rather than insist on the traditional conception that breach of the contract is wrong. The school of law and economics, with its efficient breach theory, provided a new approach to explaining contracts and breaches, and challenged the traditional notion of *pacta sunt servanda*[1] and the moralistic nature of obligation.[2] In 1897, Justice Holmes wrote in his well-known book The Path of the Law, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else."[3] Afterwards, this conception of contract became a dynamic support for the theory of efficient breach, which is assumed to have first appeared in Birmingham (1970)[4] and received its name from Goetz & Scott (1977).[5]

At the early stage, after the theory was born, it worked on one hand, on a superficial layer as a descriptive concept for a situation where breach of a contract would be profitable for the party who breached after placing the non-breaching party in as good a position as he would have occupied had the contract been performed.[6] In this situation, breach of contract, compared to performance, would make the promisor better off without making the promisee worse off. Hence, performing the original contract is assumed to be economically undesirable for the society. On the other hand, grounded in the theory of efficient breach, early scholars focused on the justification of EB and the doctrine's contributions to the structure of contract law and contract

1. "Pacta sunt servanda" is Latin for "agreement must be kept".

2. Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859, 860 (2000); CHARLES FRIED, CONTRACT AS PROMISE, A THEORY OF CONTRACTUAL OBLIGATION 1 - 6 (Harvard Uni. Press 1981).

3. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

4. Robert R. Birmingham, *Breach of Contract, Damages Measurex and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

5. Charles J. Goetz et al., *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 5 COLUM. L. REV. 554, 555 (1977).

6. Some scholars call the theory a simple efficient breach model, which makes a comparison between the cost of performance and the expected benefit. *See, e.g.*, Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 949 (1982).

remedies. They asked whether or not breach is immoral and what the rules of contract law should be so as to provide incentives to parties to breach efficiently. It was proposed that the contract remedy rules should encourage breach when breach is efficient, but discourage it otherwise.[7]

The EB doctrine, in its simplest form, stops here and has been in debate since it first appeared in academic work. For instance, it is stated that the theory of efficient breach is cultivated in a simple and short-term mind without the consideration of long-term interests from cooperation. On the other hand, people argue that the moral and ethic factors contained in contract obligations have been ignored.[8] Furthermore, the significant disconnect between the theoretical hypothesis and legal realities put those early findings into plight.[9] After almost forty years of controversy, the topic of efficient breach has essentially lost its attraction in the normative construction of contract rules.[10] Since 2000, many scholars have raised radical attacks against this doctrine and suggested it be ended.[11] The plight of efficient breach theory also indicates the problems embedded in the law and economic analysis. As Posner indicated, the law and economic analysis of the last decades, has almost stayed at establishing economic models without explaining the existing law or examining the practical matters. As a result, the analysis has failed to produce a real economic theory of contract law and cannot provide a solid basis for criticizing and reforming contract law.[12] Starting from this point, this paper will not keep on building ideal efficient breach models, but it will set the efficient breach theory against the background of real law and analyze

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7. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984).

8. *See, e.g.* Dawinder S. Sidhu, *A Crisis of Confidence and Legal Theory: Why the Economic Downturn Should Help Signal the End of the Doctrine of Efficient Breach*, 24 GEO. J. LEGAL ETHICS 357, 397 (2011).

9. *Id.* at 393.

10. Gregory Klass, *Efficient Breach, in* THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 2-29 (Gregory Klass, G. Letsas & Prince Saprai eds., 2013), *available at* http://ssrn.com/abstract=2228072 (last visited Mar. 29, 2014).

11. Sidhu, *supra* note 8, at 360.

12. "In the last ten years, theory has become divergent, and impasses have emerged. The simple models that dominated discussion prior to the 1990s do not predict observed contract doctrine. The more complex models that emerged in the 1980s and dominated discussion in the 1990s failed to predict doctrine or relied on variables that could not, as a practical matter, be measured. As a result, the predictions of these models are indeterminate, and the normative recommendations derived from them are implausible. " *See* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003).

whether this doctrine can be promoted in the existing rules.

Another premise set in the beginning of this paper concerns a trend toward forming the Common European Contract Law. This development, also referred to as the Europeanization of contract law, was created by a number of factors including the increasing cross-border trade across the common European market, efforts from scholars, the European Union and the common law. Although some critical voices also arise, questioning the necessity and possibility of this undertaking of unification,[13] the topic of Europeanization is still being developed in both academic work and real practice for the purpose of achieving greater coherence and a more general common European civil law. In the present stage, the harmonization of European private law has gained great achievement, focusing on contract law, especially on sales contracts and consumer law. A recent achievement was presented as the publication of the European Proposal on Common European Sales Law[14] by the European Commission on October 11th 2011, which was largely based on the Draft Common Frame of Reference[15] and the previous Principles of European Contract Law[16] ("PECL" 1994). As is indicated in the beginning of the CESL, the purpose is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules.[17] Based

13. For example, the Tiebout argument in favor of legislative competition provides a strong argument for decentralization of European law. As is pointed out, legal diversity contributes to the competition among different legal systems and in that sense increases the quality of law. Moreover, the "transaction costs" argument that has been pointed out by the traditional literature in favor of Europeanization has also been challenged. On the one hand, the cost of Europeanization is assumed to surpass the benefit brought out by this undertaking and on the other hand, the cost of transactions incurred by cultural, social or economic factors is thought to be larger than that is incurred by legal diversity. For more information about the debate on Europeanization and decentralization, *see* Michael. G. Faure, *How Law and Economics May Contribute to the Harmonization of Tort Law in Europe*, in GRUNDSTRUKTUREN DES EUROPAISCHEN DELIKTSRECHTS 31 (Reinhard Zimmermann ed., 2003).

14. *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011). The CESL is comprised of three main parts: a Regulation (hereinafter Reg. CESL), Annex I to the Regulation consisting of the contract law rules (hereinafter CESL), and Annex II containing a Standard Information Notice.

15. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, OUTLINE EDITION (Christian von Bar et al. eds., 2009) [hereinafter DCFR].

16. PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I (Ole Lando & Hugh Beale eds., vol. I, 1995); PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II (Ole Lando & Hugh Beale eds., 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW, PART 3 (Ole Lando et al. eds., 2003) [hereinafter PECL].

17. Reg. CESL, *supra* note 14, art.1.

on this goal, the CESL provides a set of standard terms for cross-border sales covering contracts for the supply of goods to be manufactured or transferred and contracts for the supply of digital contents, as well as the service contracts related to the sales contracts.[18] Moreover, emphasis is placed specially on offering a specific, largely protective sales regime for consumers and small medium sized entrepreneurs ("SME"),[19] for whom negotiations about the applicable law are less possible.

Putting those two contexts together, the concern of this paper will be merely placed on the substantive content of those contract rules, which have been drafted in the CESL. The paper will answer to what extent efficient breach doctrine can be promoted within the content of the CSEL. Moreover, efficient breach in the past, to a large extent, is only considered as a seller's breach and has been analyzed within the context of general sales contracts. The scope of this paper, however, will be narrowed down to the consumer contract in which one of the parties is a natural person and acting for purposes which are outside his trade, business, craft or profession. Following this logic, the structure of the contracts ("contracts for the supply of goods to be manufactured or transferred") includes a business seller (or a producer), a consumer buyer, a duty to convey a property (or to produce a good) and a price.[20]

As is inferred from the doctrine of efficient breach, the primary issue driving the introduction of efficient breach theory is the situation where strictly performing the original contract is economically inefficient. To deal with this situation, the seller can choose to break the contract, or negotiate with the buyer or make a possible substitutive performance. Breach and compensation of the non-breaching party is just one option that a seller may choose and discussion about this issue can fit into a broader framework of law and economic analysis of contract law in which the basic hypothesis is that contract actors are rational and welfare maximizers. By the same token, the theory of

18. *See id.* arts. 4-5.

19. CESL has made a clear differentiation between a trader and a consumer. As is given in Article 2 of the CESL Regulations, a "'trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession." *Id.* art. 2(e). A "'consumer' means any natural person who is acting for purposes[,] which are outside that person's trade, business, craft, or profession." *Id.* art. 2(f). In addition, Article 7 of the CESL Regulations defines a small medium sized enterprise as "a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding €43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country." *Id.* art. 7, § 2.

20. In this section, the words "seller" and "buyer" will also be used in the same meaning as the words of "promisor" or "debtor" and "promisee" or "creditor."

efficient breach may be applied to consumer contracts based on the assumption that both consumers and traders engage in contracting behavior to enhance their welfare which is measured by either wealth or happiness. Each party to the contract expects to receive more than he or she relinquishes.[21] Starting from this cognition, the discussion about efficient breach in this paper will focus on the CESL rules in relation to the situation where strictly performing the original contract is economically inefficient but neither party to the contract prefer welfare-decrease. In this sense, the doctrine of efficient breach provides a viewing point to make the economic analysis of the substantial rules of the CESL. To make this evaluation, Section 2 of this paper will first summarize what has been achieved in law and economic literature and establish the basic benchmarks for evaluating remedy rules. Afterwards, the general remedy system in EU sales contract law will be discussed in Section 3. In addition, the doctrine of efficient breach will be discussed. Although it has been discussed widely, in prior literature it was limited to the simplest model of non-performance. To overcome this problem, Section 4 will analyze the applicability of efficient breach under the context of specific types of breach.

I. EFFICIENT BREACH IN AN ECONOMIC PERSPECTIVE

The terminology of efficient breach, which appeared in the literature, was used on the basis of general contracts. This section will give a brief introduction to the doctrine of efficient breach and assess what it can contribute to the structure of contract law, especially for the contract remedy rules.

A. A Seller's Efficient Breach

The classical statement of efficient breach was indicated in Birmingham 1970 "repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered."[22] Around the same time, another paper by Scott and Goetz first used the concept of efficient breach.[23] Afterwards, this concept was largely cited as the basis for the common law remedy

21. *See* Jan M. Smits, *Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market* 8-9 (Maastricht European Private Law Inst., Working Paper No. 2012/13, 2012), *available at* http://ssrn.com/abstract=2060017 (last visited Apr. 2, 2014).

22. Birmingham, *supra* note 4, at 284.

23. Goetz et al., *supra* note 5, at 557-59.

of expectation damages.[24] Under this concept it is required that the breacher pay damages in an amount that would make the victim of breach as well off as she would have been had the breach not occurred.[25] The reason is given as "if the promisor is willing to breach and pay damages equal to the promisee's lost surplus, he must be earning a surplus from breach that is greater than the surplus yielded from performing the contract.[26]

A party to a contract, therefore, is induced to breach as long as he is able to retain the remaining part of the profits yielded by his breach after compensating the expected loss of the other party. By this way, if a contract turns out to be disadvantageous or wasteful after its formation, the promisor to this contract can be released from it by paying damages rather than by seeking a successful renegotiation; similarly, if and only if a contract stays valuable, the promisor will complete it as agreed.[27] Moreover, in the case that one party breaks a contract, the non-breaching party is entitled to expectation damages so that he will be in the same position as if there had been performance. Therefore, the non-breaching party will be indifferent between having the breacher breach and pay damages or having the breacher perform the contract.[28] This situation is in accordance with the Potential Pareto Improvement (or Kaldor-Hicks improvement). [29]

Another inference derived from the early study of efficient

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24. Peter Linzer, *On the Amorality of Contract. Remedies—Efficiency, Equity, and the Second "Restatement"*, 81 COLUM. L. REV. 111, 111 (1981).

25. Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679, 1680 (2008).

26. David W. Barnes, *Anatomy of Contract Damages and Efficient Breach Theory*, 6 S. CAL. INTERDISC. L.J. 397, 425 (1997-1998).

27. *Id.*

28. Richard Craswell defined the Indifference Principle as: "the stated goal of contract damages is to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 636 (1988).

29. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 47 (6th ed. 2011). The potential Pareto efficiency is the modification of Pareto efficiency. The later one refers to a movement that makes at least one person better off and nobody worse off. It requires the gainer explicitly compensate the loser in any change. If there is no payment, the loser can veto any change. So any change is only possible by unanimous consent. However, according to Kaldor-Hicks efficiency, if a movement creates a winner and a loser but the winner can compensate the loser and still have some gain left, then the movement is efficient. Breach of a contract can be Kaldor-Hicks Efficient, but not Pareto Efficient. The breach may create a loser (promisee) although it can generate a higher surplus and enhance the net welfare. Therefore, only if the breacher can still be better off after he fully compensates the other party's loss, the breach will eventually create a Pareto Efficient state. It is noted that the compensation by a contract-breacher should place the victim in the position that he would have been in had the contract been performed. *Id.*

breach doctrine was the critiques over penalty clauses (or punitive damages) that are created deliberately over-compensatory by the parties so as to deter breach or ensure performance. The penalty clauses, which are mostly created through a damage agreement (liquidated damages clauses) between the parties, are accused of causing a problem of overcompensation and deterring efficient breach.[30] That is, a promisee that is subject to penalty clauses will be motivated to take undue precaution and to always perform the contract in fear of paying penalty damages.[31] This idea has been incorporated into some courts' opinions in the U.S. One such case, *Leasing Serv. Corp. v. Justice & Childers*, states "contractual terms fixing damages in an amount clearly disproportionate to actual loss seek to deter breach through compulsion and have an in terrorem effect: fearing severe economic loss, the promisor is compelled to continue performance, while the promisee may reap a windfall in excess of his just compensation.[32]

Two simple models have been established for explaining the efficient breach theory. Suppose a contract, which is assumed to be advantageous to the parties at the time of contract formation.[33] After the contract is signed, a number of unspecified contingencies arise in the ongoing contract relationship, which might change an advantageous contract into a disadvantageous contract. When a contingency increases the performance cost so that performing the oringinal contract will decrease the profits earned by the contract parties, the promisor will choose to breach the contract in order to avoid the cost of performance. This is referred to as an unfortunate contingency. In addition, after the formation of a contract, if an external buyer comes, willing to pay a price which is much higher than that of the oringinal buyer, the seller will be motivated to breach in order to earn more surplus. This is a fortunate contingency.[34]

The following are examples of a fortunate contingency and an unfortunate contingency: Suppose Y agrees to produce a car and sell it to X at a price of €10,000. Suppose at the time when X and Y enter the contract, Y estimates the production cost of the car will be €5,000 but X estimates he can resell the car for €15,000. Two situations might

30. Juan P. Moreno, *The Efficient Breach Hypothesis: Its Impact and Effect on the Penalty Clause as Defined under Colombian Law*, 1 ILL. BUS. L.J. 4, 5 (2010).

31. *See* Goetz et al., *supra* note 5, at 556.

32. Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 677 (2001).

33. At the time two parties enter a contract, both of the parties consider performance of the contract as efficient, otherwise the parties would not sign the contract.

34. COOTER & ULEN, *supra* note 29, at 325-26.

happen after the formation of the contract. First, it might be an unfortunate contingency that increases the production cost (for concreteness, I will use PC to describe it) to €16,000.[35] Or, second, it might be a fortunate contingency that offers the seller Y another trading opportunity. Assume that Z approaches Y and explains that he desperately needs this car and he would pay €20,000. Suppose the car is worth €25,000 for Z and the highest price he would bid is €25,000.

Tables 1 and 2 indicate each party's surplus in the case when the performance cost increases and when a third party places a higher value on the car provided that perfect expectation damages can be awarded. In the first case, Y is supposed to be better off if he tries to seek a lease from performance by paying €15,000 as compensation rather than investing €16,000 in producing the car. Moreover, the buyer X may keep a fixed surplus of €5,000 no matter whether or not the contract is performed as long as a compensatory damage measure is available. In this sense, it is possible to reach a Pareto Efficiency through Y's non-production and avoid the decrease in the total surplus. Similarly, when the second scenario occurs, breaking the original contract and transferring the car to the alternative buyer may bring out a higher surplus of €20,000 than transferring the car to the original buyer does. Breach is efficient.

Table 1. Surplus of Each Party if PC increases[36]

PC=16,000	**Y's decision**	**X**	**Y**	**Total**
Expectation damages	*Perform*	*€5,000*	*-€6,000*	*-€1,000*
	Breach (√)	***€5,000***	***-€5,000***	***0***

35. These two examples are modified from the examples that have been used by Cooter and Ulen. *See id.* at 326-31. Similar examination can be found in Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 998-1015 (2005).

36. We use "*N*" to indicate the net profit, "*p*" to denote performance and "*b*" to denote breach. If Y performs the contract, each party's profit is calculated as: Npx=€15,000-€10,000=€5,000; Npy=€10,000-€16,000= -€6,000. If Y decides not to perform, then each party's surplus is measured as: Nbx=€15,000-€10,000=€5,000; Nby=0-Nbx=0-€5,000=€5,000.

Table 2. Surplus of each party if a third party bids a higher price[37]

		X	Y	Z	Total
Value		*€15,000*	*€5,000*	*€25,000*	
Expectation Damages	**Y sells the car to X**	*€5,000*	*€5,000*	*0*	*€10,000*
	Y sells the car to Z	*€5,000*	*€10,000*	*€5,000*	*€20,000*

B. Efficient Breach, Negotiation and Remedies

As is indicated in the previous examples, the primary issue that motivates the scholars to talk about efficient breach theory is how to deal with the situations where breach of the contract will be more efficient than performing the contract. To deal with this situation, the parties have multiple solutions, either ex-ante or ex-post.

Through ex-ante negotiation, the parties can specify each other's rights and obligations in reaction to the possible uncertainties, such as writing a price reduction clause in case of a sharp increase in performance cost. Or they can decide how to react to those contingencies by ex-post renegotiation after disputes arise and try to use a more efficient contract to replace the previous one. [38] For example, after a second bargainer comes to a party to a contract, all the parties involved in this transaction may gather together and re-negotiate the price. Through this approach, a bidding war may occur and thus prevent the promisor from implementing the less efficient contract. Or, if a seller fails to sell a product to the buyer who values it more,[39] this buyer can transact with the buyer who received the product. In this way, resources will also be allocated to the best user in the end. What's more, since the parties are the best judge of their own benefits, the approach of ex-ante or ex-post negotiation may always achieve an efficient result.

37. When Y performs and the car is sold to X, each person's profit can be calculated as this: the Npx= €15,000-€10,000=€5,000; Npy=€10,000-€5,000=€5,000; Nz=0; Npx+Npy+Nz=€5,000+€5,000+0=€10,000. If Y breaches and resells the car to Z, then the net profits are calculated: Nbx=15,000-10,000=5,000; Nby= (€20,000-€5,000)-(€15,000-€10,000) =€10,000; Nz=€25,000-€20,000=€5,000; Nbx+Nby+Nz=€5,000+€10,000+€5,000=€20,000.

38. COOTER & ULEN, *supra* note 29, at 326.

39. For example, a buyer who values a property less might have already recieved the goods according to the property law. For instance, in many civil law countries, registration is an important requirement for obtaining ownership over real property. Suppose there are two people who want to buy a house. If the first buyer has done the registration in the public authority, the second buyer cannot get the property, even if he is willing to pay a higher price.

However, ex-ante or ex-post negotiations might fail for several reasons. The trading parties' limitation of foresight may prevent contract parties from predicting all the possible events and writing a complete contract ex-ante; or the costs of negotiation and the conflicts in the parties' interests might sometimes discourage a successful renegotiation. In this sense, there is some space for legal rules, especially remedy rules, which may fill up the contract gaps and offer the conflicting parties a legal basis for solving the problem.

Within the framework of legal rules, nevertheless, different options are available for achieving an efficient consequence. Or in other words, legitimating breach and issuing expectation damages is far from the only way to avoid performance of an inefficient contract. In the simple efficient breach doctrine, the assumption that the approach of breach is economically efficient is based on two conditions: (1) the expectation damages may motivate those behaviours which will increase the total surplus created in the transaction (Nb =0 or €20,000 > Np=-€1,000 or €10,000); and (2) the non-breaching party is able to get full compensation (L= €5,000). Nevertheless, a similar result may be realized as long as the seller is not forced to strictly perform the original contract when a fortunate contingency or an unfortunate contingency occurs. For instance, even if the default remedy is specific performance, avoidance of an inefficient contract is still available. On the one hand, the parties may negotiate with each other in order to reach a desirable solution. When an unfortunate contingency arises, the seller might be willing to pay the buyer up to €5,999 for a release from the contract rather than loss €6,000 in producing the car; or the buyer would accept a price higher than €5,000 for the buyer's non-performance.[40] On the other hand, the law may set some exceptions to specific performance in reaction to the situation where performing the contract turns out to be socially inefficient. This refers to the impractical doctrine dealing with "the circumstances in which a party's performance is physically possible but will cause severe hardship".[41] Moreover, the goal of full compensation could be also, or even better, accomplished through the remedy of specific performance. Especially, when the subject of a contract is a unique good or subjective values have been attached to a contract, it is difficult for a court (a third party) to use the baseline of "market price difference" or "lost profits" to assess the amount of

40. Klass, *supra* note 10, at 13.

41. Donald J. Smythe, *Impossibility and Impracticability*, *in* CONTRACT LAW AND ECONOMICS 2011, at 207 (6 ENCYCLOPEDIA OF LAW AND ECON., 2nd ed., 2011).

compensation.[42] In those cases, either determining the baseline for evaluating the subject of the contract is complicated or finding a substitution in the market is impossible. In addition to these two concerns which may influence the efficiency of the result, if more than one approach would lead to a similar result, then the difference in efficiency of the rules is related to the transaction costs under different rules.[43] Contractual parties are supposed to prefer the approach which is less costly so that their net profits from transactions are maximized. Therefore, if a contract dispute has been brought to a court, then the problem that should also be recognized is the level of transaction costs facing the plaintiff and the defendant under different remedy rules,[44] such as the cost of litigation, the cost of assessing damages or the cost of execution.

Beyond the worries within the expectation damages, questions arise as to the effect of punitive damages in relation to the possibility of efficient breach. In contrast to the traditional concerns about penalties' deterrence to efficient breach, my argument is that damages stipulated by parties have advantages in inducing rational decisions, precluding conflicts or costly litigation and allocating risks. Behavioural experiments and economic assumptions about rational theory add much more force to support this statement. For example, as is shown in either Gneezy & Rustichini's *Day-care Centre Study* (1998)[45] or Wilkinson-Ryan's observation of *Sick-leave Case* in the Boston Fire Department

42. A non-breaching party's expectation loss can be calculated as the market price difference or the value difference. When a buyer breaches, the expectation loss of the seller is normally calculated as the discrepancy between the market price at the time when the breach occurs and the contract price. When a seller breaches, the expectation loss of the buyer is normally calculated as the difference between the contract price and the value that the buyer places on the contract-for goods. However, if the buyer has a substitutive offer after the breach happens, then what he has lost is the discrepancy between the price set in the substitutive contract and the price set in the original contract. For instance, suppose a contract to produce a product. If the parties agree on a price of €10,000 at the time of contract formation and the production cost is estimated to be €5,000, then the expected surplus of the producer is €5,000. Assume that the parties also learn that the market price for this product is assessed as €12,000. In this case, the expectation loss will be €2,000. COOTER & ULEN, *supra* note 29, at 309-10; Eisenberg, *supra* note 35, at 991.

43. Macneil, *supra* note 6, at 957.

44. Ulen, *supra* note 7, at 369.

45. In 1998, Gneezy and Rustichini made the famous study of the "day care centre" in Israel. They researched the relationship between a penalty and the possibility that parents pick up their kids late. A result is found that the number of late-coming parents increased significantly after a monetary fine is attached to the behavior of coming late. As is explained, introduction of a fine may remove the non-market nature that actors place on being late. Actors are willing to treat a fine as a price for being later and no guilt or shame will be attached to the act of buying a commodity. *See* Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

(2001 – 2002)[46], it is found that people's behaviour becomes more strategic and self-interested when the punishment of uncooperative behaviour (late coming, sick-leaving) has been clarified.[47] The reason, given by those observers, is that actors are more likely to deny social norms and moral concerns of complying promises and be more self-seeking when there is an explicit and real penalty for non-cooperation. [48]Therefore, efficient breach will be promoted rather than be deterred when there is an explicit arrangement of contract damages. Moreover, within the dimension of rational theory, it is inferred that the permission of penalty clauses would encourage other rational behaviour beyond efficient breach. An example is that offering contract parties more freedom in drafting damages clauses would promote risk-allocation and "a penalty clause may represent the best effort of the parties to allocate risk"[49] because people would carefully stipulate the amount of compensation in relation to each party's risk attitude rather than agree on an amount which is unreasonably high. If the seller is risk-averse, the seller would prefer a kind of damage payment that will guarantee him a fixed profit and is unaffected by neither the performance cost nor any outsider's offer. [50] The seller would not accept any damage measure that is higher than the expected loss suffered by the buyer and penalty clauses will not be drafted into the contract. In another case where a seller is risk-preferring or risk-neutral and a buyer is risk-averse, the parties might use a high amount of damages to shift the risk of non-performance from the buyer to the seller.[51] However, it is hardly for the

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46. "In December of 2001, the Boston Fire Department changed its sick-leave policy to allow fifteen sick days per year. The previous system had allowed unlimited sick time, and the new rule was part of an initiative to bring professional management tools to the department. In 2001, firefighters took a total of 6,432 sick days. In 2002, the total number of sick days rose to 13,431—more than double the previous year." Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 635 (2010).

47. Daniel Houser et. al., *When Punishment Fails: Research on Sanctions, Intentions and Non- Cooperation*, 62 GAMES ECON. BEHAVIOR 509, 522-23 (2008).

48. DiMatteo, *supra* note 32, at 705; Wilkinson-Ryan, *supra* note 46, at 664.

49. Wilkinson-Ryan, *supra* note 46, at 644.

50. Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 706 (1986).

51. The risk-averse buyer is willing to pay a premium in advance so as to shift the risk to the seller. So he would accept to pay a higher amount of contract price. *See id.* at 705-06. As is stated:

> If the seller is risk neutral and the buyer is risk averse, it is beneficial to both parties for the seller to insure the buyer. . . . Damages in excess of full compensation would not appeal to a risk-averse buyer because he would face an unwanted variation in his income, depending on whether the product failed. He would not wish to pay a higher price for the product. . . . If the buyer is risk preferring, a clause that specified

parties to reach an extremely high amount of damage payment which is only aimed for punishing breach provided the process of contracting is based on equal condition. In one aspect, the party who bears a risk of paying penalty damages would require a higher price to cover any increase in the cost of performance.[52] The higher the amount of damages, the higher the price the buyer has to pay. So the buyer has no incentive to require unreasonably high damages. In another aspect, there is rare example in the commercial context where a seller is in favour of risk or gambling and would accept an unreasonable penalty clause.

C. Implications for the Structure of Contract Remedies Rules

Put all those questions together and the simple efficient breach theory is not as convincing as what was assumed in the early stage. As shown in the previous section, a single expectation damages rule may not reach the ideal result which is consistent with the efficient breach model. Moreover, social or economic factors other than the threat of legal liability will also influence the possibility of efficient breach, such as the fear of losing reputation or the long-term benefit in cooperation. Today, few scholars are in favour of the simple efficient breach doctrine. However, the doctrine of efficient breach is still valuable in the sense that it opens a window for evaluating contractual behaviour and assessing legal remedies in a wider perspective. In response to the unspecified risks arising after the contract formation, the efficient breach doctrine is an optional approach that would be taken by legislators and contract parties. In this paper, three implications of efficient breach theory on contract remedy rules are drawn.

One of the most important implications is that by differentiating an efficient performance zone (or inefficient breach zone) and an efficient breach zone (or inefficient performance zone), the doctrine makes us re-think the behaviour that either falls into the efficient breach zone or into the efficient performance zone.[53] Take the previous case set in Section 2.1 as an example; the efficient breach point is where the production cost increases to €15,000 or the external bidder values the car for €15,000. If the production cost increases to higher than €15,000,

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damages in excess of losses would provide an opportunity to gamble.

Samuel A. Rea, Jr., *Efficiency Implications of Penalties and Liquidated Damages*, 13 J. LEGAL STUD. 147, 152 (1984).

52. Kornhauser, *supra* note 50, at 720.

53. Gerrit De Geest, *Specific Performance, Damages and Unforeseen Contingencies in the Draft Common Frame of Reference, in* ECONOMIC ANALYSIS OF THE DCRF: THE WORK OF THE ECONOMIC IMPACT GROUP WITHIN COPECL NETWORK OF EXCELLENCE 123, 126-27 (Filomena Chirico & Pierre Larouche eds., Munich: Sellier 2010).

the entire surplus produced by the original contract will be consumed by the increasing production cost and the contract will turn into the efficient breach zone. Within the efficient breach zone, breach would be efficient because it produces higher surplus than performance does for the society. In another sense, a slight increase in performance cost (for example, PC=€1000) would not necessary denote an efficient breach. Moreover, breaches in reality actually involve other types of costs such as the litigation cost, cost of damage calculation and the loss of reputation and future trading opportunities, other than the cost of legal liability.[54] Thus, when, and only when the extent of the increase is clear and well beyond the normal range, performance of the contract will become inefficient. By the same token, only when a second buyer comes with a price which is much higher than the value that the first buyer would pay, does breach of the original contract fall into the efficient breach zone.[55] In addition, another interesting topic arousing quite a lot of discussions in law and economics refers to the concept of opportunistic breach. A breach is deemed as opportunistic when "one-party attempts to reap the benefit of the bargain without bearing the agreed-upon cost".[56] For example, a seller may appropriate all the pre-payment by the buyer and invest the money in other uses without providing reciprocal performance.[57] We may want the law of contracts to discourage this type of breach and consider depriving the actor of all the benefits he could obtain from the opportunism.

Another lesson we can learn from the efficient breach theory is that remedies for breach may have multiple influences over the whole transaction. One important example is that the contract remedy has an influence on a person's breach-or-perform decision. By realizing this, we can better evaluate how contract remedies would affect people's incentives to behave intentionally.[58] To promote efficient breach and avoid wasteful performance, the contract law should create incentives to

54. *See id.*; HANS-BERND SCHÄFER & CLAUS OTT, THE ECONOMIC ANALYSIS OF CIVIL LAW 320-24 (Matthew Braham trans., Edward Elgar Publ'g 2004).

55. Or a second seller is willing to accept a price which is much lower than that the lowest price the first seller would accept.

56. Klass, *supra* note 10, at 10.

57. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 118-19 (8th ed. 2011).

58. For instance, Barnes observes that the efficient breach theory is an example that scholars study the relationship between damages rules and surplus-increasing breach. *See* Barnes, *supra* note 26, at 398 ("The topic of greatest scholarly interest, judicial notice, and casebook teaching is the effect of rules on incentives to break promises intentionally . . . Economists conclude that contract damage rules tend to provide incentives to breach contracts that align the self-interested preferences of a person contemplating breach with society's interest in ensuring that its scarce resources are used wisely.").

breach in the circumstances where breach may lead to a higher sum of surpluses than that yielded by performance and vice versa. On the one hand, the law should not force a promisor to strictly perform the original contract in the situation when a contract falls into the efficient breach zone. It does not necessarily require that expectation damages should be set as the default remedy. On the other hand, the remedy rules should be able to protect the expectation interest of the promisee, namely, to put the promisee in the same position as she would have been had the contract been performed.

The third point, that we can infer from the efficient breach doctrine is related to the freedom in contracting and renegotiation. As is noted, breach and compensation is the second-best tool for welfare maximization in many occasions. A more desirable approach to achieving an efficient result derives from private negotiation. After all, contract parties are better than courts or legal scholars at assessing their own preferences and working for their own welfare. They know more about how to deal with risks in their transactions, which kind of breaches are clearly efficient and should be priced rather than punished, through which remedy they can avoid inefficient breach more cheaply and so on.[59] We want the law to facilitate parties' ex-ante and ex-post contracting. One important point is to diminish mandatory rules in contract law and give parties more freedom in choosing their own remedies. For example, courts should reduce inference with liquidated damage clauses. Rather than scrutinize over the amount of damages stipulated by contract parties, a more preferable way for courts is to evaluate the formation process of those clauses.

Based on those three points, this paper will address some specific questions in relation to the application of efficient breach theory in the CSEL. With regard to the general case of breach and remedy, it is necessary to figure out the line between the efficient breach zone and the efficient performance zone drawn by the CESL and the CESL's approach to dealing with the situation where a contract falls into each zone. In addition, the findings deriving from the study of the general breach case will be put in the context of specific breach cases in order to examine the possibility of different types of efficient breach.

59. Klass, *supra* note 10, at 24.

II. APPLICATION OF THE EFFICIENT BREACH DOCTRINE IN THE GENERAL RULES OF THE CESL

As shown in the previous section, one important topic driving the discussion of efficient breach theory arises from the situations where breach of the contract is more efficient than performance. Using the economic surplus standard, a contract either falls into the efficient breach zone or into the efficient performance zone. According to economic theory, contract law should aim to optimize the contracting parties' incentives to take efficient actions, or to facilitate their abilities to maximize welfare from transactions.[60] It is assumed, based on this insight, that contract law should be able to motivate contract parties to avoid strict performance of a contract when it falls into the efficient breach zone, but encourage performance otherwise.

The proposal for regulation defines the CESL's scope to sales contract, covering contracts for transferring ownership of goods and contracts for the supply of goods to be manufactured or produced. As is noticed, one important feature of the sales contracts shaped by the CESL is the sharp distinction made between the business contracts (hereinafter B2B contracts) and the consumer contracts (hereinafter B2C contracts). However, the fundamental structures of these two types of contractual relationships are quite similar. Both the consumer party and the business party engage in transactions for their own profits, as a result of which, contracts entered into voluntarily by the parties will lead to welfare enhancement.[61] In the absence of a fully complete contract,[62] potential risks or opportunistic behaviour may arise in the contractual relationship and thus decrease or eliminate the utility of the contract. There are several factors leading to the incompleteness of a contract, such as the transaction costs[63], or the limited foresight of the

60. *Cf.* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113. YALE L.J. 541, 544 (2003).

61. Smits, *supra* note 21, at 6.

62. Assume a complete contract. Then the trading parties have to consider every risk, consequence, possible opportunistic behaviour of the other one, etc. ("contingently completeness"). Correspondingly, the contract should specify the exact actions that one party should perform when every risk happens. For example, it should include the time, place, way and quality of performance ("obligationally completeness"). *See* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 730 (1992).

63. In order to draft a complete contract, the trading parties have to take all the potential risks into account and deal in their contract with all of the risk in a specific way. Drafting complete contracts incurs the cost of searching information, the cost of negotiation and so on. Hence, a low possibility risk or insignificant risk may always be neglected by the contracting parties. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 299-301 (Harvard Univ. Press 2004).

parties. Moreover, the risk of opportunism increases in consumer contracts caused by consumers' lack of information, the absence of a truly competitive market or even the standard form contracts that are not subject to negotiation.[64] As a result, the contract that was assumed to be efficient at the time of conclusion may turn out to be wasteful because the cost of implementing the original contract increases or businesses may opportunistically try to cut down the investment in the performance of a binding contract. Taking those concerns into account, there is space for introducing legal interference into consumer contracts in order to shape the parties' incentives to taking proper behaviour, for instance, to motivate a business party to comply with what he has agreed. What is debatable, however, is the desirable extent of legal interference. Applied to consumer contracts, if the law imposes a high requirement for performance on the business party, this would be converted into the price of the product or shrink the supply of products and hence to a decrease in social welfare.[65]

This section will discuss the general attitude taken by the CESL toward breach, remedies and efficient breach zone.

A. Seller's Breach and Buyer's Remedy in General

The central concept stressed in this paper refers to "breach". However, instead of using the concept of "breach", the CESL uses the term "non-performance" to include any failure to perform a contract obligation, regardless of whether the failure is excused.[66] Part IV of the

64. In a normal case, the consumer contract is presented as a standard form contract in which the consumer cannot negotiate individually but can only "take it or leave it". As is argued by Slawson, *infra*, about 99% of consumer contracts are standard form contracts. In economic theory, standard contracts are preferable for the concern of lowering transaction cost. As to the consumer contract, which occurs at regular basis, it is costly for the business to negotiate with consumers individually. However, in another sense, consumers are compelled to adhere to the standard terms in the contract and the situation for the consumer is worse off if the business tries to exploit economic benefits without bearing any cost. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); *Cf.* Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 594-608 (1990).

65. Smits, *supra* note 21, at 9.

66. The term of "non-performance" instead of "breach" has also been used in PECL, as well as subsequent European soft law texts. For example, Chapter 8 of PECL provides rules on "Non-Performance and Remedies in General"; Chapter III of Book III of DCFR offers the rules about "Remedies for Non-performance". In the CESL, Chapter 11 addresses "the buyer's remedies" and chapter 13 addresses "the seller's remedies". PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW, *supra* note 15; PRINCIPLES OF EUROPEAN CONTRACT LAW, *supra* note 16; *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, *supra* note 14.

CESL sets out the framework of the contractual parties' obligations and remedies. Cases of breach might be presented either as a business seller's breach or a consumer buyer's breach. This section will focus on the basic structure of a business seller's breach and a consumer buyer's remedies as indicated in the CESL.

Article 87 of the CESL includes two major types of a seller's non-performance, covering the situations where a seller fails to deliver the goods ("non-delivery") or the goods delivered are not in conformity with the contract ("non-conformity"). Breach of an obligation is the condition for awarding a consumer remedies. Generally, a consumer buyer is provided with a set of standard remedies in Article 106.[67] As is indicated, in the case that a breach takes place, a consumer buyer may require: (1) Performance (including specific performance, repair or replacement);[68](2) Withholding the buyer's own performance [69] (usually payment of money); (3) Terminating the contract;[70] (4) Declaring a price reduction[71]; or (5) Claiming damages.[72]

Moreover, Article 106 contains important information for the consumer party, namely that the consumer is provided with a free choice of remedies and Article 108 adds mandatory nature to the general application of remedies rules in B2C contracts[73] On the one hand, it means that a consumer buyer may either choose among any of the remedies listed in Article 106, or resort to more than one remedy in

67. CESL, *supra* note 14, art. 106, §§1, 3.

68. *Id.* art. 110, §1 (entitling the buyer to require performance of the seller's obligations).

69. *Id.* art. 113, §1 (stating that a buyer who performs at the same time as, or after, the seller performs, has a right to withhold performance until the seller has tendered performance or has performed).

70. *Id.* art. 114, §§1, 2 (stating that a buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87; in a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant).

71. *Id.* art. 120, §1 (stating that a buyer who accepts a performance not conforming to the contract may reduce the price; the reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance).

72. CESL, *supra* note 14, art. 159, §§1, 2 (stating that a creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused; the loss for which damages are recoverable includes future loss which the debtor could expect to occur).

73. *Id.* art. 108 (stating that in a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader's attention by the consumer).

the same case as long as the remedies he chooses are not incompatible. For instance, if a buyer chooses to terminate a contract, it means the bond created by the contract will be brought to an end and he cannot ask for repair or replacement. On the other hand, the consumer's free choice is not subject to cure by the seller, which is stated in Article106(3).[74] Article 109 follows by specifying that the "cure" by a seller in the case of "non-conformity". As is shown, a seller whose early tender was not in conformity with the contract may make a new and conforming tender within the time allowed for performance or cure the defect at its own expense even after the time allowed for performance.[75] The buyer may terminate the contract if the non-conformity amounts to being fundamental.[76] This is the normal case in commercial sales, where both the seller and the buyer are professional businessmen, but not in the B2C contract. The message conveyed in Article106(3) is that a consumer buyer has great freedom in choosing remedies. He may require the seller to either repair the defects in the goods he received or change the defective goods into conforming goods. But more importantly, the consumer is able to turn down any offer by the seller to cure so as to require price reduction, damages, or termination of the contract immediately.[77] The application of the remedy is at the consumer's choice. Furthermore, Article 114 adds that consumers may terminate the contract even when the lack of conformity is not fundamental, enhancing a consumer's free choice of remedies. Meanwhile, the application of a consumer buyer's remedies is mandatory so that the parties may not exclude it or derogate from or vary its effect in advance. However, the consumer's free choice of remedies is not absolute. The type of remedies that are available to a consumer buyer depends on the specific type of breach. Following Article 106, the CESL adds more provisions, coordinating the

74. *Id.* art. 106, §3 (stating that "if the buyer is a consumer: (a) the buyer's rights are not subject to cure by the seller. . .").

75. *Id.* art. 109, §1 (stating that "a seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance").

76. *Id.* art. 114, §1 (stating that "buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87 (2)").

77. *See* CESL, *supra* note 14, art. 114, §2; *see also* Gerhard Wagner, *Buyers' Remedies under the CESL: Rejection, Rescission, and the Seller's Right to Cure* (Apr. 5, 2012), *available at* http://www.law.uchicago.edu/files/files/Wagner%20paper.pdf (last visited Mar. 26, 2014) (presentation at the University of Chicago to Host Conference on European Contract Law); *see also* Régine Feltkamp & Frédéric Vanbossele, *The Optional Common European Sales Law: Better Buyer's Remedies for Seller's Non-performance in Sales of Goods*?, 6 EUR. REV. PRIV. L. 873, 894 (2011).

application of different types of remedies in specific types of breach, which will be discussed in Section 4.

B. Damage Rules

As to the damages rules, the CESL has a separate part (Part VI) covering the issue of damage measurement, types of damages and conditions for damages.

Following the CISG and the DCFR,[78] the CESL also sets the aim of damages as compensatory; namely, it aims to make a non-breaching party indifferent to breach and performance of the contract.[79] As Article 160 indicates, "the general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position." Article 160 also adds that the damages cover the loss which the creditor has suffered and the gain of which the creditor has been deprived, which includes a future loss caused by the breach of contract. Inferring from Article 165 of the CESL, a creditor's loss from non-performance is generally measured by the discrepancy between the contract price and the market price. But Article 164 adds that if the creditor has arranged an alternative transaction to replace the original transaction reasonably, he could recover the shortfall between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction.[80] Suppose the buyer has arranged an alternative sale in which he paid a price (P') higher than the contract price (P); what he can then recover on the basis of Article 164 is the discrepancy between P' and P, namely P'-P. A problem occurs in the situation where the buyer has arranged a cheaper substitutive transaction (P'<P). In addressing the principle of "full compensation", the commentary to the CESL states that "if the creditor's loss is higher, he retains the right to recover the loss through a claim for damages on the basis of Article 159."[81] However, in the case where a buyer could arrange a cheaper alternative purchase, the buyer actually suffers no loss and cannot obtain any compensation. As is shown, the CESL tries to entitle a creditor to his real loss rather than to

78. *See* United Nations Convention on Contracts for the International Sale of Goods, arts. 74-5, Apr. 11, 1980, 1489 U.N.T.S. 3. [hereinafter CISG]; *see also* DCFR, *supra* note 15, bk. III, sec. 3-702.

79. COMMON EUROPEAN SALES LAW (CESL) COMMENTARY, 639-40 (Reiner Schulze ed., Nomos Verlagsgesellschaft et al., 2012) [hereinafter CESL COMMENTARY].

80. *See* CESL, *supra* note 14, arts. 164-65.

81. *See* CESL COMMENTARY, *supra* note 79, at 652.

motivate the creditor to make the best possible substitutive transaction.

The CESL, moreover, sets several limits and conditions on the expectation measure as well. First, not all types of loss are recoverable. Article 2 of the CESL specifies the losses that are recoverable by limiting them to economic loss and non-economic loss in the form of physical pain and suffering. Other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment are precluded from recovery with emphasis. The second limit to expectation damages derives from the famous Hadly rules[82], namely, a debtor is only liable for losses that he could foresee or could be expected to have foreseen when the contract was concluded as a possible consequence of his breach.[83] This is in accordance with one of the requirements needed for an efficient breach to take place. As is assumed, the debtor to a contract has to obtain sufficient information concerning the cost and the benefit of breach in order to assess whether it is more profitable to breach, to perform, or to negotiate with the other party. The Hadly rule builds a bridge between the debtor's incentive to breach and the creditor's incentive to disclose information in terms of his expected loss from the non-performance of the contract. Since the damages are limited to the loss that is foreseeable by the debtor at the time of contract conclusion, the buyer has to disclose as much information as possible at the stage of contract formation in order to fully recover his loss from the non-performance. Another condition for awarding expectation damages is the causal relationship between nonperformance and loss. However, the CESL doesn't establish any standard for evaluating this causal relationship.[84] In addition, the CESL exempts the debtor from compensating the loss to the extent that the creditor contributed to the non-performance or its effects, or the creditor omitted reasonable steps

82. The Hadley Rule derives from the famous English case of Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Exch.); 9 Exch. 341. Two implication were drawn from this case:

(1)[T]hat it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach, and (2) that specifically the proper test for determining whether particular items of damage should be compensable is to inquire whether they should have been foreseen by the promisor at the time of the contract.

As is suggested, the "foreseeability" test is subject to defining what a hypothetical reasonable man would have foreseen at the time he signed the contract. *See* L. L. Fuller & William R. Perdue, Reliance Interest in Contract Damages: 1, 46 YALE L. J. 52, 84-85 (1936).

83. CESL, *supra* note 14, art. 161.

84. The commentary under Book III, §3-701 of the DCFR provides a basic standard for evaluating causation between non-performance and loss. As is required, the creditor can only recover the losses that would not have occurred without the failure in performance. DCFR, *supra* note 15, bk. III, sec. 3-701, comment B.

to reduce the loss.[85]

The CESL is silent in terms of the party-designed damages for the seller's non-performance. In the previous example, both PECL and DCFR take a similar approach toward party-designed damages as that of the "Resolution on Penalty Clause" (RPC 1971).[86] The attitude is to distinguish normal liquidated damages from pure penalty clauses. Liquidated damages, which are higher than the damages payable for breach, are generally allowed and enforceable. But in the situation where the damage clause has specified an excessive amount of damages disproportionate to the actual loss from non-performance, the court is authorized to reduce the sum of damages. The CESL, in contrast, doesn't incorporate this kind of rule. The CESL's concentration on regulating "unfair contract terms" in B2C contracts or B2B (SMEs) contracts to some extent is relevant to its silence in addressing the rule on liquidated damages or penalty clauses. In the context of a consumer contract, the contract usually takes the form of a standard contract drafted only by the business party and the consumer may either "agree or leave". Logically, the business party would not specify any damage clause against his own interest. Rather, the problem in standard contract terms arises from the business' advantageous position in drafting unfair terms that are unfavorable to the consumer, such as penalty clauses for consumers' non-performance. The business party has the incentive to insert an unfair penalty clause as long as his marginal cost of doing so is lower than the marginal value.[87] Then a desirable way of eliminating unfair penalty terms is to invalidate them. Article 85 of the CESL indicates that "a contact term is presumed to be unfair if its object or effect is to. . .(e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance. . . ." If the damages clause is presumed unfair, it is not binding on the consumer party unless the business can prove it is not unfair.[88] By default, it is inferred that the CESL allows general liquidated damages but only excludes penalty clauses against consumer parties that have failed the

85. CESL, *supra* note 14, arts. 162-63.

86. Resolution (78) 3 of the Committee of Ministers of the Council of Europe, Relating to Penal Clauses in Civil Law art. 7 (1978). "The sum stipulated may be reduced by the court when it is manifestly excessive. In particular, reduction may be made when the principal obligation has been performed in part. The sum may not be reduced below the damages payable for failure to perform the obligation. Any stipulation contrary to the provisions of this article shall be void." *Id.* Similar articles are §9:509 PECL, *supra* note 16, and Book III, sec. 3-702 of DCFR, *supra* note 15.

87. Meyerson, *supra* note 64, at 606-07.

88. CESL, *supra* note 14, arts. 79, 83, 85.

"Unfair Contract Terms" test.

C. Rules in the Efficient Performance Zone

In economic theory, actors engage in contracting in order to enhance their welfare, thus the law should motivate the parties to comply with their agreement. Accordingly, breach of a mutually agreed upon contract should be refrained from unless performance of the contract would decrease the social welfare. Within a trade between a business and a consumer, the seller is motivated to comply with the contract consciously, by either the goal of earning money, his personal values, or as a means to protect his professional reputation.[89] Moreover, legal rules encourage performance in the efficient performance zone by, for instance, imposing obligations on the contracting parties and creating remedy rules for a non-breaching party that may increase the cost of breach and alter a promisor's incentive to breach. The CESL adopted this notion of encouraging the performance of those contracts within the efficient performance zone.

A general issue stressed in relation to the efficient performance zone concerns the remedies that are available to the buyer. According to Article 106 of the CESL, a hierarchy does not exist among those remedies. Within the five types of remedies provided by the CESL, performance is regarded as an important remedy arising from non-performance but not as the primary one.[90] Article 106(1) and Article110(1) set the general provisions entitling a buyer to performance, including claiming specific performance, repair of the goods, or replacement of the goods. Basically, if a seller fails to deliver the goods or the goods delivered are not in conformity with the contract, the buyer may ask for delivery, repair or replacement unless some specific conditions set out in the CESL are satisfied.[91] Provided that the performance claim is available to the buyer, the seller's principal reaction to a contract will not be to breach, but rather to comply with the contract or negotiate with the buyer in order to buy the non-performance. Moreover, what motivates the seller to perform at an optimal level is a whole system composed of both legal and non-legal incentives.[92] Within the legal system, remedies beyond specific

89. SCHÄFER & OTT, *supra* note 54, at 277.

90. Feltkamp & Vanbossele, *supra* note 77, at 891-92.

91. Section 3.4, *infra*, will discuss the exceptions to the claim of specific performance.

92. In terms of non-legal incentives, reputation and economic surplus may induce performance. For example, the seller is willing to perform in order to obtain reciprocal performance by the buyer; or he has to keep his promise in order to sustain a good reputation within the common playing field. *See* Schwartz & Scott, *supra* note 60, at 557-

performance and damages may also provide such deterrence to non-performance. For example, by withholding the obligation to pay, the buyer can, on the one hand shift away the risk of losing the value of his monetary payment if the seller fails to perform[93] and on the other hand, induce the seller to accomplish due performance since the seller expects economic surplus from the payment.

Within the efficient performance zone, Article 89(1) of the CESL recognizes a situation where performance of a contract has become more onerous, but the surplus from performance is still assumed to be higher than that from non-performance under the heading of "Change of Circumstances". Article 89 also provides two types of contingencies which may cause onerosity in performance, namely, an increase in the cost of performance, or a decrease in the value of what is to be received by a seller. Nevertheless, to be mentioned, the seller's obligation to perform the contract in general will not be affected if the extent that performance becomes more onerous is not great. In this sense, if a seller refuses to deliver the goods as required, or delivers defective goods merely on the ground of a minor difficulty in performance, the buyer may still make a claim for remedies including requiring performance.[94]

D. Rules in the Efficient Breach Zone

Following the theory of efficient breach, a contract falls into the efficient breach zone when an unexpected contingency arises so that the performance of the contract will create less profit than the breach does. As is noted in Section 2, either a drastic increase in performance cost, or an extremely high bid by a third party may bring a contract into the efficient breach zone. In the efficient breach zone, performance of the original contract should be refrained from so as to avoid economic waste and to enhance the total welfare that the contract parties obtain. Two questions will be stressed in this section: (1) When does a contract fall into efficient breach zone?; and (2) How does the CESL deal with the situations when the contract is in the efficient breach zone?

1. When Will Contracts Fall into the Efficient Breach Zone?

The CESL provides three examples where a seller's obligation to perform will be influenced, by the doctrine of efficient breach: (1)

58.

93. CESL COMMENTARY, *supra* note 79, at 514.

94. CESL, *supra* note 14, art. 89. More discussion about Article 89 will be presented in Section 3.4.1, *infra*.

"Excused Non-performance," (2) "Change of Circumstance" and (3) "Impossibility or Impracticability."

First, Article 88 provides the doctrine of "Excuse,"[95] referring to an impediment which is beyond the non-performing party's control, and where that party could not be expected to have taken the impediment into account at the time when the contract was formed, or to have avoided or overcome the impediment or its consequences.[96] However, the CESL doesn't give further explanation of prerequisites for "excused non-performance" or show any examples which may be recognized as these kind of impediments. The situation described in Article 89 can also be covered by the civil law principle of "Force Majeure,"[97] which is widely used in literature.[98] The requirements for recognizing force majeure can be traced back to the previous documents that Article 88 of CESL is based on. For example, the ICC Force Majeure Clause 2003 sets out that: (1) the impediment must be out of the debtor's control, or not fall in the sphere of risk of the debtor; (2) it must have been unforeseeable at the time of contract formation; and (3) it or its consequences must have been unavoidable. It lists some typical events that amount to impediments, such as war, natural disasters or acts of terrorism. In addition, the commentary below Book III, Section 3:104 of DCFR provides some examples to show when an obstacle should be recognized as an insurmountable impediment that is outside of the debtor's control and could not been taken into account by the debtor.

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95. Article 79(1) of CISG, Article 8:808(1) of PECL 1999 and Book III, Section 3-104(1) of DCFR 2008 are practically similar to Article 88(1) of CESL.

96. CESL, *supra* note 14, art. 88, §1.

97. Ingeborg Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*, 44 UCC L.J. 457, 469-71 (2012).

98. The principle of force majeure originated in the French Civil code of 1804. *See* CODE CIVIL [C. CIV.] art. 1148 (Fr.) ("There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event."). International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, 169 (1994), *available at* http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf (last visited Apr. 1, 2014) [hereinafter UNIDROIT PRINCIPLES]. There are also other terms to describe similar supervening events that make contract performance impossible. For instance, the English law principle of "frustration" or German law principle of "impossibility". In many situations, those terms are used interchangeably, except for some subtle difference. For instance, the English principle of frustration has a broader meaning, including that "which renders the contract something radically different from that which was in the contemplation of the parties." *See* Peter Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, 2 NORDIC J. C. L. 38, 38-45 (2012), *available at* http://ssrn.com/abstract=1982895 (last visited Apr. 1, 2014); *see also* HUGH BEALE ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 1106 (2d. ed. 2010).

As is shown, an unexpected strike in the nationalised company which distributes natural gas can be recognized as out of the control of a debtor who only heats its furnaces with gas.[99] An earthquake is also considered as an impediment since it is insurmountable or irresistible unless the debtor can build a virtual fortress. In those cases, "one cannot expect the debtor to take precautions out of proportion to the risk,"[100] hence, the impediment or its consequence cannot be overcome or avoided and strictly performing the contract is impossible.

The CESL also contains a separate provision on "change of circumstance", namely Article 89 which derives immediately from the DCFR and the PECL.[101] As noted in Section 3.3, whether or not a debtor's obligation of performance is affected depends on what extent that performance has become more onerous. Article 89 indicates a situation under the name of "an exceptional change of circumstance." An exceptional change of circumstance makes performance excessively onerous, because the cost of performance has increased or the value of what is to be received in return has diminished to a large extent. However, Article 89 doesn't draw a clear line between the situation where "performance becomes more onerous" and the situation where "performance becomes excessively onerous." It merely indicates that the excessive onerosity is caused by "an exceptional change of circumstances," which is also an ambiguous terminology. The task of distinguishing an exceptional change of circumstance from simple changes in the surrounding conditions of a contract is left to judges in individual cases. Another name which is more commonly used by scholars to denote the situation depicted in Article 89 is "hardship."[102] Different from force majeure, performing the original contract is only excessively onerous, but physically possible, when the principle of "change of circumstance" or "hardship" applies. It might be a great

99. DCFR, *supra* note 15, at 809.

100. *See* De Geest, *supra* note 53, at 128; *see also* DCFR, *supra* note 15, at 810.

101. The identical article in DCFR is Book III, Section 1-110 and in PECL is Section 6:111. Conversely, the CISG, upon which both the PECL and DCFR were drawn, includes both the force majeure and "change of circumstance" in the same Article: 79. As is indicated by some scholars, the approach taken by the CISG is preferable, because it is difficult to draw a distinction between "force majeure" and "hardship". Many subsequent events, as is argued, will just make performance more onerous, rather than render it impossible. Meanwhile, the prerequisites for both cases are the same. Therefore, to some extent, hardship is just one situation of force majeure and should be regulated in the same provision covering the later case. Schwenzer, *supra* note 97, at 470.

102. *See id.*; *see also* Hector L. MacQueen, *Change of Circumstances: CISG, CESL and A Case From Scotland*, 11 J. INT'L TRADE L. & POL'Y 300, 300 (2012); Ulrich Magnus, *CISG and CESL, in* LIBER AMICORUM OLE LANDO, 225, 251 (Michael Joachim Bonell et al. eds., 2012).

fluctuation of price in the material market that raises the seller's costs of production greatly, for instance, to 200%.[103] In such a situation, producing the commodity as required by the contract is still possible, but the increased costs will consume all the profits that may be created by the contract and thus performance of the contract is economically inefficient. Except for "being exceptional", a "hardship" is recognized only when three prerequisites are satisfied. Article 89(3) requires that the change of circumstance should occur: (1) at the time after conclusion of the contract; (2) when its possibility or scale could not have been taken into account by the debtor; and (3) when the risk of it has not been assumed by the aggrieved party or cannot reasonably be regarded as having been assumed.[104] Apply those conditions to a consumer contract. Changes of circumstances in relation to matters within the area of professional expertise may normally be precluded from the scope of Article 89. As a professional, the business seller is considered to have assumed or should have assumed risks arising out of his profession. [105]

In addition to Articles 88 and 89, which are included in the general chapter of obligations and remedies, what should be mentioned as well is Article 110(3), which puts forth two exceptions to the remedy of specific performance. Two cases are recognized where a buyer cannot require specific performance. The first case refers to a situation where performance of the contract is impossible or has become unlawful. Another one occurs if the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.[106] Situations embodied in Article 110(3) are recognized in relation to the traditional contract law theory of "impossibility" or "impracticability."[107] With regard to assessing when performance of a contract is impractical (or uneconomic), the standard adopted in Article

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103. Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39 VICTORIA U. WELLINGTON L. REV. 709, 715-17 (2008) [hereinafter Schwenzer, *Force Majeure*].

104. CESL, *supra* note 14, art. 89, § 3.

105. This has been clearly stressed in the commentary of DCFR.

106. CESL, *supra* note 14, art. 110, § 3 (stating that performance cannot be required where: (a) performance would be impossible or has become unlawful; or (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain).

107. As to the "impossibility principle", it covers not only physical impossibility, but also legal impossibility. However, more information about when and how performance should be judged unlawful cannot be found in the CESL. It leaves us to wonder which law should be applied to make this judgment. For instance, will performance of a contract be rendered unlawful if it violates mandatory rules in the national laws and regulations? *See* Feltkamp & Vanbossele, *supra* note 77, at. 897.

110(3), which is grounded on the comparison between the costs of performance and the benefit that a buyer will obtain, is analogous to the requirement for the situation where efficient breach arises because of an unfortunate contingency. Performance of a contract is rendered impractical if the cost of performance exceeds the benefit that the buyer can obtain from it. In other words, an impractical contract may fall into the efficient breach zone where performance of the contract is inefficient. In contrast to Article 88 and Article 89, Article 110(3) has not set any prerequisite for the cause of impossibility or impracticability. Hence, even if a situation of impossibility or impracticability is induced by some events that are expectable or controllable to the seller, Article 89 may apply as long as the performance becomes impossible or extremely costly; meanwhile, the CESL is chosen by the contracting parties.

To summarize, situations where a sales contract may fall into the efficient breach zone have been recognized by the CESL. With regard to the type of contingency rendering a contract economically inefficient, the CESL only includes unfortunate contingencies which have increased a seller's cost of performance or decreased the benefit that the seller may obtain in return. The general qualification for this type of contingency is based on a "cost-benefit" rule of comparing the cost or burden of performance and the cost incurred by non-performance. A contract falls into the efficient breach zone only when its performance becomes impossible or is excessively costly. As a result, the seller's obligation of performance will be influenced. Nevertheless, the CESL doesn't specially mention the circumstance where non-performance is motivated by the higher surplus yielded from contracting with a third party. Even if a third party bids a price that is much higher than the highest price offered by the buyer, the seller's obligation of performance will not be affected and he must perform his obligation as required by the contract.[108]

2. The CESL's Reaction to Contracts with the Efficient Breach Zone

When a contract falls into the efficient breach zone, there are two basic conditions for qualifying the sellers breach as an efficient breach. First of all, the law should not force the seller's to perform the contract so that the seller is able to make free choice of breach, performance or offer to negotiate. Moreover, the buyer should not be worse off on account of the seller's non-performance. This would be possible if the buyer's expectation interest is protected through the award of

108. CESL, *supra* note 14, art. 89, § 1.

expectation damages.[109] Then, questions arising in relation to the CESL are whether the CESL allows non-performance or not, and if so, whether it entitles the aggrieved buyer to the claim of expectation damages or not.

Concerning the situation of force majeure, the CESL follows the traditional doctrine by exempting the seller from liability for non-performance. The general rule of excuse for non-performance is drafted in Article 88. Moreover, Article 106(4) adds information on the effects of excuse by extending excuse to damages claims and performance claims.[110] Other remedies remain available to the buyer.[111] Therefore, in the case of force majeure, a buyer may still withhold his payment, claim price reduction, or termination of the contract except for requiring specific performance and damages. Paragraph (3) of Article 88 further specifies an obligation of notification by the party who is unable to perform. After the seller is aware or could be expected to have been aware of an impediment, he has to give notice to the buyer of this impediment and its effect without any undue delay. The text of the CESL also clearly indicates the sanction for violation of the duty to notice by holding the party liable for any damages incurred from his failure to give notice.[112]

Rather than directly allowing non-performance, the CESL imposes a duty to renegotiate on the contract parties in the case of hardship. As is set in Article 89(1), when performance becomes excessively onerous, the parties have to enter into negotiations in order to adapt or terminate the contract. Following the previous DCFR,[113] Section (2) of Article 89 carries the idea of encouraging re-negotiation further.[114] If the parties fail to reach an adaptation or termination of the

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109. Qi Zhou, *Is a Seller's Efficient Breach of Contract Possible in English Law*, SELECTEDWORKS (2008), *available at* http://works.bepress.com/qi_zhou/1 (last visited Feb. 19, 2014).

110. Magnus, *supra* note 102, at 251.

111. CESL, *supra* note 14, art. 106, §4 (stating that if the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages).

112. *Id.* art. 88, §3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty. *Id.*

113. DCFR, *supra* note 15, bk. III, § 1-110(3)(d).

114. CESL, *supra* note 14, art. 89 ¶ 2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may: (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or (b)

contract within a reasonable time, a court or arbitral tribunal can do so upon the request of either the seller or the buyer.[115] Two general restrictions are set in relation to the adjustment of the contract by a court or arbitral tribunal in Article 89(2). First of all, the court or arbitral tribunal cannot decide to adjust the contract without any request of either party. Only if the parties cannot negotiate successfully within a reasonable time and one of the parties makes a request to the court or arbitral tribunal for a solution, may the court adapt or terminate the contract.[116] Secondly, the CESL requires that the adaption should be made from the perspective of the contracting parties, namely, it should be "in accordance with what the parties would reasonably have agreed at the time of contracting if they took the change of circumstances into account." In brief, although Article 89 doesn't expressively allow non-performance, its clarification of the parties' duty to renegotiate as well as a possible adjustment of the contract to hardship implicitly interferes with any direct claim for specific performance of the contract by the buyer.

In addition to invoking Article 89 to defend against a buyer's performance claim, the seller may also resort to Article 110(3) to avoid performing the contract if performance has become excessively burdensome or costly. As Article 110(3) provides, performance cannot be required if it is objectively impossible or legally impossible, or it incurs excessively high costs or burdens.[117] Implicitly, application of exceptions to performance, which is based on the balance between costs and benefits, should be applied to two other forms of performance, namely, repair and replacement. If cure is impossible or the cost or burden of cure exceeds what a buyer can benefit from it, the seller may decline the buyer's request of cure. Nevertheless, the CESL has not exempted a debtor from damages when performance is impossible or impracticable. Article 159 entitles a creditor to any damages for loss caused by non-performance of an obligation by the debtor, with the only exception in the situation where the rule of force majeure applies and

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terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court. *Id.*

115. *See* Feltkamp & Vanbossele, *supra* note 77, at 891; *see also* Schwenzer, *supra* note 97, at 471.

116. *See* MacQueen, *supra* note 102, at 301.

117. *See* DCFR, *supra* note 15 (goes a step further by specifying the consequence if a creditor insists on specific performance; DCFR III. 3:302 (5) indicates that a creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that she has increased the loss or the amount of payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense).

the debtor's non-performance is excused.[118]

From the above statements, three primary conclusions can be drawn. First, specific performance is generally not allowed if contracts fall into the efficient breach zone where performance is impossible or impracticable. Second, with regard to the issue of damages, whether or not the buyer is able to obtain damages depends on the cause of non-performance. In principle, a buyer is still entitled to damages when he is not able to claim for specific performance of the contract. However, where the non-performance is caused by an impediment that the seller did not expect and did not assume the risk; the procedure of renegotiation should be intrigued. Furthermore, if this kind of unexpected impediment is uncontrollable and unavoidable or could not be overcome by the debtor, the creditor cannot ask for damages because non-performance is excused. In other words, the idea implied in the damages rule is to correlate the possibility of damages to the allocation of risk. The CESL makes the debtor who assumed the risk of impediment take the risk and pay damages to the other party. If the seller is risk neutral, he is indifferent to risk and should assume the risk of non-performance after the conclusion of the contract. By awarding expectation damages, the CESL removes the risk of non-performance from the buyer and shifts it to the seller. Nevertheless, non-performance will be excused in the circumstance where the seller has not assumed the risk. Third, cooperation and renegotiation is generally encouraged within the efficient breach zone. Some special obligations or rules have been established by the CESL in order to promote the communication and cooperation between contract parties. On the one hand, the debtor who has been influenced by a force majeure event is imposed of an obligation to inform, upon which the other party may understand the situation and take appropriate measures without any delay. For instance, the creditor may negotiate with the debtor to either adapt or terminate the contract or to arrange a substitute sale to reduce the loss incurred by non-performance. On the other hand, Article 89(2) directly puts forth the parties' duty to negotiate within a reasonable time and the possibility of a court or an arbitral tribunal's adjustment of the contract in light of a hardship. However, imposing an obligation to renegotiate and permitting a court to adjust the contract also gets some critiques from scholars. For instance, as is pointed out, "allowing the court to directly interfere in the content of a contract is a serious challenge to the principle of party autonomy and the pacta sunt servanda

118. CESL, *supra* note 14, art. 159.

rule."[119] Moreover, creation of a duty to negotiation and a mandatory renegotiation period is accused of being unnecessary. The reason, as is given, is that the parties already have a strong incentive to renegotiate and settle disputes because settling is cheaper than going to a court.[120] Nevertheless, the rule on renegotiation will just intervene with the parties' freedom in choosing between renegotiation or going to trial directly.[121]

III. EFFICIENT BREACH IN SPECIFIC CASES OF CONSUMER CONTRACTS

It was shown in Section 3 that the CESL partially absorbs what has been derived from the law and economic analysis of efficient breach. Although the CESL doesn't directly use the terminology of efficient breach, the idea of differentiating the efficient breach zone and the efficient performance zone, based on the balance between costs and benefits of performance is present in it. What may lead a contract to fall into the efficient breach zone is only an unlucky impediment that increases a seller's performance cost or decreases the value of what he is assumed to receive in return. In those situations, a claim of specific performance is not allowed even though it is possible for a buyer to require damages unless the seller's non-performance is excused. The amount of damages that a buyer obtains should be equal to the amount that will put the buyer into the position he would have been in if the contract had been duly performed. Theoretically, efficient breach is possible within the framework of the CESL.

Those findings can also applied to specific cases of consumer contracts. In consumer sales, if the seller's breach can generate more profit than performance does and bring no loss to the buyer, the breach is economically efficient and should not be condemned. This is the ideal model. In specific cases, a seller breaks the contract in different ways. The seller might refuse to deliver the goods, or the delivery might be finished after the time required for performance, or the goods

119. Feltkamp & Vanbossele, *supra* note 77, at 891.

120. *See* De Geest, *supra* note 53, at 132-33.

121. *Id.* De Geest states: "(T)he likely effects of a duty-to-renegotiate are usually (a) that court decisions are delayed, because when a party comes to the conclusion that settlement is not possible (for instance, because parties have different expectations as to what the court will decide, so that there is no 'settlement range'), she still has to wait until the mandatory renegotiation period is over before going to court; and (b) that parties are obliged to play a you-quit-first game in which they have to try to make the other party leave the negotiation table first, so that the other one is held responsible for the failure of the negotiations."

offered might be in conformity with the contract. Under the general provisions covering breach and remedies, the CESL recognizes two major forms of non-performance and provides corresponding remedy rules.

A. Hypothesis of Efficient Non-Delivery or Delayed Delivery

The first case of non-performance that is present in the CESL is non-delivery or delayed delivery of the goods. Suppose a case of non-delivery. If we apply the findings in Section 3 to the specific case, efficiency is realized if the seller is not forced to deliver the goods and the buyer's position will not be worse off when the contract has fallen into the efficient breach zone.

An important condition for making efficient non-delivery is that the contract has fallen into the efficient breach zone recognized by the CESL. That is, the delivery of the goods is either impossible, impracticable because the cost or burden of delivery increases dramatically, or the value of the payment decreases to a great extent. For example, the earthquake destroyed all the products so that the seller is unable to provide the products as required or it would be extremely expensive for the seller to find alternative products. Nevertheless, a more profitable opportunity from a third party's offer will not affect a seller's obligation to deliver the goods. The seller still has to deliver the good to the original buyer as is required by the contract even if selling the goods to a third party may create higher surplus. To be noted, efficient non-delivery would only happen to the contracts that involve future performance.[122] Within the passage of time between the exchange of promise and the delivery, unexpected contingencies may arise and increase the cost of delivery or render delivery impossible. To the contrary, discussion of efficient non-delivery doesn't make sense in the case of simultaneous exchanges where delivery of the goods happens at the same time the contract is concluded. Suppose the contracts happening on a regular basis, such as the purchase in grocery shops or eating at restaurants. Products are delivered as long as a consumer finishes a series of behaviour, such as picking up items and making payment at the cash desk. In those cases, the contract is performed at the same time as the contract is concluded.

122. As is indicated by Cooter & Ulen, there are three models of promise: (1) "one party pays now for the other party's promise to deliver goods later ('payment for a promise'); (2) one party delivers goods now for the other's promise to pay later ('goods for a promise'); and (3) one party promises to deliver goods later and the other party promises to pay when the goods are delivered ('promise for a promise')." COOTER & ULEN, *supra* note 29, at 283.

According to the CESL, a seller is generally not forced to make delivery if the contract has fallen into the efficient breach zone recognized by it. In this case, the seller is free to choose the welfare maximizing breach. As to the remedies available to the consumer buyer, what he may claim depends on whether or not the seller's non-delivery is excused. If the intervening event amounts to force majeure covered by Article 88, the seller is exempted from non-delivery and the buyer cannot claim for damages, but can withhold payment of the price, terminate the contract, or reduce the price.[123] But since delivery of the goods as required is impossible because of the force majeure, the consumer in theory may not resort to price reduction. He is able not only to refuse to pay for the goods, but also to terminate the contractual relationship and claim his money back if he has already made the payment. As a result of termination, the contractual relationship of the parties will end and any benefit that a party had received from the other party returned.[124] In other cases which fall outside the scope of Article 88, the seller is not excused from non-delivery and the consumer is entitled to expectation damages in addition to the rights to withhold his payment and to terminate the contract.[125] The amount of damages that a consumer may obtain is equal to the benefit that he would get had the product been delivered,[126] namely, the value that was placed on the product at the time the contract was formed. In this sense, the consumer may balance the remedies available and choose either to terminate the contract or to make a claim for damages. Thus, non-delivery will only happen if it is impossible or it is more profitable than delivery after the seller compensates the consumer's expectation losses.

B. Hypothesis of Efficient Non-Conformity (Defective Performance)

Suppose another circumstance of non-performance which happens frequently in real life, namely, a seller has delivered the goods, but the goods delivered are not in conformity with the contract. This situation is also referred to as defective performance. It is assumed that the contract falls into the efficient breach zone when the cost of providing conforming products is disproportionate to the benefit of it in the hands of the buyer.

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123. CESL, *supra* note 14, arts. 88, 106.

124. *See id.* art. 172. Where a contract is avoided or terminated by either party, each party is obliged to return what that party ("the recipient") has received from the other party. The obligation to return what was received includes any natural and legal fruits derived from what was received.

125. *Id.* arts. 110 ¶ 3, 159.

126. *Id.* art. 160.

Basically, the goods provided by a seller should be of the quantity, quality, and description required by the contract; they should be contained, packaged, and supplied along with any accessories or instruction in the manner as required by the contract according to Article 99 of the CESL. Article 100 further states seven criteria for assessing non-conformity. Generally, the goods should comply with any particular purpose made known to the seller at the time of the conclusion of the contract and the usual or ordinary purpose for the goods.[127] Moreover, Article 102 further requires that the goods be free from any right or not obviously unfounded claim of a third party, including rights or claims based on intellectual property.[128]

According to the CESL, if the goods provided by a seller are not in conformity with the contract, the consumer buyer may freely choose remedies among a variety of options which include, requiring specific performance, withholding the payment of the price, terminating contract, reducing the price, and claiming damages. To be noted, specific performance in the case of defective performance is present either to repair the defects or to replace the defective goods with conforming goods. Moreover, as is indicated in Article 111(1), the choice between repair and replacement is at the consumers will,[129] which carries the consumers free choice of remedies one step further. A consumer buyer, thus, is able to make the choice of remedies based on the relative benefit and cost of different remedies.[130] He may decide whether or not to give the seller a chance to cure the defects and in which way the seller should cure the defects according to his own preference. Repair or replacement might be preferable if a consumer thinks the value of the cured goods is great, for example because the goods are unique or the market prices of the goods have gone up.[131] But once the consumer has validly required remedying the lack of

127. According to Article 100, the product must be in conformity with what has been agreed to by the contractual parties. *See id.* art. 100. It should be fit for any particular purpose made known to the parties at the time of the conclusion of the contract, possess the qualities of the product held out to the buyer as a sample or model and possess the qualities indicated in any pre-contractual statement which forms part of the contract terms. Moreover, Article 100 requires that the product provided by the seller comply with what has been considered usual or reasonable. It should be fit for the purposes of ordinary use; be contained or packaged in the manner usual or adequate for such goods or; be supplied along with such accessories or instructions as the buyer may reasonably expect to receive; and possess such qualities and performance capabilities as the buyer may expect. CESL, *supra* note 14, art. 100.

128. *Id.* art. 102; *see* Feltkamp & Vanbossele, *supra* note 77, at 888.

129. CESL, *supra* note 14, art. 111 §1; Wagner, *supra* note 77, at 5.

130. Wagner, *supra* note 77, at 18.

131. *Id.*

conformity by repair or replacement, he can not resort to other remedies except for withholding payment within a reasonable time, not exceeding thirty days.

Consider the CESL's attitude toward the remedy of cure in the situation when the contract falls into the efficient zone so that defective performance has more economic efficient than offering conforming goods. Except for setting general limits by Articles 88, 89 and 110, the CESL adds more to the restriction of the buyer's choice of remedies through Article 111. As is stated, a consumer's choice between repair and replacement is hindered if the option chosen would be unlawful or impossible, or would impose high costs on the seller compared to the other option available. Article 111 provides three indicators to evaluate whether the cost of cure is high or not, including: (1) the value of the goods without a lack of conformity; (2) the significance of the lack of conformity; and (3) whether the alternative remedy could be completed without significant inconvenience to the consumer. According to the doctrine of efficient breach, non-conforming performance is considered efficient if the cost of providing conforming goods is so high that it consumes all the benefit from it. The benefit yielded by offering conforming goods, to some extent, can be measured in relation to the criterion established in Article 111(1). For example, suppose consumer *X* receives a product which was expected to be worth €800 and this product was the last one offered in the shop owned by seller *Y*. If the product contains defects and repairing it may cost the seller €1,000; then the net profit yield from cure would be -€200. In this situation, cure is inefficient compared to other approaches available to the consumer.

Although a consumer's claim for cure will not be supported by the CESL if the contract falls into the efficient breach zone, the consumer may still resort to other remedies. The application of remedies for the consumer buyer is similar to that in the model of efficient non-delivery. A consumer may choose to withhold his payment of price, terminate the contract, reduce the price, or claim for expectation damages unless the inconformity is excused. What needs to be specially mentioned in the situation of lack of conformity is the remedy of price reduction. A precondition for this remedy is that the consumer decides to accept the non-conforming goods rather than terminating or rejecting it. In this situation, the value of what has been received by the consumer is disproportionate to the price set in the contract. Correspondingly, the CELS entitles the consumer to reduce the price or recover the excess, in proportion to "the decrease in the value of what was received in performance at the time performance was made compared to the value

of what would have been received by a conforming performance."[132] To be mentioned, price reduction works as an alternative to damages for the decreased value of what has been received.[133] Hence, once a buyer reduces the price, he cannot also claim for damages for the loss thereby recovered, but he is only entitled to damages for any further loss suffered.[134] To a certain extent, the amount of price reduction is calculated by the similar measurement as what is applied in damage calculation. According to Article 160 of the CESL, the amount of damages should be equal to the discrepancy between the hypothetical status that he would have enjoyed by receiving conforming products (Vc=Value of the conforming product) and the actual status of him when he receives the non-conforming products (Vd=Value of the defective product). The formula shows the relationship between the price after reduction (P') and the price of the original contract (P). As is shown, regardless of whether the expectation damages or price reduction is awarded, the goal is to put the consumer in the position as if he had received goods in conformity with the contract.

$$Vd/Vc = P'/P$$

C. Limits of the Application of Efficient Breach in Consumer Contracts

Efficient breach is possible in a legal framework where a seller will not be forced to perform the contract specifically and the buyer will not become worse off because of the non-performance if the contract falls into the efficient breach zone. This framework of efficient breach within the CESL is composed by the rules of "force majeure," "hardship," "impossibility and implacability," and remedies. Within this framework, efficient non-performance from which the surplus is greater than that from strict performance is possible, either in the form of efficient non-delivery or efficient non-conformity. Nevertheless, situations in real-world consumer sales are much more complicated. Except for the legal rules, several other factors may have an influence on the possibility of efficient breach in consumer contracts.

First, consider the possibility that specific performance is impossible or costly. Take the model of efficient non-conformity as an

132. CESL, *supra* note 14, art. 120 ¶¶ 1, 2.

133. As is indicated, the justification for price reduction is to prevent unjust enrichment for partial failure of consideration and compensates the creditor for simply not getting the full performance. It works partially as the simplified right to damages and as the simplified right to partially terminate the contract. *See* CESL commentary, *supra* note 79, at 526-27.

134. CESL, *supra* note 14, art. 120 ¶ 3.

example in which providing conforming goods is impossible or extremely costly. As is indicated in Section 4.2, specific performance in the case of lack of conformity is present as either repair or replacement. Only when both types of specific performance are impossible or extremely costly, namely when it is costly to either repair the defect or make a replacement, is efficient breach assumed to be possible. The cost of replacement depends on several factors, for example, whether the object of the contract is a general product or a unique product and the price of the product. In the premise of consumer contract, especially in retailing contracts, firms in markets may optimize over availability of different products according to the demand of consumers.[135] Normally, with regard to general goods, such as the brand of a laptop, a firm may have more than one item in stock. Moreover, empirical studies show that "consumers are often willing to buy substitute items in the same shop when faced with stock-out in frequently purchased consumer market."[136] Therefore, even if there is a sold-out problem, it might not be expensive for a seller to arrange an alternative when it comes to general products. In contrast, in the case of unique goods, such as works of art or antiques, it is impossible to find close substitutes.[137]

Second, the way of dispute resolution may also matter. As to the way of avoiding specific performance, a seller may choose to not break the contract unilaterally but to reach a settlement. For instance, he may offer to make a new tender, reduce the price, or return the money paid by the consumer back. From the standpoint of a consumer, he is willing to choose the dispute resolution that is less costly, easier, or less time-consuming. If we put the background to the cross-border purchasing, the cost involved in suing a foreign trader is huge. Therefore, what might be preferable to the consumer is also to reach a settlement with the seller, by either price reduction or termination of the contract and getting the money back rather than going to the court and suing for monetary damages if the cost of litigation is taken into account.

Another issue involved in assessing the possibility of efficient breach concerns the question of whether the remedies available to a consumer buyer are adequate to make him indifferent between

135. Christopher Conlon & Julie Holland Mortimer, *Effects of Product Availability: Experimental Evidence* (Nat'l Bureau of Econ. Research, Working Paper No. 16506, Oct. 2010).

136. Ravi Anupindi, Maqbool Dada & Sachin Gupta, *Estimation of Consumer Demand with Stock- out Based Substitution: An Application to Vending Machine Products*, 17 MKTG. SCI. 406, 407 (1998).

137. COOTER & ULEN, *supra* note 29, at 320.

performance and breach. To guarantee that the consumer's position will not worsen within the efficient breach zone, the CESL offers him free choice among a series of remedies including withholding performance, terminating the contract, price reduction, and expectation damages. But a crucial dimension to evaluate the adequacy of remedies is what the buyer expects from the contract, namely the consumer's purpose of buying. In consumer sales, the consumer's purpose of purchasing is outside of his trade, business, craft, or profession.[138] Most of the time this refers to individual use. In other words, consumers engage in transactions not only for obtaining promises or compensation, but for accomplishing instrumental goals, such as obtaining ownership, using properties, and receiving services. "The fact that an act leads to good consequences is irrelevant if it is wrong."[139] So whether a consumer's expectation can be satisfied is closely correlated to whether a consumer can obtain the concrete products. With regard to general goods, it is easy for a consumer to find a substitute in the market. In theory, as long as the buyer can make a substitutive transaction and what he can receive from the breaching party covers the additional amount necessary to purchase the substitute plus the cost of making a second transaction, the buyer will be fully compensated.[140] However, since finding a close substitute is not possible when the object of a contract is unique, what a consumer expected from performing the contract cannot be fully recovered if the contract is broken. In addition, consider the type of losses defined by the CESL that are compensable. As is shown in Section 3.2, the CESL only recognizes the non-economic loss in the form of pain and suffering, but excludes other forms of impairment of life and loss of enjoyment. Think of the "wedding dress" case, where the loss that is actually suffered by the buyer is neither purely economic loss nor any physical pain, but the enjoyment of wearing the exactly same wedding dress that was bought.[141] No matter whether the "current price" rule or "substitutive price" rule applies, what the buyer can recover according to the CESL is merely the price difference not the happiness that she would enjoy from wearing the expected dress in the wedding. As long as the buyer is worse off due to the breach, it is impossible for Pareto efficiency to take place and efficient breach can hardly be created.

138. Reg. CESL, *supra* note 14, art. 2.

139. Avery W. Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 787 (2012).

140. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 275 (1979).

141. CESL COMMENTARY, *supra* note 79, at 644-45.

Fourth, some special legal devices used for consumer protection will also have an impact on the possibility of efficient breach by influencing how contractual parties react to their on-going relationship in the case where the contract falls into the efficient breach zone. One example is warranty clauses written in the contract. In practice, many firms attach a warranty to their products as their marketing strategy[142] in addition to the mandatory warranty required by the law.[143] A warranty guarantees the consumer buyer can make claims against the producer, supplier, retailer, or seller if the products delivered are not in conformity with the contract within a specified period. For instance, it guarantees repair, replacement, or money return under special situation. Suppliers, moreover, use warranty clauses as one type of implicit insurance policy since the non-conformity is uncertain and adverse. When drafting warranty clauses, suppliers have to consider the probability and expected cost of product defects as well as the corresponding settlements ex-ante.[144] In this sense, warranty clauses make the contract more complete and provide consumers with explicit information about what he should do in the case where non-conformity is costly. As a result, ex-post settlements are promoted.

Put all those considerations above together in relation to the remedy rules offered by the CESL, efficient breach would take place in a very limited frame. With regard to non-delivery, only in those contracts involving future performance, is there space for efficient breach to take place. Furthermore, the nature of the product has an impact on the probability that the contract falls into the efficient breach zone. It is more difficult to find replacement in the sales of unique goods than in the sales of general goods. So the probability that a contract falls into the efficient breach zone is higher when it comes to unique goods. But the paradox is that consumers can hardly get full compensation if the seller breaks a contract involving unique goods. What is more, compared to a damage claim, private settlement is assumed to be preferable to both consumers and sellers in solving

142. A warranty might be imposed by law or created by contract. *See* Stefan Haupt, *An Economic Analysis of Consumer Protection in Contract Law*, 4. GER. L.J. 1137, 1155 (2003).

143. For instance, the European Union imposed a mandatory warranty for consumer sales through the directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees. *See* Council & Parliament Directive 1999/44/EC, art. 5, 1999 O.J. (L 171) 12.

144. In exchange of warranties, suppliers will also increase the price of the products proportionally "because the promised measures are costly for the seller". *See* Haupt, *supra* note 142, at 1155-56.

conflicts, if the under-compensation problem and transaction cost are taken into account.

Put the other way around, situation will be different if efficient breach is assumed to be committed by the consumer buyer. First, the criterion for termination of the contract is lenient for the consumer. As provided by Article 114(2) of the CESL, if there is a defect in the product delivered by the seller, a consumer may terminate the contract unless the defect is insignificant.[145] In this case, a consumer has more freedom in choosing to get rid of the contract when he thinks the value from performing it decreases. Second, Article 132(2) provides buyers an exception to the obligation to make the payment. As is stated, "where the buyer has not yet taken over the goods and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense."[146] In many consumer transactions, products provided by a seller are standardized and it would not be difficult for the seller to arrange an alternative transaction by selling the products to others. The seller, in those occasions, cannot require the other party to take over the delivery and make the payment. What is more, the CESL entitles consumers the right to withdraw the contract without giving any reason and at no cost within a certain period after the conclusion of the contract (fourteen days).[147] Accordingly, after a contract is formed, its binding power is comparatively weaker. The consumer can easily get out of a contract if he gets a much more lucrative opportunity or thinks it is wasteful to buy the product from the original seller.

IV. CONCLUDING REMARKS

A starting point taken in this paper is that contract parties should not be forced to perform the contract when non-performance leads to wealth-maximisation. Rather than to defend expectation damages or to encourage breach, the function of the efficient breach theory, as is suggested in this paper, is to assess the approaches to motivating contract parties to perform the contract unless strictly performing it is not as profitable as what was expected at the time of contract formation.

The CESL takes the position that encouraging performance of the contract and cooperation between consumers and sellers through a

145. CESL, *supra* note 14, art. 114 ¶ 2.
146. *Id.* art. 132 ¶ 2.
147. *Id.* art. 41-43.

variety of rules including a performance rule, an information rule, and a damage rule. For example, motivating information exchange and establishing the criteria for damage measurement may facilitate the seller to assess the price for non-performance. But the CESL also opens a window for efficient breach with the aim of avoiding economically wasteful performance. When drawing the border of the efficient breach zone, the CESL compares the cost of performance with the surplus that the parties are expected to obtain from the contract. According to the CESL, specific performance is not allowed within the efficient breach zone, but other options of remedy including withholding performance, terminating the contract, price reduction and expectation damages are available to consumers. In addition, the CESL takes the concern of risk allocation into account as well, by making the seller who is assumed to bear the risk of non-performance pay damages. Among other remedies, the CESL offers the consumer a free choice of remedy, especially presenting in the consumers right to terminate the contract in the case of non-performance. Most importantly, under the premise of consumer sales, the emphasis is placed on how to guarantee that a consumer's position will not worsen because of the non-performance, rather than on how to avoid wasteful performance. This could be understood if the issue of consumer protection is taken into consideration. More research is needed in relation to balancing on the one hand how to shape the seller's incentive to take an optimal level of performance and on the other hand how to protect a consumer's expectation from the transaction.

The CESL, nevertheless, also has its shortages in relation to the issue of optimal incentives to breach, negotiate or perform. In terms of damage rules, the CESL excludes non-economic losses in the form of impairment of life and loss of enjoyment, which commonly arises in the case of consumer contract. Provided that there is no current market price to evaluate the buyer's loss, it is difficult to make an accurate calculation of contract damages. Moreover, within the efficient breach zone, the CESL's imposition of the obligation to negotiate is opaque and unnecessary. On the one hand, the CESL mentions that to renegotiate is the parties' duty, but it does not indicate clearly the consequences of a violation of this duty. On the other hand, by making the failure to reach negotiations within a certain period as the prerequisite for the court's interference the CESL imposes an unnecessary burden on the contracting parties. In the circumstance where reaching an agreement via negotiations is costly, the parties should be able to go to court directly. Moreover, what has been neglected by the CESL is the possibility of breach with the aim of

pursuing a higher economic surplus. The CESL doesn't show expressively whether it allows or prohibits these types of breaches. What we can infer from the provisions in the CESL is that the seller is generally obliged to perform and the seller is entitled to specific performance even if there is a more lucrative opportunity offered by a third party. Paradoxically, in any circumstance where the outside bidder has obtained the right to the good according to property law, the damages that the buyer may claim is the expectation damages. In this sense, the seller has the incentive to breach the contract as long as he can still obtain an economic surplus after paying expectation damages.

PROMOTING COMPLIANCE: AN ASSESSMENT OF ASEAN INSTRUMENTS SINCE THE ASEAN CHARTER

Hao Duy Phan†

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I. INTRODUCTION

For nearly 47 years of its existence and development, the Association of Southeast Asian Nations (ASEAN) has made much progress on its way to building a cooperative framework for Southeast Asian countries.[1] It has, in fact, made significant contributions to the maintenance and promotion of peace, stability and cooperation for

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1. ASEAN was established in 1967 and currently consists of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. *See* Charter of the Association of Southeast Asian Nations, Feb. 24, 1976, 1331 UNTS 243 [hereinafter ASEAN Charter].

development not only in Southeast Asia, but also in the Asia-Pacific region at large.[2] Until 2007, however, ASEAN operated without a strong legal basis. The founding instrument of the Association, the 1967 Bangkok Declaration, was more of a political declaration than a constitutional treaty.[3] Although the number of regional instruments has proliferated, many have not been fully observed. Whereas the 1967 Bangkok Declaration sets out principles and purposes of cooperation and establishes annual meetings of Ministers of Foreign Affairs, a Standing Committee, an ad-hoc Committee, and a National Secretariat in each country, it does not stipulate the Association's legal personality, principles, functions, authorities, decision-making procedures, dispute settlement mechanisms, or any financial contribution arrangements.

Against that background, the adoption of the ASEAN Charter in 2007 was a breakthrough in the evolution of the organization. The ASEAN Charter entrusts the Association with a legal capacity so that it may, to some extent, act independently, and on behalf of, the region as a whole.[4] It makes clear the Association's objectives and principles.[5] It officially brings human rights into ASEAN cooperation;[6] establishes dispute settlement mechanisms in all areas of ASEAN activities;[7] streamlines ASEAN's structure and defines the Association's decision-making process; and enhances the role of the ASEAN Secretariat. The ASEAN Summit is to be convened biannually instead of in a three-year round as it was before.[8] The ASEAN Coordinating Council shall

2. The Twenty-sixth ASEAN Ministerial Meeting and Post Ministerial Conference 1993, for example, agreed to establish the ASEAN Regional Forum (ARF) to foster constructive dialogues on political and security issues of common interest and concern, and to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region. *About the ASEAN Regional Forum*, ASEAN REGIONAL FORUM, *available at* http://aseanregionalforum.asean.org/about.html (last visited Mar. 19, 2014). Its current participants include Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, Democratic People's Republic of Korea, European Union, India, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Russia, Singapore, Sri Lanka, Thailand, Timor-Leste, United States, and Vietnam. *Id.* In addition to the ARF, various mechanisms have been established to promote peace and cooperation in the wider Asia – Pacific region, *e.g.* ASEAN + 1, ASEAN + 3 and the East Asia Summit. *Id.*

3. ASEAN, *ASEAN Declaration (Bangkok Declaration)* (Aug. 8, 1967), *available at* http://cil.nus.edu.sg/rp/pdf/1967%20ASEAN%20Declaration-pdf.pdf (last visited Mar. 19, 2014).

4. ASEAN Charter, *supra* note 1, art. 3.

5. *Id.* arts. 1, 2.

6. *Id.* arts. 1, 2, 14.

7. *See id.* art. 22(2).

8. *Id.* art. 7(3)(a).

comprise ASEAN Foreign Ministers and meet at least twice a year.[9] Three Community Councils shall be established, including ASEAN Political and Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council.[10] A Committee of Permanent Representatives shall also be appointed.[11] The Chair of the ASEAN Summit shall also be the Chair of other key ASEAN bodies. In particular, the Secretary-General of ASEAN shall have an enhanced role to play in monitoring progress in implementing ASEAN decisions and ASEAN agreements, reporting to the ASEAN Summit on important issues which require approval by ASEAN Leaders, and representing ASEAN's views in meetings with external parties.[12]

Since the signing of the ASEAN Charter, more than sixty ASEAN instruments have been concluded.[13] Commitments have been made across many fields of cooperation. ASEAN is trying to build the ASEAN Community by 2015 on three foundational pillars political-security, economic and social-cultural,[14] and so ensuring compliance by ASEAN Member States with these commitments is a pressing priority.[15] However, it remains unclear how compliance with ASEAN instruments will be ensured and which mechanisms the ASEAN instruments will employ to monitor the translation of state commitments into compliance.

This article aims to examine and assess compliance monitoring mechanisms as provided in the ASEAN Charter and different ASEAN

9. ASEAN Charter, *supra* note 1, art. 8(1).

10. *Id.* art. 9.

11. *Id.* art. 12.

12. *Id.* art. 11.

13. ASEAN Secretariat, TABLE OF ASEAN TREATIES/AGREEMENTS AND RATIFICATION (Oct. 2012), *available at* http://www.asean.org/images/2012/resources/TABLE%20OF%20AGREEMENT%20%20RATIFICATION-SORT%20BY%20DATE-Web-October2012.pdf (last visited Mar. 19, 2014) (the Table does not specify which documents are treaties, agreements or instruments) [hereinafter ASEAN SECRETARIAT'S TABLE].

14. In 2003, ASEAN adopted the Declaration of ASEAN Concord II (Bali Concord II), seeking to bring the ASEAN Vision 2020 into reality by setting the goal of building an ASEAN Community by 2020 that would be comprised of three pillars, namely political-security community, economic community and socio-cultural community. In 2007, ASEAN adopted the Cebu Declaration to accelerate the establishment of the ASEAN Community by five years to 2015. In 2009, ASEAN adopted the Cha-am Hua Declaration reaffirming its commitment to building an ASEAN Community by 2015. *Id.*

15. *See* REPORT OF THE EMINENT PERSONS GROUP ON THE ASEAN CHARTER 4, *available at* http://www.asean.org/archive/19247.pdf (last visited Mar. 19, 2014) [hereinafter "EPG REPORT"].

instruments concluded since 2007.[16] For that purpose, the article is divided into four sections including the Introduction and the Conclusion. The second section examines the implementation and compliance monitoring provisions in the ASEAN Charter. The third section assesses different compliance monitoring bodies and mechanisms as stipulated in the ASEAN instruments signed after the ASEAN Charter, including self-report by ASEAN Member States; report by the ASEAN Secretary-General, the ASEAN Secretariat and ASEAN sectoral bodies; review, evaluation and recommendation by monitoring bodies; capacity building and technical assistance; and consultation. The last section argues that, although ASEAN has taken some initial steps to promote implementation, still much more needs to be done to ensure compliance and realize ASEAN's goal of building a common community. Finally, the paper also offers a number of recommendations to improve ASEAN compliance monitoring systems and further ensure implementation of ASEAN instruments. It makes the case for more institutionalized mechanisms to serve coordinating functions and monitor the implementation of existing and future instruments and thereby contribute to further advancing ASEAN in a rules-based direction.

By focusing on "ASEAN instruments," this article limits its scope of assessment to documents that have been collectively concluded by ASEAN Member States, as opposed to agreements concluded between ASEAN as an inter-governmental organization and a third external party pursuant to Article 41(7) of the ASEAN Charter[17] such as, the Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat.[18] Under the Rules

16. Specifically, the article examines instruments concluded from November 2007 through October 2012.

17. ASEAN Charter, *supra* note 1, art. 41(7) (providing that as an intergovernmental organization, ASEAN may conclude agreements with countries or sub-regional, regional, and international organizations and institutions; the procedure for concluding such agreements has been prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils).

18. The Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat was signed on April 3, 2012. *Id.*; *see* 2012 Agreement between the Government of the Republic of Indonesia and the Association of Southeast Asian Nations (ASEAN) on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat, Indonesia – ASEAN (Apr. 2, 2012), *available at* http://cil.nus.edu.sg/rp/pdf/2012%20Agreement%20betw%20Indonesia%20and%20ASEAN%20on%20Hosting%20and%20Granting%20P&I%20to%20ASEC-pdf.pdf (last visited Mar. 19, 2014) [hereinafter 2012 Indonesia – ASEAN]. This Agreement is not an ASEAN instrument but rather an international agreement by ASEAN as an intergovernmental organization in its conduct of external relations as provided in the ASEAN Charter. ASEAN Charter, *supra* note 1, art. 41(7); *see* 2012 Indonesia – ASEAN, *supra*.

of Procedure for Conclusion of International Agreements by ASEAN, documents such as the Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat are now called "international agreements by ASEAN."[19] This article does not address the agreements concluded by all ten ASEAN Member States with an external party such as, the 2010 Agreement on Cultural Cooperation between the Governments of the Member States of ASEAN and the Government of the Russian Federation.[20] It also excludes bilateral agreements concluded between two regional states in their individual capacity and not in their capacity of ASEAN Member States such as, the 2003 Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia concerning the delimitation of the continental shelf boundary.[21]

In examining different mechanisms that have been adopted to promote compliance with ASEAN instruments since the ASEAN Charter, this article relies on the Table of ASEAN Treaties/Agreements and Ratification prepared by the ASEAN Secretariat as of October 2012.[22] It should be noted that not all ASEAN instruments listed in the Table are legally binding. Instruments such as the 2012 Vientiane Action Programme (VAP) Joint Declaration of the ASEAN Defense Ministers on Enhancing ASEAN Unity for a Harmonized and Secure Community and the 2011 Declaration on ASEAN Unity in Cultural Diversity: Towards Strengthening ASEAN in Community are not

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19. *See* Rules of Procedure for Conclusion of International Agreements by ASEAN (Nov. 16, 2011), *available at* http://cil.nus.edu.sg/2011/2011-rules-of-procedure-for-the-conclusion-of-international-agreements-by-asean-adopted-on-17-november-2011/ (last visited May 7, 2014).

20. *See* 2010 Agreement on Cultural Cooperation between the Governments of the Member States of ASEAN and the Government of the Russian Federation, *available at* http://cil.nus.edu.sg/2010/2010-agreement-on-cultural-cooperation-between-the-governments-of-the-member-states-of-the-association-of-southeast-asian-nations-and-the-government-of-the-russian-federation/ (last visited May 7, 2014). Other examples include, among others, the 2011 Memorandum of Understanding between Members of the Association of Southeast Asian Nations (ASEAN) and the World Organization for Animal Health (OIE), the 2009 Memorandum of Understanding between the Governments of the Member Countries of ASEAN and the Government of the People's Republic of China on Information and Media Cooperation, and the 2008 Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (AJCEP). *See* ASEAN SECRETARIAT'S TABLE, *supra* note 13.

21. *See* Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia (Jun. 26, 2003), *available at* http://123.30.50.199/sites/en/agreementbetweenthegovernmentofthe-gid-engf2f41-nd-enge190a.aspx (last visited May 7, 2014).

22. *See* ASEAN SECRETARIAT'S TABLE, *supra* note 13.

treaties *per se* that give rise to legal obligations to ASEAN Member States as in the case of the 2007 ASEAN Convention on Counter-Terrorism or the 2004 ASEAN Treaty of Mutual Legal Assistance in Criminal Matters. It is, however, not the purpose of this article to further categorize the ASEAN instruments in the Table or make a fine distinction between ASEAN treaties from treaty-like documents. For its own purpose, this article considers all ASEAN instruments listed in the Table as commitments made by ASEAN Member States that need to be translated into reality. Further, in the context of ASEAN, binding documents do not always include compliance monitoring provisions whereas monitoring mechanisms may exist for a number of non-legally binding instruments.

II. COMPLIANCE MONITORING PROVISIONS IN THE ASEAN CHARTER

1. Report of the Eminent Persons Group

ASEAN announced its intention to create a "legal and institutional framework" through a Charter in the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter in 2005.[23] To implement the Declaration, ASEAN established the Eminent Persons Group on the ASEAN Charter to brainstorm "bold and visionary ideas"[24] and recommend key elements of the ASEAN Charter. The Eminent Persons Group consists of ten eminent individuals from all ASEAN Member States nominated by their respective governments. In 2006, the Eminent Persons Group submitted its Report to the ASEAN Summit. In the Report, the ASEAN Eminent Persons Group stated that "ASEAN's problem is not one of lack of vision, ideas, and action plans"[25] but the "real problem" facing ASEAN is "ensuring compliance and effective implementation."[26] The Eminent Persons Group expressed its concerns that delay in implementation or non-compliance would not only be counter-productive to ASEAN cooperation and integration efforts, but also undermine ASEAN's credibility and disrupt the process towards building a common community.[27] The Eminent Persons Group

23. *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter* (Dec. 12, 2005), *available at* http://www.asean.org/news/item/kuala-lumpur-declaration-on-the-establishment-of-the-asean-charter-kuala-lumpur-12-december-2005 (last visited Mar. 15, 2014).

24. EPG REPORT, *supra* note 15, at Executive Summary para. 1.

25. *Id.* para. 44.

26. *Id.* para. 6, para. 44.

27. *Id.* para. 44.

concluded that ASEAN Member States must take obligations seriously.[28] They further emphasized that a culture of commitment must be established to honor and implement ASEAN decisions, agreements, and timelines.[29]

As a result, the Eminent Persons Group put forward the following recommendations to ensure that obligations are taken seriously. First, ASEAN dispute settlement mechanisms should be established in all fields of cooperation and they should include compliance monitoring, advisory, consultation and enforcement mechanisms.[30] Second, the ASEAN Secretariat should be entrusted with monitoring ASEAN Member States' compliance with ASEAN instruments and the ASEAN Secretary-General should report the findings to ASEAN leaders on a regular basis,[31] including cases of non-compliance.[32] Third, ASEAN should have the power to take measures to redress cases of serious breach of commitments to important agreements.[33] In this regard, the Eminent Persons Group did not further elaborate as to what would constitute a "serious breach of commitments" and "important agreements," perhaps leaving it to be worked out later or resolved on a case-by-case basis.[34]

For the Eminent Persons Group, the key to ensuring effective implementation of ASEAN instruments is through: (1) establishing comprehensive dispute settlement mechanisms, and (2) entrusting the ASEAN Secretary-General with the role of monitoring. Unfortunately, the Report of the Eminent Persons Group does not specify how to ensure the ASEAN Secretary-General's monitoring role. It leaves the job of monitoring compliance with all ASEAN agreements and decisions to the ASEAN Secretary-General without mentioning the need to strengthen the capacity of the ASEAN Secretariat. It does not touch upon many other important mechanisms to promote and ensure compliance, including self-reporting by ASEAN Member States, monitoring by expert committees, verification, evaluation, reviewing, consultation, and technical assistance.

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28. *Id.* para. 6.
29. EPG REPORT, *supra* note 15, Executive Summary para. 6.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See generally* EPG REPORT, *supra* note 15. At a time when many governments in the region still prefer to see ASEAN activities carried out in accordance with the traditional ASEAN norms and principles, including non-interference, non-confrontation, and quiet diplomacy, the recommendations of the EPG, especially those on sanctions against violators, could be considered extraordinary. *Id.*

2. Compliance Monitoring Provisions in the ASEAN Charter

The ASEAN Charter, signed in November 2007 and entered into force in December 2008,[35] incorporates many recommendations of the Eminent Persons Group. Specifically, the ASEAN Charter establishes ASEAN dispute settlement mechanisms in all fields of cooperation.[36] In regards to implementing and monitoring the implementation of ASEAN instruments, it provides that the ASEAN Coordinating Council, composed of the Ministers of Foreign Affairs of ASEAN Member States, shall coordinate the implementation of ASEAN agreements.[37] Each of the three ASEAN Community Councils (Economic, Political/Security, and Socio/Cultural) ensures the implementation of relevant decisions of the ASEAN Summit, coordinates the work of different sectors under its purview, and submits reports and recommendations to the ASEAN Summit on matters under its purview.[38] The ASEAN Sectoral Ministerial Bodies implement the agreements and decisions of the ASEAN Summit under their respective purview.[39] Further the ASEAN Secretary-General shall facilitate and monitor the progress in the implementation of ASEAN agreements and decisions.[40] The ASEAN Secretary-General shall also submit an annual report on the work of ASEAN to the ASEAN Summit.[41] In terms of compliance monitoring, this presents a step forward for ASEAN to have a formal division of labor in implementing and monitoring all ASEAN instruments. With the ASEAN Charter, at least there is now one body responsible for implementing the ASEAN instruments, agreements, and decisions, and another one in charge of monitoring and reporting on the progress of the implementation to ASEAN leaders.

Nevertheless, how the ASEAN Secretary-General carries out this monitoring function is a different story. Although the ASEAN Charter maintains that the ASEAN Secretary-General shall facilitate and monitor the implementation of all ASEAN agreements and decisions, there is no provision that authorizes the ASEAN Secretary-General to

35. *See ASEAN Foreign Ministers to Celebrate the Entry into Force of the ASEAN Charter at the ASEAN Secretariat*, ASEAN, *available at* http://www.asean.org/news/item/press-release-asean-foreign-ministers-to-celebrate-the-entry-into-force-of-the-asean-charter-at-the-asean-secretariat-asean-secretariat-9-december-2008 (last visited Feb. 11, 2014).

36. *See* ASEAN Charter, *supra* note 1, art. 22(2).

37. *Id.* art. 8(2)(b).

38. *Id.* art. 9(4).

39. *Id.* art. 10(1)(b).

40. *Id.* art. 11(2)(b).

41. ASEAN Charter, *supra* note 1, art. 11(2)(b).

determine the appropriate indicators or tests to evaluate compliance, verify cases of violations, or simply request ASEAN Member States to submit their implementation reports. It is not clear how the ASEAN Secretary-General will be able to gather sufficient compliance information or whether the ASEAN Secretary-General can obtain necessary information from non-state sources such as NGOs while monitoring Member States' implementation of ASEAN instruments. Nor is it clear how the ASEAN Secretary-General can assemble all pieces of information on the implementation of hundreds of agreements and decisions, a number that will keep increasing in the future, and convey them effectively in one general, annual report to the ASEAN Summit. One may wonder what effect this report will have "on the work of ASEAN"[42] and whether it will be a generic, annual report on ASEAN's main activities or a specific and separate report on Member States' compliance with ASEAN instruments.[43] Clearly, ASEAN needs more standard procedures for the ASEAN Secretary-General to fulfil these monitoring responsibilities under the ASEAN Charter.

It is important to note that while the ASEAN Charter has a provision on monitoring the implementation of ASEAN instruments in general, it does not specifically deal with the issue of monitoring compliance with the ASEAN Charter itself. It may be argued that the ASEAN Charter shall be subject to the same general monitoring scheme undertaken by the ASEAN Secretary-General with respect to other ASEAN instruments. But again, the question remains concerning the details of how the ASEAN Secretary-General fulfils the job. The ASEAN Charter does not have a provision requesting ASEAN Member States or ASEAN sectoral bodies to support the monitoring role of the ASEAN Secretary-General by providing periodic reports on their implementation of the ASEAN Charter.

Article 5 of the ASEAN Charter simply states that "ASEAN Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter."[44] In case of serious breach of the ASEAN Charter or noncompliance, Article 20 instructs that "the matter shall be referred to the ASEAN Summit for a decision."[45] It is not clear, however, who may refer the matter to the ASEAN Summit and what

42. *Id.* art. 7(3)(a).

43. *See Evolving Towards ASEAN 2015: ASEAN Annual Report 2011-2012*, ASEAN (July 1, 2012), *available at* http://www.asean.org/resources/publications/asean-publications/item/asean-annual-report-2011-2012 (last visited Mar. 24, 2014).

44. ASEAN Charter, *supra* note 1, art. 5(2).

45. *Id.* art. 20(4).

procedure must be followed. There are no criteria to determine when a breach is serious enough to merit being referred to the ASEAN Summit. Further, it is unclear whether the term 'noncompliance' applies to any of the ASEAN instruments or only the ASEAN Charter.

Under Article 27(2) of the ASEAN Charter, and pursuant to the Rules of Procedure for Reference of Noncompliance to the ASEAN Summit,[46] ASEAN Member States only have the right to refer to the ASEAN Summit cases of noncompliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, not those of noncompliance with the ASEAN Charter or other ASEAN instruments. Even if an ASEAN Member State brings a case of serious violation of an instrument to the ASEAN Summit, there is not much the ASEAN Summit could do, except perhaps to issue a statement encouraging concerned parties to comply with the ASEAN Charter since the ASEAN Summit comprises the heads of all ASEAN Member States and is limited by its consensus-based decision-making process.[47]

III. COMPLIANCE MONITORING PROVISIONS IN ASEAN INSTRUMENTS IN THE POST-CHARTER AGE

1. Monitoring Bodies

Of the more than sixty ASEAN instruments that have been concluded since the ASEAN Charter up until October 2012, more than 20 instruments contain provisions on compliance monitoring.[48] However, a great deal of inconsistency exists among these instruments in terms of who monitors whom, who shall submit or receive implementation reports, and what to do with the implementation reports. The ASEAN Charter provides that ASEAN sectoral bodies are implementing bodies.[49] In many ASEAN instruments, however, they are monitoring bodies. Whereas the ASEAN Charter assigns a monitoring role to the ASEAN Secretary-General,[50] in many ASEAN instruments, the ASEAN Secretary-General or the ASEAN Secretariat merely serves a technical assistance function without any monitoring mandate. In

46. ASEAN Charter, *supra* note 1.

47. ASEAN Charter, *supra* note 1, art. 20(1) and (2). Providing that, as a basic principle, decision-making in ASEAN shall be based on consultation and consensus. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

48. *See* ASEAN SECRETARIAT'S TABLE, *supra* note 13.

49. ASEAN Charter, *supra* note 1, art. 10(1)(b).

50. *Id.* art. 11(2)(b).

some cases, both the ASEAN Secretariat and ASEAN sectoral bodies have monitoring authority. Article 52 of the ASEAN Charter states that, "[i]n case of inconsistency between the ASEAN Charter and another ASEAN instrument, the ASEAN Charter shall prevail."[51] Yet, this provision is *prima facie* only applicable to ASEAN instruments that were concluded and entered into force prior to the adoption of the ASEAN Charter and not applicable to those concluded after the ASEAN Charter.[52]

For the three pillars of cooperation, ASEAN has three separate blueprints, namely the 2007 ASEAN Economic Community Blueprint, the 2009 ASEAN Political-Security Community Blueprints, and the 2009 ASEAN Socio-Cultural Community Blueprint. On November 20, 2007, ASEAN Leaders signed the Declaration on the ASEAN Economic Community Blueprint and adopted the ASEAN Economic Community Blueprint to put in place "rules-based systems to realize the establishment of the ASEAN Economic Community by 2015."[53] According to the Blueprint, ASEAN Economic Ministers are responsible for the *overall* implementation of the Blueprint.[54] Relevant ASEAN sectoral bodies, on the other hand, are held accountable for the specific implementation of the Blueprint.[55] Furthermore, relevant ASEAN sectoral bodies are also responsible for monitoring the implementation of the Blueprint under their purview.[56] In other words, two different, and supposedly independent tasks of implementing and monitoring are given to the same ASEAN sectorial bodies. Adding to the complexity, the ASEAN Secretariat also has the responsibility of monitoring the implementation of the Blueprint,[57] which means that the same function of monitoring is assigned to two different bodies. It may be understood that the monitoring function of ASEAN sectoral bodies is limited to monitoring the implementation of commitments under their

51. *Id.* art. 52(2).

52. According to the ASEAN Charter, "all treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid. In case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail." *Id.* art. 52.

53. ASEAN Economic Community Blueprint (Nov. 20, 2007), *available at* http://cil.nus.edu.sg/2007/2007-asean-economic-community-blueprint-adopted-on-20-november-2007-in-singapore-by-the-heads-of-stategovernment/ (last visited Mar. 8, 2014) [hereinafter 2007 ASEAN Economic Community Blueprint].

54. *Id.* para. 70 (emphasis added).

55. *Id.*

56. *Id.*

57. *Id.*

purview whereas the ASEAN Secretariat's role is extended to monitoring the overall implementation of the Blueprint. However, if there is any mechanism for coordination between these two monitoring bodies, it is not provided for in the Blueprint.

Under the 2009 ASEAN Socio-Cultural Community Blueprint, the ASEAN Socio-Cultural Community Council is the body responsible for the overall implementation of the Blueprint.[58] The ASEAN Socio-Cultural Community Council is also responsible for coordination among sectoral bodies in implementing the Blueprint.[59] All relevant ASEAN ministerial bodies have the responsibility to ensure effective implementation of various elements, actions and commitments in the Blueprint by incorporating them in their respective work plans, mobilizing resources for their implementation, and undertaking national initiatives to meet these commitments.[60] The ASEAN Secretariat shall monitor the implementation of the 2009 ASEAN Socio-Cultural Community Blueprint with a view toward ensuring that all activities are responsive to the needs and priority of ASEAN.[61]

The 2009 ASEAN Political-Security Community Blueprint does not specifically assign a monitoring role to any organ of ASEAN. Instead, it creates the Coordinating Conference for the ASEAN Political-Security Community Plan of Action to serve as a platform for coordinating efforts of various sectoral bodies in implementing the Blueprint.[62] The ASEAN Political-Security Community Council shall also coordinate the implementation of the Blueprint.[63] Hence, there are two bodies responsible for coordination, both of which are comprised of ASEAN Foreign Ministers. No formal division of work between these two bodies is explicitly provided. The difference could be that whereas the Coordinating Conference for the ASEAN Political-Security Community Plan of Action only coordinates efforts within the Political-Security Community, the ASEAN Political-Security Community Council may also coordinate activities that cut across the other Community Councils.[64] All relevant ASEAN senior official bodies are

58. ASEAN Socio-Cultural Community Blueprint ¶ III.1 (Mar. 1, 2009), *available at* http://cil.nus.edu.sg/2009/2009-blueprint-on-the-asean-socio-cultural-community/ (last visited Mar. 17, 2014) [hereinafter 2009 ASEAN Socio-Cultural Community Blueprint].

59. *Id.*

60. *Id.* para. III.2.

61. *Id.* para. III.7.

62. ASEAN Political-Security Community Blueprint ¶ 30 (Mar. 1, 2009), *available at* http://cil.nus.edu.sg/2009/2009-blueprint-on-the-asean-political-security-community/ (last visited Mar. 17, 2014) [hereinafter 2009 ASEAN Political-Security Community Blueprint].

63. *Id.*

64. *Id.* para. 31.

responsible for ensuring the implementation of various elements, actions and commitments in the Blueprint.[65]

In addition to these blueprints, some other ASEAN instruments also give the monitoring authority to different ASEAN sectoral bodies while providing the ASEAN Secretariat with little more than a technical or administrative role in the process. The 2012 ASEAN Agreement on Customs, for example, states that the ASEAN Directors-General of Customs Meeting, with the support of the ASEAN Secretariat, shall monitor, review and coordinate all aspects relating to the implementation of the Agreement.[66] The 2012 Protocol Six on Railways Border and Interchange Stations provides that the ASEAN Senior Transport Officials Meeting is the body responsible for the monitoring, review, coordination and supervision of all aspects relating to implementation of the Protocol[67] and that the ASEAN Secretariat shall render necessary technical assistance to the ASEAN Senior Transport Officials Meeting.[68] In fact, few instruments concluded after the ASEAN Charter are fully consistent with the ASEAN Charter in terms of mandating the ASEAN Secretary-General or the ASEAN Secretariat to facilitate and monitor implementation progress. The 2009 ASEAN Trade in Goods Agreement is among the few instruments that give such a mandate to the ASEAN Secretariat. Specifically, under this Agreement, the ASEAN Secretariat has two roles, namely, (1) supporting the ASEAN Economic Ministers and the Senior Economic Officials' Meeting in supervising, coordinating and reviewing the implementation of the Agreement; and (2) monitoring the progress in the implementation of the Agreement.[69]

Interestingly enough, a few ASEAN instruments also establish a separate committee to monitor or facilitate the implementation of commitments contained therein. Most of these instruments were

65. *Id.* para. 29.

66. ASEAN Agreement on Customs art. 53(1) (Mar. 30, 2012), *available at* http://www.asean.org/images/archive/DG%2021%2014%20Annex%2003%20AAC%20True%20Certified%20Copy.pdf (last visited Mar. 19, 2014) [hereinafter 2012 ASEAN Agreement on Customs].

67. Protocol Six: Railways Border and Interchange Stations, art. 7(1) (Dec. 16, 2011), *available at* http://www.asean.org/archive/documents/Protocol%206%20Railways%20Border%20and%20Interchange%20Stations.pdf (last visited Mar. 19, 2014) [hereinafter 2012 Protocol Six on Railways Border and Interchange Stations].

68. *Id.* art. 7(3).

69. 2009 ASEAN Trade in Goods Agreement art. 90(3) (Feb. 26, 2009), *available at* http://cil.nus.edu.sg/2009/2009-asean-trade-in-goods-agreement-adopted-on-26-february-2009-in-cha-am-thailand-by-the-economic-ministers/ (last visited Mar. 19, 2014) [hereinafter 2009 ASEAN Trade in Goods Agreement].

concluded in 2009, one year after the ASEAN Charter entered into force. The 2009 Memorandum of Understanding on ASEAN Cooperation in Agriculture and Forest Products, for example, establishes a Joint Committee that includes the Chairperson of the National Focal Points Working Group or Industry Clubs, concerned government officials, representatives of the ASEAN Chambers of Commerce and Industry, relevant private sectors recommended by the National Coordinators, and the ASEAN Secretariat as the secretary of the Joint Committee to oversee the implementation of the cooperation scheme.[70] Similarly, the 2009 ASEAN Framework Agreement on the Facilitation of Inter-State Transport and the 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit also set up a Transit Transport Coordinating Board composed of a senior official nominated from each ASEAN Member State and a representative of the ASEAN Secretariat to oversee and monitor the Agreement's implementation.[71] In the same vein, the 2009 ASEAN Mutual Recognition Arrangement on Dental Practitioners creates the ASEAN Joint Coordinating Committee on Dental Practitioners comprising no more than two appointed representatives from each ASEAN Member State to facilitate and review the implementation of the Mutual Recognition Arrangement.[72] Under the 2009 ASEAN Comprehensive Investment Agreement, the ASEAN Investment Area (AIA) Council shall oversee, coordinate, and review the implementation of the Agreement. The AIA Council shall also facilitate the avoidance and settlement of disputes arising from the Agreement, and consider and recommend to the ASEAN Economic Ministers any amendments to the Agreement.[73] Yet

70. Memorandum of Understanding on ASEAN Cooperation in Agriculture and Forest Products Promotion Scheme para. 19 (Nov. 11, 2009), *available at* http://www.asean.org/archive/publications/ADS2009.pdf (last visited Mar. 19, 2014) [hereinafter Memorandum of Understanding on ASEAN Cooperation in Agriculture and Forest Products Promotion Scheme].

71. ASEAN Framework Agreement on the Facilitation of Inter-State Transport art. 27(2) (Dec. 10, 2009), *available at* http://cil.nus.edu.sg/2009/2009-asean-framework-agreement-on-the-facilitation-of-inter-state-transport/ (last visited Mar. 19, 2014); 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit art. 29(2) (Dec. 16, 1998), *available at* http://cil.nus.edu.sg/1998/1998-asean-framework-agreement-on-the-facilitation-of-goods-in-transit-signed-on-16-december-1998-in-hanoi-vietnam-by-the-transport-ministers/ (last visited Mar. 19, 2014).

72. ASEAN Mutual Recognition Arrangement on Dental Practitioners art. VI (Feb. 26, 2009), *available at* http://cil.nus.edu.sg/2009/2009-asean-mutual-recognition-arrangement-on-dental-practitioners-signed-on-26-february-2009-in-cha-am-thailand-by-the-economic-ministers/ (last visited Mar. 19, 2014) [hereinafter 2009 ASEAN Mutual Recognition Arrangement on Dental Practitioners].

73. ASEAN Comprehensive Investment Agreement art. 42, *available at* http://cil.nus.edu.sg/2009/2009-asean-comprehensive-investment-agreement-signed-on-26-

another example is the 2009 ASEAN Trade in Goods Agreement, which provides that ASEAN Economic Ministers shall, for the purposes of the Agreement, establish an ASEAN Free Trade Area (AFTA) Council that includes one ministerial-level nominee from each Member State and the ASEAN Secretary-General to supervise, coordinate and review the implementation of the Agreement.[74]

2. Reports on Implementation Progress by the ASEAN Secretariat or ASEAN Sectoral Bodies

Among the ASEAN instruments that were concluded after the ASEAN Charter and have provisions on implementation reports,[75] the majority tend to place reporting obligations on an ASEAN organ rather than on ASEAN Member States. Among those that assign reporting obligations to an ASEAN organ, some require the ASEAN Secretariat to submit reports and an ASEAN sectoral body to receive reports. Others, conversely, assign an ASEAN sectoral body the responsibility to submit reports and the ASEAN Secretariat to receive reports. As indicated below, there is no consistency with regards to clarifying the reporting and reported bodies. Nor is there a compelling rationale provided for requiring the ASEAN Secretariat to report in one case and an ASEAN sectoral body to report in another case.

For the 2007 ASEAN Economic Community Blueprint, as mentioned in the first part of this section, relevant ASEAN sectoral bodies are responsible for implementing the Blueprint,[76] whereas the ASEAN Secretariat is tasked with monitoring compliance with the Blueprint.[77] Implementation of the above programs is to be monitored, reviewed and reported to all stakeholders.[78] The Blueprint, however, does not require the implementing body, ASEAN sectoral bodies, to report to the ASEAN Summit on the progress of implementation of the Blueprint, but instead assigns that role to the ASEAN Secretary-General.[79]

The 2007 Declaration on the ASEAN Economic Community Blueprint nonetheless states that the implementing body, that is, the concerned sectoral Ministers, not the ASEAN Secretary-General, shall

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february-2009-in-cha-am-thailand-by-the-economic-ministers/ (last visited Mar. 17, 2014) [hereinafter 2009 ASEAN Comprehensive Investment Agreement].

74. ASEAN Trade in Goods Agreement, *supra* note 69, art. 90.

75. *See* ASEAN SECRETARIAT'S TABLE, *supra* note 13.

76. ASEAN Economic Community Blueprint, *supra* note 53, para. 70.

77. *Id.* para. 73.

78. *Id.* para. 70.

79. *Id.* para. 71.

report to the ASEAN Summit through the ASEAN Economic Community Council.[80] As a result, there is an inconsistency between the Blueprint and the Declaration, the latter was signed to adopt the Blueprint. For cooperation in the financial sector, the Blueprint further provides that "an appropriate implementation mechanism in the form of regular progress reports to the Leaders" shall be established,[81] despite the fact that there already exists a provision as to how reports on the implementation of all sectors of cooperation under the Blueprint shall be submitted to the ASEAN Leaders. Also, there is no further provision as to who shall submit the report, what counts as an "appropriate" mechanism, and what the content of these reports should be.

Under the 2009 ASEAN Socio-Cultural Community Blueprint, similarly, reports on implementation progress are not prepared by the implementing countries, that is, ASEAN Member States, or the implementing bodies, which are ASEAN sectoral bodies, but by the monitoring body – the ASEAN Secretary-General.[82] The three bodies that receive the reports include the ASEAN Summit, the ASEAN Socio-Cultural Community Council and the relevant sectoral ministerial meetings.[83] It is not clear in this Blueprint how the ASEAN Secretary-General can produce the reports when there is no provision obligating the implementing bodies to provide the Secretary-General with the necessary information.

The 2009 ASEAN Political-Security Community Blueprint also has a similar reporting mechanism whereby implementation progress shall be reported annually by the ASEAN Secretary-General to the annual ASEAN Summit through the ASEAN Political-Security Community Council.[84] In 2011, however, ASEAN Leaders signed the Bali Declaration on ASEAN Community which aims to promote the implementation of the three blueprints and strengthen cooperative activities in these three pillars. In this Declaration, it is the ASEAN Coordinating Council (ACC), not concerned Ministers from ASEAN member states or the ASEAN Secretary-General, who shall prepare and submit implementation reports to the ASEAN Summit.[85]

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80. Declaration on the ASEAN Economic Community Blueprint (Nov. 20, 2007), *available at* http://cil.nus.edu.sg/2007/2007-declaration-on-the-asean-economic-community-blueprint-signed-on-20-november-2007-in-singapore-by-the-heads-of-stategovernment/ (last visited Mar. 17, 2014).

81. ASEAN Economic Community Blueprint, *supra* note 53, para. 74.

82. ASEAN Socio-Cultural Community Blueprint, *supra* note 58, para. III.A.4.

83. *Id.*

84. *Id.*

85. Bali Declaration on ASEAN Community in a Global Community of Nations "Bali

In addition to these instruments on building the ASEAN Community, reporting mechanisms by the ASEAN Secretariat or ASEAN sectoral bodies are also provided in a few other ASEAN instruments. Pursuant to the 2009 ASEAN Trade in Goods Agreement, the ASEAN Secretariat shall regularly report to the ASEAN Free Trade Area Council on the progress of implementing of the Agreement.[86] According to the 2007 Memorandum of Understanding on the ASEAN Power Grid, the tasks of reporting and receiving reports are not handled by the ASEAN Secretariat or the ASEAN Secretary-General, but rather by two different ASEAN bodies. The Heads of ASEAN Power Utilities/Authorities (HAPUA) Council, assisted by the ASEAN Power Grid Consultative Committee, has to make the reports. Reports shall then be submitted to the ASEAN Ministers on Energy Meeting at the ASEAN Senior Officials Meeting on Energy.[87] The ASEAN Secretariat does not have any major role to play in this process. Similarly, under the 2009 ASEAN Comprehensive Investment Agreement, the ASEAN Coordinating Committee on Investment (CCI) is responsible for making implementation reports and submitting them to the ASEAN Investment Area (AIA) Council through the Senior Economic Officials Meeting (SEOM).[88]

The 2009 Memorandum of Understanding on ASEAN Cooperation in Agriculture and Forest Products Promotion Scheme, on the other hand, provides that reports are made by an ASEAN entity, not an ASEAN official body.[89] Specifically, the ASEAN Forest Products Industry Club may report its implementation to the overseeing Joint Committee on Forest Productions Promotion Scheme.[90] Thus, in this case, the reporting body is an ASEAN private entity and the recipient

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Concord III," para. C(3) (2011), *available at* http://www.preventionweb.net/files/23664_baliconcordiii28readyforsignature29.pdf (last visited Mar. 25, 2014).

86. ASEAN Trade in Goods Agreement, art. 90(3) (Feb. 26, 2009), *available at* http://cil.nus.edu.sg/2009/2009-asean-trade-in-goods-agreement-adopted-on-26-february-2009-in-cha-am-thailand-by-the-economic-ministers/ (last visited Mar. 24, 2014).

87. Memorandum of Understanding on the ASEAN Power Grid, art. V (Aug. 23, 2007), *available at* http://cil.nus.edu.sg/rp/pdf/2007%20Memorandum%20of%20Understanding%20on%20the%20ASEAN%20Power%20Grid-pdf.pdf (last visited Mar. 24, 2014).

88. 2009 ASEAN Comprehensive Investment Agreement, *supra* note 73, art. 42.

89. ASEAN entities are not official ASEAN organs. They are entities that support the ASEAN Charter, especially its purposes and principles and are listed in Annex 2 of the ASEAN Charter. The ASEAN Charter provides that ASEAN "may engage" with these institutions. *See* ASEAN Charter, *supra* note 1, art. 16.

90. Memorandum from Understanding on ASEAN Cooperation in Agriculture and Forest Products Promotion Scheme, *supra* note 70, art. IV.

body is a committee that has both public and private representatives. It should be noted, however, that this Memorandum of Understanding uses the term *may* instead of *shall*,[91] which suggests that reporting is an option, not an obligation.[92]

Another example of a complicated reporting mechanism can be found in the Protocol Six on Railways Border and Interchange Stations which ASEAN concluded in 2012 to implement the 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit. The 2012 Protocol provides that the ASEAN Senior Transport Officials Meeting is the monitoring body.[93] The 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit, however, gives the monitoring authority to the Transit Transport Coordinating Board.[94] Under the 2012 Protocol, the ASEAN Senior Transport Officials Meeting has the obligation to submit, through the ASEAN Secretariat, regular reports on the progress of implementation of the Protocol to the Transit Transport Coordinating Board.[95] The Transit Transport Coordinating Board, in turn, has the obligation under the 1998 Framework Agreement to submit reports on implementation progress to relevant ASEAN Ministerial bodies.[96] In other words, the 1998 Framework Agreements and its 2012 Protocol establish two different monitoring bodies. The monitoring body in the 2012 Protocol has to report to the monitoring body in the 1998 Framework, which then has to report to relevant ASEAN Ministerial bodies. The process is even more confusing when the ASEAN Secretariat, though given only a technical assistance role, has the obligation to submit evaluation reports directly to the Transit Transport Coordinating Board for further actions.[97]

Yet another example of unclear reporting responsibilities is the mechanism established for the 2010 ASEAN Plan of Action for Energy

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91. *Id.*

92. *Id.* (Emphasis added.)

93. 2012 Protocol Six on Railways Border and Interchange Stations, *supra* note 67, art. 7(1).

94. ASEAN Framework Agreement on the Facilitation of Goods in Transit art. 29(2) (1998), *available at* http://cil.nus.edu.sg/1998/1998-asean-framework-agreement-on-the-facilitation-of-goods-in-transit-signed-on-16-december-1998-in-hanoi-vietnam-by-the-transport-ministers/ (last visited Feb. 1, 2014) [hereinafter 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit].

95. 2012 Protocol Six on Railways Border and Interchange Stations, *supra* note 67, art. 7(2).

96. 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit art. 29(3) (1998).

97. "Further actions" are not specified in article 29(4) of the 1998 ASEAN Framework Agreement on the Facilitation of Goods in Transit.

Cooperation 2010-2015.[98] Under this instrument, reports shall be jointly prepared by two institutions, the ASEAN Centre for Energy (ACE) and the ASEAN Secretariat, and submitted to the annual ASEAN Senior Officials Meeting on Energy and the ASEAN Ministers on Energy Meeting meetings. However, there is no instruction provided in the instrument, regarding a division of work between these two institutions.[99] Having a similar degree of ambiguity in the chain of responsibilities, the 2012 ASEAN Agreement on Custom asks the ASEAN Secretariat to regularly report to the ASEAN Directors-General of Customs Meeting on the implementation progress[100] and, at the same time, asks the ASEAN Directors-General of Customs Meeting to submit a report to the ASEAN Finance Ministers Meeting.[101] Yet, the Agreement on Customs does not clarify whether the report submitted by the ASEAN Directors-General of Customs Meeting to the ASEAN Finance Ministers Meeting is the one prepared by the ASEAN Secretariat.

It is important to note that all of the ASEAN instruments in the examples cited above do not have a provision with respect to the obligations of ASEAN Member States to provide relevant information to the reporting bodies. It is not clear in these instruments how monitoring reports can be prepared, where relevant information can be obtained and how the reports are handled by the recipient bodies. Provisions on required reporting frequency are sometimes clear[102] but other times can be vague[103] or, in some cases, unavailable altogether. ASEAN, in short, is yet to have a clear reporting system to monitor its Member States' compliance with ASEAN instruments.

3. Self-reporting by ASEAN Member States

Multilateral treaties usually place an obligation on State parties to communicate information and submit reports on the legislative, executive and judiciary measures and programs that they have taken to implement their treaty obligations. Self-reporting is indeed one of the most popular techniques employed internationally to monitor treaty

98. ASEAN Plan of Action for Energy Cooperation 2010 – 2015 Bringing Policies to Actions (2010), *available at* http://cil.nus.edu.sg/rp/pdf/2010%20ASEAN%20Plan%20of%20Action%20on%20Energy%20Cooperation%20(APAEC)%202010-2015-pdf.pdf (last visited Feb. 1, 2014).

99. *Id.* para. 68.

100. ASEAN Agreement on Customs, *supra* note 66, art. 53(3) (2012).

101. *Id.*

102. Some instruments provide that reports shall be submitted annually.

103. Some instruments provide that reports shall be submitted regularly.

compliance by State parties, whether it is a treaty on human rights, the environment or anti-corruption.[104] Self-reporting also offers State parties an opportunity to review, assess and improve their own treaty implementation records. Compared to other compliance mechanisms such as verification or inspection, self-reporting may be perceived by States as less intrusive and less sensitive in terms of impact on sovereignty, and more acceptable. Treaty monitoring bodies, especially those for a regional organization of developing countries like ASEAN, are usually unable, in terms of technical capacity and human resources, to closely monitor each State party's compliance or to inspect and verify the implementation of every single instrument that a State has ratified.

It makes sense, therefore, for ASEAN to reply on self-reporting by its Member States, at least in the first stage, for purposes of monitoring compliance.[105] The reality, nevertheless, is that self-reporting requirements do not appear very frequently in ASEAN instruments. In the list of ASEAN instruments concluded from 2008 until 2012, the 2009 Initiative for ASEAN Integration Strategic Framework, the Initiative for ASEAN Integration Work Plan 2 (2009 – 2015), and the 2010 Protocol to Amend the Protocol to Provide Special Consideration for Rice and Sugar are among the very few ASEAN instruments that impose a reporting obligation on ASEAN Member States.

The Initiative for ASEAN Integration Strategic Framework and the Initiative for ASEAN Integration Work Plan 2 (2009 – 2015) were adopted on March 1, 2009 with a view to "narrowing the development gap" within ASEAN and enhancing the organization's competitiveness by regional cooperation "through which the more developed ASEAN Members could help those member countries that most need it."[106] Under the Initiative, different groups of ASEAN Member States are subject to different reporting requirements. Reporting frequency is clearly provided, according to which ASEAN Member States have to

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104. *See*, for example, human rights and environment treaties deposited with the United Nations Secretary-General. *United Nations Treaty Collections*, UN, *available at* http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en and http://treaties.un.org/pages/Treaties.aspx?id=27&subid=A&lang=en (last visited Mar. 31, 2014).

105. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 154 (1995).

106. *Initiative for ASEAN Integration Strategic Framework and Initiative for ASEAN Integration Work Plan 2 (2009 – 2015)*, para. 1, NAT'L U. SING. (2009), *available at* http://cil.nus.edu.sg/2009/2009-initiative-for-asean-integration-iai-strategic-framework-and-iai-work-plan-2-2009-2015-adopted-on-1-march-2009-in-cha-am-thailand-by-the-heads-of-stategovernment/ (last visited Mar. 31, 2014) [hereinafter *2009 Initiative for ASEAN Integration Strategic Framework and Initiative for ASEAN Integration Work Plan 2* (2009–2015)].

submit their reports to relevant bodies annually. The Initiative for ASEAN Integration Work Plan is also reportedly reviewed on a periodical basis to account for the ASEAN Community building process and the emerging needs of Cambodia, Laos, Myanmar and Vietnam.[107] These countries are required to submit annual reports on the assistance they have received from all sources, concentrating on the utility, impact and effectiveness of the projects benefiting from the assistance. Six other ASEAN Member States (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) are also required to submit annual reports on their assistance programs for Cambodia, Laos, Myanmar and Vietnam.[108] Although there is no specific provision with regard to which body shall ultimately consider the reports, since the ASEAN Secretariat is tasked with consolidating them,[109] it may be presumed that the reports by ASEAN Member States shall be sent initially to the ASEAN Secretariat. However, it remains unclear as to which one of the following three bodies the reports shall go to (or whether the reports shall go to all three bodies): the ASEAN Summit, which guides and advises the implementation of the Initiative; the ASEAN Coordinating Council, which provides recommendations to the ASEAN Summit on the Initiative's implementation; or the Initiative for ASEAN Integration Task Force, which provides policy guidelines, directions and general advice on the Initiative for ASEAN Integration Work Plan.[110]

Another self-reporting mechanism was established under the 2007 Protocol to Provide Special Consideration for Rice and Sugar. The 2007 Protocol was concluded to allow an ASEAN Member State, under exceptional cases, to request a waiver from the obligations imposed under the Agreement on Common Effective Preferential Tariff and its related Protocol, with regard to rice and sugar.[111] ASEAN Member States that have been granted the waiver have the obligation to submit an annual report for review to the ASEAN Free Trade Area Council.[112] The ASEAN Free Trade Area Council shall, at its annual meeting, review the waiver to determine whether the exceptional circumstances

107. *Id.* para. 25.

108. *Id.* para. 23.

109. *Id.*

110. *Id.* paras. 11-13.

111. Protocol to Provide Special Consideration for Rice and Sugar art. 1(1) (Aug. 23, 2007), *available at http://ditjenkpi.kemendag.go.id/website_kpi/files/content/5/Protocol_to_provide_special_consideration_for_rice_and_sugar20071031111849.pdf* (last visited Feb. 4, 2014).

112. *Id.* art. 5(2).

that justify such waiver still remain and whether the terms and conditions, if any, attached to the waiver are being met.[113] Based on the outcome of the annual review, the ASEAN Free Trade Area Council shall render its decision on whether to continue, modify or terminate the waiver.[114] The reporting process is, in short, very clear. The ASEAN Secretary-General or the ASEAN Secretariat does not have any formal role during this whole process. It should be noted that this is not exactly a report on implementation, but rather an update on the exceptional circumstances justifying a waiver from CEPT obligations. Apart from the two cases examined above, there are few, if any, other self-reporting mechanisms established under an ASEAN instrument concluded after the ASEAN Charter until October 2012. This is an indication that, since the ASEAN Charter was adopted, ASEAN instruments usually do not have a strong monitoring mechanism when it comes to self-reporting.

4. Review, Evaluation and Recommendations by Monitoring Bodies

Reporting is certainly one of the popular techniques for monitoring compliance, but it is usually not enough. In many cases, information obtained through reporting is provided by the States under scrutiny and since States tend to emphasize what they have achieved over what they have failed to do, these reports sometimes lack credibility. To resolve this problem, there often needs to be mechanisms through which reports are reviewed, verified and evaluated, and recommendations are made by the monitoring bodies on steps that should be taken to improve compliance.

The International Labour Organization (ILO), for example, has established an elaborate procedure for reviewing and evaluating member States' reports whereby member States have to periodically (every two years for some conventions and five years for others) submit their implementation reports to the reviewing body – the Committee of Experts on the Application of Conventions and Recommendations.[115] The Committee, composed of twenty experts, albeit having no investigatory powers, can request a State to provide further specific information and is mandated to make critical evaluations of State

113. *Id.* art. 5(1).

114. *Id.* art. 5(3).

115. *See* International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, *available at* http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm (last visited Feb. 5, 2014).

reports. It then makes suggestions to improve implementation, which are published in its annual reports.[116]

In the World Trade Organization (WTO), all members are subject to the Trade Review Policy Mechanism whereby the Trade Policy Review Body[117] reviews and evaluates States' law and policy statements and the Secretariat's reports.[118] In preparing its reports, which contain details about State policy, law and practice, the WTO Secretariat seeks the cooperation of member States, but has the sole responsibility for the facts presented and views expressed. Reports of the Secretariat, statements by States and concluding remarks by the Trade Policy Review's Chairperson are all published.[119] The aim of the process is to improve the adherence by all members to the rules and commitments made under the Multilateral Trade Agreements, hence contributing to a smoother functioning of the multilateral trade system.[120]

In the area of human rights, State parties to the International Covenant on Political and Civil Rights submit reports to the Human Rights Committee on the measures they have adopted that give effect to the rights recognized.[121] The Human Rights Committee then reviews and examines the reports and offers recommendations to the State parties.[122] The Committee on the Elimination of Racial Discrimination (CERD)[123] was also established under the International Convention on

116. *See id.*

117. The WTO General Council meets as the Trade Policy Review Body. The Trade Policy Review Body is thus open to all WTO members. *See* WTO, *Trade Policy Review Body*, *available at* https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm (last visited Feb. 5, 2014).

118. PEW CTR. ON GLOBAL CLIMATE CHANGE, PEW CHARITABLE TRUST, MRV: A SURVEY OF REPORTING AND REVIEW IN MULTILATERAL REGIMES 8 (2010), *available at* http://www.c2es.org/docUploads/survey-reporting-review-multilateral-regimes.pdf (last visited Mar. 17, 2014).

119. *Id.*

120. *Trade Policy Review Mechanism ("TPRM")*, WORLD TRADE ORG., *available at* https://www.wto.org/english/tratop_e/tpr_e/annex3_e.htm (last visited Feb. 4, 2014).

121. International Covenant on Civil and Political Rights (ICCPR) art. 40.1, Dec. 16, 1966, 999 U.N.T.S. 171.

122. The Human Rights Committee (CCPR) is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights. The Committee convenes three times a year for sessions of three weeks duration in Geneva (Switzerland) or New York (United States). *Id.*

123. The Committee on the Elimination of Racial Discrimination (CERD) was the first body created by the UN to monitor actions by States to fulfil their obligations under the Convention on the Elimination of Racial Discrimination. The Committee meets in Geneva, Switzerland and holds two sessions per year consisting of three weeks each to consider state reports, review the implementation, address arising issues, and make recommendations to

the Elimination of Racial Discrimination to "make suggestions and general recommendations based on an examination of reports and information received from the State parties."[124] The Committee on Economic, Social and Cultural Rights,[125] the Committee on the Elimination of Discrimination against Women,[126] the Committee against Torture,[127] the Committee on the Rights of the Child,[128] and the Committee on Migrant Workers[129] were similarly established by their relevant human rights treaties to review and evaluate reports and supervise the protection and promotion of those rights recognized by the treaties.

Among all ASEAN instruments listed in the ASEAN Secretariat's Table, the 2007 ASEAN Economic Community Blueprint and the 2009 ASEAN Socio-Cultural Community Blueprint are among the rare cases where there is actually specific guidance for evaluating implementation. As provided in the 2007 ASEAN Economic Community Blueprint, the ASEAN Secretariat shall develop and maintain a set of statistical indicators, including an integrated tariff and trade database system and the ASEAN Economic Community scorecards, to monitor and assess compliance with each element of the ASEAN Economic Community.[130] In fact, the ASEAN Secretariat has set up the ASEAN Economic Community Scorecard to identify actions that must be undertaken by ASEAN collectively and by its Member States individually to establish

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state parties. *Id.*

124. International Convention on the Elimination of All Forms of Racial Discrimination art. 9.2, Dec. 21, 1965, 660 U.N.T.S. 195.

125. The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts, originally established under the ECOSOC, empowered to monitor the implementation of the International Covenant on Economic, Social and Cultural rights. The Committee was established in 1985 by ECOSOC Resolution 1985/17. *Id.*

126. The Committee on the Elimination of Discrimination against Women (CEDAW) was established under the International Convention on the Elimination of Discrimination against Women to monitor the implementation of the Convention.

127. The Committee against Torture (CAT) was established pursuant to art. 17 of the Convention and began to function on January 1, 1988 to monitor the implementation of the Convention. In addition to the reporting procedure, the Convention establishes three other mechanisms: consideration of individual complaints, undertaking of inquiries and examination of inter-state complaints.

128. The Committee on the Rights of the Child (CRC) was established pursuant to art. 43 of the Convention on the Rights of the Child to supervise the implementation of the Convention.

129. The Committee on Migrant Workers (CMW) monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49, art. 72 (Dec. 18, 1990).

130. 2007 ASEAN Economic Community Blueprint, *supra* note 53, para. 73

the ASEAN Economic Community by 2015. The ASEAN Economic Community Scorecard components include: (1) qualitative and quantitative indications of the ratification, adoption and transposition into domestic laws, regulations and administrative procedures of agreed obligations and commitments within the prescribed timeframes as specified in the ASEAN Economic Community Blueprint; (2) tracking implementation of agreements/commitments and achievement of milestones in the ASEAN Economic Community Strategic Schedule; and (3) statistical indicators on the ASEAN Economic Community.[131] The ASEAN Economic Community Scorecard is structured into: (1) single market and production base; (2) competitive economic region; and (3) equitable economic development and integration into the global economy.[132] Evaluation levels of the Scorecard are categorized as "fully implemented," "on-going," "not fully-implemented," and "not yet commenced." The dates for reporting the Scorecard are in April and October annually. Monitoring of the ASEAN Economic Community using the Scorecard mechanism started in 2008 and is being conducted in four phases: 2008-2009, 2010-2011, 2012-2013, and 2014-2015.[133] A report on Phase I (2008-2009) and Phase II (2010-2011) has already been released. The ASEAN Economic Community Scorecard is also used to review and evaluate the implementation of the 2010 ASEAN Strategic Action Plan for Small and Medium Enterprises Development (2010-2015).[134] The implementation and monitoring of the Strategic Action Plan shall be further guided by a medium-term Strategic Schedule and annual work programs.[135]

The 2009 ASEAN Socio-Cultural Community Blueprint also provides that the ASEAN Secretariat shall fulfil its monitoring function by developing and adopting indicators and systems to monitor and assess the progress of implementation of the various elements and actions in the Blueprint.[136] In 2011, two years after the conclusion of the 2009 ASEAN Socio-Cultural Community Blueprint, the ASEAN

131. ASEAN Secretariat, *ASEAN Economic Community Scorecard: Charter Progress toward Regional Economic Integration Phase I (2008-2009) and Phase II (2010-2011)*, ASEAN (2012), *available at* http://www.asean.org/resources/publications/asean-publications/item/asean-economic-community-scorecard-3 (last visited Mar. 19, 2014).

132. *Id.*

133. *Id.*

134. *2010 ASEAN Strategic Action Plan for SME Development (2010 – 2015)*, ASEAN, art. 6 (Aug. 25, 2010), *available at* http://cil.nus.edu.sg/2010/2010-asean-strategic-action-plan-on-sme-development-2010-2015/ (last visited Mar. 18, 2014) [hereinafter *2010 ASEAN Strategic Action Plan for SME Development (2010 – 2015)*].

135. *Id.*

136. 2009 ASEAN Socio-Cultural Community Blueprint, *supra* note 58, at III.D

Secretariat officially submitted to ASEAN sectoral bodies under the ASEAN Socio-Cultural Community, the development of the ASEAN Socio-Cultural Community Scorecard to assess the achieved goals, targets and outcomes and the ASEAN Socio-Cultural Community Blueprint Implementation-focused Monitoring System to monitor the implementation of activities and programs under the Blueprint.[137] It is anticipated that the report of the ASEAN Secretary-General to the ASEAN Leaders on the implementation of the ASEAN Socio-Cultural Community Blueprint will comprise: (1) a quantitative implementation-focused monitoring Review of the ASEAN Socio-Cultural Community Blueprint; (2) a quantitative Scorecard of the ASEAN Socio-Cultural Community - 2012 and 2015; and (3) a brief qualitative assessment of progress that states the challenges and suggests solutions.[138] Information that the monitoring system can provide includes: (1) number of actions taken by ASEAN sectoral bodies or ASEAN Member States; (2) actions that remain unattended; (3) levels of cooperation; (4) levels of intervention; (5) outputs of projects and activities and (6) the status of implementation and activities. The ASEAN Socio-Cultural Community Scorecard and Implementation-focused Monitoring System for the ASEAN Socio-Cultural Community Blueprint Implementation were endorsed by the Senior Officials Committee in 2011.[139]

For most of the other ASEAN instruments, the guidelines and procedures for monitoring, reviewing and evaluating implementation are not that specific. The 2009 ASEAN Trade in Goods Agreement, for example, provides that the ASEAN Secretariat shall have monitoring, reporting and supporting roles, and the ASEAN Economic Ministers Meeting and the ASEAN Free Trade Area Council shall have supervising, coordinating and reviewing roles.[140] However, it does not specify what the ASEAN Secretariat would do to monitor, and what the ASEAN Economic Ministers Meeting and the ASEAN Free Trade Area Council would do to supervise. Similarly, the 2012 ASEAN Agreement on Customs gives the supervising authority on all aspects of the Agreement implementation to one body, the ASEAN Directors-General

137. *See* Misran Karmain, *Development of the ASEAN Socio-Cultural Community Scorecard* (ASCC Scorecard) (May 10, 2011), *available at* http://www.anamai.moph.go.th/download/Scan_ASCC.pdf (last visited Mar. 5, 2014).

138. *Id.*

139. ASEAN Secretariat, Mid-Term Review of the ASEAN Socio-Cultural Community Blueprint (2009-2015), *available at* http://www.asean.org/images/resources/2014/Apr/FA_Consolidated_Final_MTR_Report_FINAL-WEB[1].pdf (last visited May 7, 2014).

140. 2009 ASEAN Trade in Goods Agreement, *supra* note 69, art. 90.

of Customs Meeting,[141] and gives the monitoring authority to another body, the ASEAN Secretariat. Nonetheless, there are no further details on how the implementation of the Agreement shall be supervised and monitored.[142] In a different case, the 2012 Protocol Six on Railways Border and Interchange Stations gives all relevant authorities (supervising, reviewing, coordinating and monitoring) to only one body (the ASEAN Senior Transport Officials Meeting),[143] but again, provides no instructions as to how the ASEAN Senior Transport Officials Meeting shall fulfil its job.

5. Capacity Building and Technical Assistance

No matter how detailed and well-designed they are, reporting and review mechanisms alone may not be able to ensure effective implementation of all ASEAN instruments when certain ASEAN Member States lack the capacity to implement the instruments to which they are parties. To address the issue of lack of capacity, ASEAN has adopted an "ASEAN minus X" formula to give less developed countries a grace period by allowing them to delay the implementation of certain instrument provisions. The ASEAN Charter provides that, with regard to the implementation of economic commitments, the "ASEAN minus X" formula may be applied where there is a consensus to do so.[144] Under the framework of the ASEAN Free Trade Area, for example, six ASEAN original members (Thailand, Indonesia, Malaysia, the Philippines, Singapore and Brunei) would go ahead with their Common Effective Preferential Tariff by 2003, while Cambodia, Laos, Myanmar and Vietnam are given more time (until 2015) to catch up with their tariff reduction measures. It should be noted, however, that this formula is only applicable to certain economic instruments.[145] In fact, there have been fewer instruments adopting this formula in recent years. [146]

141. 2012 ASEAN Agreement on Customs, *supra* note 66.

142. *Id.*

143. 2012 Protocol Six on Railways Border and Interchange Stations, *supra* note 67, art. 7(1), (3).

144. ASEAN Charter, *supra* note 1, art. 21(2).

145. *Id.*

146. In August 2012, ASEAN Member States signed the Memorandum of Understanding among the Governments of the Participating Member States of the Association of Southeast Asian Nations (ASEAN) on the Second Pilot Project for the Implementation of a Regional Self-Certification System. Implementing the Memorandum of Understanding among the Governments of the Participating Member States of the Association of Southeast Asian Nations on the Second Pilot Project for the Implementation of a Regional Self-Certification System, Exec. Ord. 142, 142 O.G. s. 2013 (Oct. 14, 2013) (Phil.).

ASEAN Member States, especially Cambodia, Laos, Myanmar and Vietnam, need substantial assistance to strengthen their capacity for implementing ASEAN instruments. The ASEAN Secretariat also needs assistance to fulfil its monitoring responsibility, as well as to complete many other legal tasks it has been assigned under the ASEAN Charter. An examination of ASEAN instruments concluded in recent years, however, suggests that capacity-building assistance for ASEAN Member States has only been provided in a limited number of instruments. Furthermore, no instrument has specifically mentioned measures to strengthen the ASEAN Secretariat's monitoring capacity.

As stated in the 2007 ASEAN Economic Community Blueprint, for ASEAN to establish an economic community by 2015, different measures must be carried out to build and strengthen the individual and institutional capacity of regional governments so as to ensure the smooth implementation of economic and trade programs.[147] The Blueprint also emphasizes that the ASEAN Economic Community will have to address the development divide and accelerate the integration of Cambodia, Laos, Myanmar, and Vietnam through the Initiative for ASEAN Integration and other regional initiatives. Major areas of cooperation where capacity building activities need to be taken include the industry sector,[148] recognition of professional qualifications, closer consultation on macroeconomic and financial policies, trade financing measures, enhanced infrastructure and communications connectivity, development of electronic transactions through e-ASEAN, integrating industries across the region to promote regional sourcing, and the private sector.[149]

The 2009 ASEAN Socio-Cultural Community Blueprint also has different provisions on capacity building. Capacity building is provided in labor management,[150] information and communication technology,[151] civil service,[152] poverty reduction,[153] health,[154] social justice and welfare,[155] the environment,[156] and cultural creativity, among others.[157]

147. *See* 2007 ASEAN Economic Community Blueprint, *supra* note 53, para. 19.
148. *Id.* para. 73.
149. *Id.* para. 7.
150. 2009 ASEAN Socio-Cultural Community Blueprint, *supra* note 58, para. 12.
151. *Id.* para. 14.
152. *Id.* para. 17.
153. *Id.* para. 19.
154. *Id.* para. 22.
155. 2009 ASEAN Socio-Cultural Community Blueprint, *supra* note 58, 11, para. 27.
156. *Id.* para. 31.
157. *Id.* para. 14.

To ensure its effective implementation, the 2009 ASEAN Socio-Cultural Community Blueprint tasks relevant ASEAN sectoral bodies to identify and implement technical studies or training programs on issues, areas, or topics where capacity building supports are required and to establish appropriate capacity building programs to assist new Member States in enhancing the achievement of the ASEAN Socio-Cultural Community.[158]

Similarly, the 2009 ASEAN Comprehensive Investment Agreement emphasizes the importance of according special and differential treatment to the newer ASEAN Member States through technical assistance to strengthen their capacity in relation to investment policies and promotion, including in areas such as human resource development and highlight commitments in areas of interest to the newer ASEAN Member States. It recognizes that commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.[159]

6. Consultation

Consultation is a process where state parties come together to share implementation experience, promote understanding and awareness, discuss ways to overcome difficulties encountered in implementation, provide advice and assistance in the implementation process, and prevent disputes from arising. As this is a rather facilitative and non-confrontational process, it would be assumed to be an ASEAN popular measure to promote and ensure compliance. However, very few ASEAN instruments adopted since the ASEAN Charter actually have provisions on consultation.

From 2008 to 2010, ASEAN concluded four agreements on air services cooperation, namely the 2008 ASEAN Memorandum of Understanding on Cooperation relating to Aircraft Accident and Incident Investigation, the 2009 ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services, the 2009 ASEAN Multilateral Agreement on Air Services and the 2010 ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services. These are among the few ASEAN instruments that have provisions on consultation as a way to promote compliance. The 2008 ASEAN Memorandum of Understanding on Cooperation relating to Aircraft Accident and Incident Investigation mentions very briefly that participating Parties will consult each other from time to time to ensure

158. *Id.* para. 17.

159. 2009 ASEAN Comprehensive Investment Agreement, *supra* note 73, art. 14.

the implementation of this Memorandum of Understanding.[160] Three other agreements on air services have an almost identical provision (Article 17) on consultation, according to which the aeronautical authorities of the Contracting Parties shall consult with one another from time to time with a view to ensuring the implementation of, and satisfactory compliance with, the provisions of these Agreements.[161] Unless otherwise agreed, such consultations shall begin at the earliest date possible, but no later than sixty days from the date the other contracting party or parties receive, through diplomatic or other appropriate channels, a written request, including an explanation of the issues to be raised. Once the consultations have been concluded, all the contracting parties as well as the ASEAN Secretary-General shall be notified of the results.[162]

IV. CONCLUSION: THE WAY FORWARD

As reflected in the 2006 Report of the Eminent Persons Group, ASEAN does recognize that the real problem it faces is to ensure effective implementation and compliance with instruments that it has concluded.[163] It understands that non-compliance or delay in implementation may not only hinder regional cooperation and integration efforts, but also undermine its credibility and disrupt the process toward building a common community.[164] Initial steps to establish various mechanisms to promote the implementation of ASEAN instruments have been taken. First and foremost, the ASEAN Charter creates a division of work according to which the ASEAN Sectoral Ministerial Bodies have the responsibility to implement all ASEAN agreements,[165] the ASEAN Coordinating Council shall

160. 2008 ASEAN Memorandum of Understanding on Cooperation, *supra* note 159, art. 7.

161. *See* 2009 ASEAN Multilateral Agreement on Air Services, and the 2010 ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services art. 16, *available at* http://www.asean.org/communities/asean-economic-community/item/asean-multilateral-agreement-on-the-full-liberalisation-of-air-freight-services-manila-20-may-2009 (last visited Mar. 27, 2014); 2009 ASEAN Multilateral Agreement on Air Services art. 16, *available at* http://www.asean.org/communities/asean-economic-community/item/asean-multilateral-agreement-on-air-services-manila-20-may-2009-2 (last visited Mar. 27, 2014); 2010 ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Services art. 16, *available at* http://cil.nus.edu.sg/2010/2010-asean-multilateral-agreement-on-full-liberalisation-of-passenger-air-services/ (last visited Mar. 27, 2014).

162. *Id.*

163. EPG REPORT, *supra* note 15, para. 6.

164. *Id.* para. 44.

165. ASEAN Charter, *supra* note 1, art. 10(1).

coordinate the implementation,[166] and the ASEAN Secretary-General shall monitor the progress of implementation.[167] Various ASEAN instruments concluded in the post-Charter age have further detailed their expected forms of compliance mechanisms. Some ASEAN instruments have even established separate committees to monitor or facilitate implementation progress. Some have specific guidance on how implementation is reviewed and evaluated, by using, for example, the ASEAN Economic Community Scorecard and the ASEAN Socio-Cultural Community Scorecard.

Nevertheless, there is still a long way to go for ASEAN to have effective mechanisms that can ensure compliance as the Eminent Persons Group suggested. While the ASEAN Charter obliges ASEAN sectoral bodies to implement ASEAN instruments in general,[168] there is no provision regarding a similar obligation of ASEAN Member States. Although the ASEAN Charter authorizes the ASEAN Secretary-General to monitor the progress of implementation of all ASEAN instruments and decisions,[169] there are no guidelines or rules of procedure for the ASEAN Secretary-General and the ASEAN Secretariat to do their jobs. Among the instruments that have been concluded after the ASEAN Charter until October 2012, the majority do not have compliance monitoring provisions.

Under the instruments that do have compliance monitoring provisions, many issues remain, such as unclear institutional design, inconsistent procedures, overlapping authorities, lack of guidelines, and in many cases, an absence of stronger monitoring measures like review, verification or recommendations. Some instruments ask one specific body to monitor the implementation, while assigning another body to supervise and review the implementation.[170] Some give all responsibilities in terms of monitoring, supervising, supporting and facilitating to one single body, but do not clarify what those monitoring, overseeing and supervising functions imply.[171] No instrument gives the

166. *Id.* art. 8(2)(b).

167. *Id.* art. 11(2)(b).

168. *Id.* art. 10(1)(b).

169. *Id.* art. 11(2)(b).

170. According to the 2009 ASEAN Trade in Goods Agreement, the supervising, coordinating and reviewing role belongs to the ASEAN Economic Ministers and the Senior Economic Officials' Meeting while the ASEAN Secretariat is assigned to monitor the progress in the implementation of the Agreement and assist the ASEAN Economic Ministers and the Senior Economic Officials' Meeting in supervising, coordinating and reviewing the implementation of the Agreement. *See* 2009 ASEAN Trade in Goods Agreement, *supra* note 69, art. 90(3).

171. Under the 2012 Protocol Six on Railways Border and Interchange Stations, for

monitoring bodies the power to make recommendations for specific ASEAN Member States to improve their implementation records. The ASEAN Secretariat is dependent on ASEAN Member States to provide compliance data; yet, not all ASEAN Member States are equally willing to share, or capable of sharing, relevant sufficient data. For ASEAN, compliance and reporting problems are also, at least partially, attributed to the lack of capacity. Some ASEAN Member States may have the resources that would enable them to comply and report on their compliance. Others, however, may fall short.

It is important, therefore, that ASEAN has guidelines, rules of procedure, or standard operating procedures for reporting and monitoring compliance with ASEAN instruments. Reporting procedures need to be clear and consistent, the implementing states and bodies need to submit reports to the monitoring bodies and not the other way around. Reporting frequency needs to be clarified, whether it is annual reporting for a number of instruments, biennial for some instruments, or on a five-year basis for other instruments. The monitoring bodies should have the right to request an ASEAN Member State to provide specific implementing information and that ASEAN Member State should be required to comply with that request. The monitoring bodies should also be mandated to make critical evaluations of state reports and make recommendations to improve implementation. Measurements and indicators used to evaluate compliance, where applicable, should be further developed. The ASEAN Coordinating Council and the ASEAN Community Councils should have a more active role. The agenda of the ASEAN Summit, the ASEAN Coordinating Council or the ASEAN Community Councils should include a regular item on examining the reports on the progress of implementation of ASEAN instruments. That way, ASEAN Member States will be under more pressure to take their commitments seriously. More efforts should also be made and specific measures should be worked out to strengthen the capacity of ASEAN Member States, especially Cambodia, Laos, Myanmar and Vietnam, to implement ASEAN instruments and decisions, as well as the capacity of the ASEAN Secretariat to provide administrative and technical support

example, the ASEAN Senior Transport Officials Meeting is the body responsible for the monitoring, review, coordination and supervision of all aspects relating to implementation of the Protocol. The 2009 ASEAN Comprehensive Investment Agreement gives the power to oversee, coordinate, review and facilitate the implementation of the Agreement to the ASEAN Investment Area Council. The 2009 ASEAN Trade in Goods Agreement assigns the ASEAN Free Trade Area Council to undertake supervision, coordination and review functions at the same time. *Id.* art. 90(3)(a); *see also* 2012 Protocol Six on Railways Border and Interchange Stations, *supra* note 67, art. 7(1); 2009 ASEAN Comprehensive Investment Agreement, *supra* note 73, art. 42(3)(b).

to various sectoral bodies that coordinate the implementation of ASEAN instruments and to assist in monitoring the compliance with an increasing number of ASEAN instruments and decisions.

For these recommendations to be realized, more political will is needed. ASEAN Member States need to recognize that it is in their own interest and the interest of the organization to take stronger actions to implement various cooperative instruments that they have concluded. A strengthened compliance monitoring system is a must if ASEAN wants to cultivate a culture of honoring and implementing commitments and reach the goal of building a rules-based community.

THE ANSWER IS IN THE EVIDENCE: PLAIN PACKAGING, GRAPHIC HEALTH WARNINGS, AND THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

Michelle M. Chester†

"WARNING: Smoking can kill you."[1]

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1. '*Warning: Smoking Can Kill You*', N.Y. TIMES (Aug. 27, 2012), *available at* http://www.nytimes.com/2012/08/28/opinion/warning-smoking-can-kill-you.html?_r=0 (last visited Apr. 23, 2014).

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I. INTRODUCTION

Efforts to reduce the number of smokers and the health effects brought on by smoking and second-hand smoke around the world have been on the rise. In 2001, Canada passed the first law of its kind, requiring tobacco companies to put graphic health warnings on their packaging, and in 2011 revised that law to increase the size of the pictorial warning.[2] Following Canada's lead, Australia passed a similar, but more stringent, requirement on tobacco packaging known as "plain packaging."[3] In August 2012, Australia's highest court upheld what is considered to be the "world's toughest law on cigarette promotion."[4] Australian Attorney-General, Nicola Roxon[5], believes that other countries will see the success its new packaging requirements have on

2. *Canada to boost package warnings – inside and out*, FRAMEWORK CONVENTION ALLIANCE (Oct. 4, 2012), *available at* http://www.fctc.org/index.php?option=com_content&view=article&id=598:canada-to-boost-package-warnings-inside-and-out&catid=235:advertising-promotion-and-sponsorship&Itemid=239 (last visited Jan. 21, 2014) [hereinafter FCA].

3. Rod McGuirk, *Australian Cigarette Logo Ban Law Upheld By Court*, HUFFINGTON POST (Aug. 15, 2012), *available at* http://www.huffingtonpost.com/2012/08/15/australian-cigarette-logo-ban_n_1778145.html (last visited Jan. 21, 2014). A full description of plain packaging is discussed in full in section II.A., *infra* pp. 4-5.

4. McGuirk, *supra* note 3.

5. In October 2012 when this statement was made, Nicola Roxon was the Attorney-General and the minister for Emergeny Management for Australia. *Nicola Roxon announces her resignation*, ABC NEWS (Feb. 2, 2013), *available at* http://www.abc.net.au/news/2013-02-02/nicola-roxon-annonces-her-resignation/4497384 (last visited Jan. 22, 2014). She announced her resignation in February 2013. *Id.*

reducing the number of smokers and that they will adopt similar requirements.[6] Tobacco companies worry that this law will set a "global precedent" that will have a serious effect on their business.[7]

In the United States, a similar act, the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), was signed into law in 2009.[8] This act does not go as far as plain packaging, however, it does require tobacco companies to print graphic health warnings on their tobacco packaging; which is an element of plain packaging.[9] Sections 201 and 204 specifically require that:

> [p]ackaging and advertisements for cigarettes and smokeless tobacco must have revised warning labels with a larger font size. Font colors are limited to white on black background or black on white background. Cigarette package health warnings will be required to cover the top 50 percent of both the front and rear panels of the package, and the nine specific warning messages must be equally and randomly displayed and distributed in all areas of the United States. These messages must be accompanied by color graphics showing the negative health consequences of smoking cigarettes.[10]

While sections 201 and 204 were codified in 2009, their fate is still uncertain. Currently, there is a split in the circuits about whether these compelled graphic cigarette-warning labels are constitutional. In April 2012, the Sixth Circuit, in *Discount Tobacco City & Lottery, Inc. v. United States*, held that the provocative warnings were reasonably related to the government's interest in informing consumers and, therefore, could require tobacco manufacturers to print the images on its products.[11] However, in August 2012, the D.C. Circuit in *R.J. Reynolds Tobacco Co. v. FDA* struck down the mandate stating that the "FDA has not provided a shred of evidence—much less 'substantial evidence'. . . showing that the graphic warnings [would] 'directly advance' its interest in reducing the number of Americans who smoke."[12] The reason for the split in rulings largely came down to the different

6. McGuirk, *supra* note 3.

7. *Id.* The tobacco companies also argue that the new packaging rules in Australia violate intellectual property rights and devalue their trademark. *Id.*

8. Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 520 (6th Cir. 2012).

9. McGuirk, *supra* note 3; Family Smoking Prevention and Tobacco Control Act (FSPTCA) of 2009, Pub.L. No. 111-31, §§ 201, 204, 123 Stat. 1776 (2009) [hereinafter "FSPTCA"].

10. FSPTCA, *supra* note 9.

11. *Discount Tobacco*, 674 F.3d at 569.

12. R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1219 (D.C. Cir. 2012).

standards of review used by each court.[13] The Court in *Discount Tobacco* applied a lower standard of review because it found graphic health warnings to be factual disclosures, while the Court in *R.J. Reynolds* applied a more stringent standard of review put in place to protect commercial speech.[14]

This Note will explore plain packaging and graphic health warnings imposed on tobacco companies. It will focus on conducting a comparative analysis between the respective laws in Australia, Canada, and the United States regarding plain packaging, graphic health warnings, and the jurisprudence regarding compelled corporate speech in the interest of public health.

In the second section, this Note will discuss plain packaging and graphic health warnings by further defining plain packaging and discussing some of the more recent findings on how plain packaging and graphic health warnings affect tobacco consumption.

In the third section this Note will discuss where Australia and Canada currently stand on plain packaging and graphic health warnings. This will be accomplished by examining current laws in each country and court cases addressing the constitutionality of those laws.

The fourth section of this Note will discuss where the United States currently stands on plain packaging and graphic health warnings. This will be accomplished by looking at the FSPTCA and the First Amendment's protection of commercial speech. Additionally, this section will address the circuit split on the FSPTCA concerning its constitutionality. An examination of *Discount Tobacco* and *R.J. Reynolds* will provide a basis for this discussion.

The fifth section of the Note will apply the findings on plain packaging and graphic health warnings from Canada and Australia to the United States' FSPTCA. This will be accomplished by addressing the difference in constitutional regimes and the role of foreign/comparative analysis in the United States to determine whether it violates freedom of expression. Further, this Note will look at the laws of Australia and Canada and propose that the FSPTCA should be found constitutional if this case were to go in front of the United States Supreme Court.

Lastly, this Note will conclude with a discussion on the FSPTCA and will demonstrate how and why the United States Supreme Court should look to precedent set in other countries to determine its constitutionality. Specifically, it will address the interest of public

13. *Discount Tobacco*, 674 F.3d at 558; *R.J. Reynolds*, 696 F.3d at 1212-13.

14. *Discount Tobacco*, 674 F.3d at 558; *R.J. Reynolds*, 696 F.3d at 1212-13.

health in compelled commercial speech. Further, this section will demonstrate that if the United States Supreme Court hears this issue, it should find that the FSPTCA is not in violation of freedom of expression and is constitutional.

II. PLAIN PACKAGING

This section provides background information on plain packaging. Part A begins by defining and describing plain packaging, while Part B discusses the empirical evidence that has been collected on plain packaging and graphic health warnings.

A. Defining Plain Packaging

Plain packaging strips tobacco-packaging products of any logos, trade colors, descriptive words, or specialized font size and style.[15] The brand name is the only graphic image on the package.[16] In fact, all packaging, regardless of brand, is the same neutral color, contains a graphic health warning, and a quit smoking help-line phone number.[17] Depending on the country where the tobacco packaging is distributed, the pictorial health warning sign could cover from 50% to 75% of the front of the package, and from 50% to 90% of the back of the package.[18] It is intended that plain packaging will

> 1. reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
>
> 2. increase the noticeably and effectiveness of mandated health warnings; and
>
> 3. reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.[19]

Countries considering implementing plain packaging and/or

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15. Melodie Tilson, *Plain Packaging of Tobacco Products*, NON-SMOKERS' RIGHTS ASS'N/SMOKING & HEALTH ACTION FOUND 1 (July 2008), *available at* http://www.nsra-adnf.ca/cms/file/files/Plain%20Pkg%20NSRA%20FINAL%20Aug08.pdf (last visited Jan. 15, 2014).

16. *Id.*

17. *Id.*

18. FCA, *supra* note 2; Rebecca Thurlow, *Australia Cigarette-Packaging Curbs Prompt Suit.*, WALL ST. J. (Nov. 21, 2011), *available at* http://online.wsj.com/article/SB10001424052970204443404577051361355154868.html (last visited Jan. 15, 2014).

19. *Health Warnings*, AUSTL. GOV'T: DEP'T OF AGING (Dec. 4, 2012), *available at* http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn (last visited Jan. 15, 2014).

graphic health warnings have anywhere from 9-19 graphic pictures, any of which must be on a package at all times.[20] According to merchants in Australia, where the plain packages have recently been released into the general market, the plain packages are very hard to differentiate, and make finding specific brands of tobacco or cigarettes hard to locate on the shelf.[21]

B. Packaging Effects on Tobacco Consumption

According to the Australian Minister of Health, "[o]ver the past two decades, more than 24 different studies have backed plain packaging. . ."[22] However, according to economists at the Montreal Economic Institute, "empirical research is inconclusive as [to] the actual effectiveness of [plain packaging], some studies suggest that [it] could on the contrary have unintended negative consequences."[23] In fact, the economists at the Montreal Economic Institute claim that the present graphic health warnings, which "amount [to] partial plain packaging," have no impact on consumption and could possibly have a negative impact on consumption.[24] Most studies that have been conducted agree that removing brand design elements will reduce brand image association.[25] However, the real question to be asked is whether the reduction of brand association will lead to a reduction in tobacco consumption. According to BMJ Group, "[t]hese point-of-sale tobacco advertising and cigarette displays create an enticing in-store presence for youth, and a cue to prompt adult smokers to purchase."[26]

Economists at the Montreal Economic Institute ("MEI") claim that

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20. FCA, *supra* note 2; Thurlow, *supra* note 18.

21. Benjamin Miller, *Traders fear flak at plain pack*, SYDNEY MORNING HERALD (Oct. 29, 2012), *available at* http://www.smh.com.au/small-business/trends/traders-fear-flak-at-plain-pack-20121029-28cbl.html (last visited Jan. 15, 2014).

22. Press Release, Hon. Nicola Roxon MP & Hon. Tanya Plibersek MP, World Leading Plain Packaging Laws Given a Clean Bill of Health (Aug. 15, 2012), *available at* http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/1849762/upload_binary/1849762.pdf;fileType=application%2Fpdf#search=%22media/pressrel/1849762%22 (last visited Jan. 15, 2014).

23. Michel Kelly-Gagnon & Youri Chassin, *Plain Packaging and its Unintended Consequences*, MONTREAL ECON. INST. (Aug. 2011), *available at* http://www.iedm.org/files/note0811_en.pdf (last visited Jan. 15, 2014).

24. *Id.*

25. M. A. Wakefield, D. Germain & S. J. Durkin, *How does increasingly plainer cigarette packaging influence adult smokers' perception about brand image? An experimental study*, 17 BMJ 6 (Sept. 30, 2008), *available at* http://tobaccocontrol.bmj.com/content/17/6/416.full (last visited Jan. 15, 2014).

26. *Id.* (discussing how tobacco packaging that is brightly colored and appealing to the eye is more likely to catch the eye of children and encourage adults to purchase tobacco products).

it is not the appeal of the brand design that encourages tobacco consumption, but rather, the media, peers, and family.[27] The economists argue "that no causal relation has been established between plain packaging of cigarettes and tobacco consumption."[28] In other words, according to the MEI, there is no scientific basis for the promotion of plain packaging, which they define as "removing all distinctive elements. . .associated with a product and replacing them with a generic package that usually includes government mandated warnings."[29]

Further, smoking rates for teens and adults in the United States are similar to Canada's, where graphic health warnings, or "partial plain packaging" according to the MEI, have been in effect for over ten years.[30] Thus, enhancing the idea that plain packaging and graphic health warnings have no real effect on tobacco consumption. While this study purports to refute plain packaging and graphic health warnings, the MEI has been criticized for being a "think tank."[31] Further, the MEI "admitted receiving 3.4% of its total annual budget in 2004 from the tobacco industry" and from 2004 to 2006 it received $135,000 from Imperial Tobacco Canada.[32] Therefore, research by the MEI should be taken with caution.

However, in a more recent study published in January 2013, BioMedical Central validated plain packaging, and thus graphic health warnings.[33] The study concluded that the most likely result of plain packaging and graphic health warnings would be a reduction in smoking for both adults and children, with the greatest reduction in smoking occurring among children.[34] This study recognized the absence of empirical evidence to determine if plain packing works.[35] Therefore, to study this issue, the expert elicitation method was used to

27. Kelly-Gagnon & Chassin, *supra* note 23.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Exposing Recent Tobacco Industry Front Groups and Alliances*, NON-SMOKERS' RIGHTS ASS'N SMOKING & HEALTH ACTION FOUND. 12-13 (Oct. 2008), *available at* http://www.nsra-adnf.ca/cms/file/files/pdf/FrontGroups_Oct_2008.pdf (last visited Jan. 18, 2014).

32. *Id.*

33. Pechey et al., *Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An Elicitation of International Experts' Estimates*, BMC Public Health 1 (2013), *available at* http://www.biomedcentral.com/content/pdf/1471-2458-13-18.pdf (last visited Jan. 18, 2014). BMC Public Health is committed to maintaining high standards through full and stringent peer review. *Id.*

34. *Id.*

35. *Id.*

quantify the uncertainty.[36] Thirty-three tobacco control experts were questioned by telephone and the results were linearly pooled in order to represent the opinion of the "average expert."[37] While the percent reduction in smoking varied between experts, the most important finding from the study was that none of the experts believed plain packaging would increase smoking in either adults or children.[38] Rather, the implementation of plain packaging would likely lead to a reduction in tobacco consumption for both adults and children.[39] This study directly refutes the finding from economists at the MEI, which states that plain packaging could have negative consequences by encouraging, rather than discouraging, tobacco consumption.[40]

Another study, conducted by researchers at Legacy® and Harvard School of Public Health, provides evidence as to the effectiveness of graphic health warnings in reducing tobacco consumption.[41] Further, the study suggests that the regulation set forth in the FSPTCA in the United States would benefit all groups of race and socio-economic status'.[42] Stating that "[g]iven the disproportionate burden of tobacco-related disease faced by the poor and minorities, mandating strong pictorial warnings is an effective and efficient way to communicate the risk of tobacco use."[43] The study examined reactions to graphic health warnings by 3,371 smokers.[44] The results of the study showed that graphic health warnings were more effective than text-only cigarette warnings because the smokers indicated that "the labels were more

36. *Id.*

37. Pechey et al., *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*

41. Press Release, Harv. Sch. of Pub. Health, Graphic warnings on cigarettes effective across demographic groups (Jan. 14, 2013), *available at* http://www.hsph.harvard.edu/news/press-releases/graphic-warnings-on-cigarettes-effective-across-demographic-groups/ (last visited Jan. 21, 2014). "Legacy Research Institute maintains an assurance with the Department of Health's Office of Human Subject Protections to conduct clinical studies, and with the National Institute of Health's Office of Laboratory Animal Welfare to conduct basic research." *Accreditation*, LEGACY HEALTH, *available at* http://www.legacyhealth.org/our-legacy/about-legacy/accreditation.aspx (last visited Jan. 27, 2014).

42. *Id.*

43. *Id.*

44. Jennifer Cantrell, Donna M. Vallone, James F. Thrasher, Rebekah H. Nagler, Shari P. Feriman, Larry R. Muenz, David Y. He, & Kasisomayajula Viswanath, *Impact of Tobacco-Related Health Warning Lables Across Socioeconomic, Race and Ethnic Groups: Results from a Randomized Web-based Experiment*, PLOS ONE (Jan. 14, 2013), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0052206 (last visited Jan. 21, 2014).

impactful, credible, and [had] a greater effect on their intentions to quit."[45] Further, the researchers indicated that the study provided evidence as to the effectiveness of graphic health warnings on tobacco products and that the graphic health warnings in the FSPTCA "would achieve the desired effect. . .[and] enhanc[e] the efficiency and cost-effectiveness of [the] warning label policy."[46]

Regardless of the conclusions from competing studies, no one will really know what effect plain packaging or graphic health warnings will have on tobacco consumption until plain packaging laws have been in effect long enough to measure their impact. Thus, the real questions we must ask ourselves until then is whether graphic health warnings really advance a government interest in the reduction of tobacco consumption, and whether we are willing to limit corporate freedom of speech to find out?

III. TOBACCO PACKAGING IN AUSTRALIA AND CANADA

This section provides a general overview of the status of tobacco packaging in Australia and Canada. Part A discusses the law currently in effect in Australia and the impact of plain packaging on Australian tobacco consumers. Part A.1 discusses the Australian Constitution and intellectual property rights in relation to trade with other countries. Part A.2 explains the recent ruling by Australia's Highest Court. In Part B, these same topics are explored in Canada's Tobacco Products Labelling Regulations. Part B.1 then discusses the Canadian Constitution and free speech. Finally in Part B.2, the impending litigation in the Ontario Superior Court and a ruling by the Supreme Court of Canada in *Canada (Att'y Gen.) v. JTI-Macdonald Corp.*, is discussed.

A. Australia

In 2011, Australia passed the first law of its kind requiring tobacco companies to manufacture their products using plain packaging. This took their law a step beyond any other country by requiring more than just graphic health warnings to be printed on tobacco packaging.[47] The Tobacco Plain Packaging Act 2011 ("TPP Act") requires that all retailers make the switch from the old packages to the new plain packages by December 1, 2012.[48] The TPP Act will "restrict tobacco industry logos, brand imagery, colours and promotional text appearing

45. Harv. Sch. of Pub. Health, *supra* note 41.
46. *Id.*
47. Thurlow, *supra* note 18.
48. Roxon & Plibersek, *supra* note 22.

on packs. Brand names will be standard colour, position and standard font size and style.[49]

Further, each package must have a pictorial warning covering 75% of the front of the package and 90% of the back of the package.[50] This is an increase in size from previous legislation, which went into effect in 2006, that required 30% of the front and 90% of the back of cigarette cartons to have graphic health warnings.[51] According to the Minister of Health, "[n]o longer when a smoker pulls out a packet of cigarettes will that packet be a mobile billboard."[52]

These new packages have statements such as "don't let children breathe your smoke" and "smoking causes blindness."[53] Further, the packages have graphic warnings displaying visually disturbing sights such as diseased lungs, smoker's eye problems, and cancer of the mouth.[54] Parliament enacted the TPP Act to achieve two objectives: (1) improve public health, and (2) regulate tobacco packaging in order to reduce appeal, increase effectiveness of the packaging, and increase awareness of the health consequences associated with using tobacco products.[55] In effect, the second objective is merely a means to achieve the first objective.

1. Australian Constitution and Intellectual Property Rights

All Australians have the right to freedom of speech, association, assembly, religion, and movement.[56] Further, "Australians are free, within the bounds of the law, to say or write what [they] think privately or publicly, about the government, or about any topic."[57] However, the issues concerning recent tobacco litigation involve section 51,

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49. *Id.*

50. Thurlow, *supra* note 18.

51. *Health Warnings*, *supra* note 19.

52. Roxon & Plibersek, *supra* note 22.

53. Rod McGuirk, *Australian court OKs logo ban on cigarette packs*, NBC NEWS (Aug. 15, 2012), *available at* http://www.nbcnews.com/health/australian-court-oks-logo-ban-cigarette-packs-1B5384435 (last visited Jan. 27, 2013).

54. Jonathan Pearlman, *Tobacco companies to challenge Australian plain packaging legislation*, TEL. MEDIA GROUP (Apr. 17, 2012), *available at* http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/9208436/Tobacco-companies-to-challenge-Australia-plain-packaging-legislation.html (last visited Jan. 21, 2013).

55. *Tobacco Plain Packaging Act 2011* (Cth) No. 148 ch. 3 (Austl.), *available at* http://www.comlaw.gov.au/Details/C2011A00148 (last visited Jan. 21, 2012).

56. *Five fundamental freedoms*, AUSTL. GOV'T (2013), *available at* http://www.immi.gov.au/living-in-australia/choose-australia/about-australia/five-freedoms.htm (last visited Jan. 21, 2013).

57. *Id.*

intellectual property rights, and the rights of corporations. Section 51 sets out Parliament's power to make laws affecting peace, order, and good government for the Commonwealth, thus granting parliament general welfare powers.[58] Specifically pertinent to tobacco litigation in Australia is section 51(xxxi).[59] According to section 51(xxxi), the Parliament has the power to make laws through "[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."[60] The term "property" takes on a broad definition and tends to extend to property rights created by statute.[61] Further, the Court in *Bank of NSW v. The Commonwealth*, took the word "property" to extend to "inanimate and anomalous interests. . .include[ing] the assumption and indefinite continuance of exclusive possession and control."[62]

According to the High Court, in order to put into play section 51(xxxi), "it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."[63] However, under section 51(xxxi), the emphasis placed on the acquisition of property was for the benefit of the Commonwealth and not merely the "taking" of private property.[64] Thus, the difference between merely taking versus acquiring is extremely important in determining if section 51(xxxi) has been violated. In order to acquire property, one must also acquire the proprietary rights to the property.[65] The property must be "dedicated or devoted to uses" in that it is used for the purpose of the Commonwealth.[66] Further, "there must be an obtaining of at least *some identifiable benefit or advantage relating to the ownership or use of property*."[67]

Along with questions of infringement on the Australian Constitution through section 51(xxxi), tobacco companies also argued that the TPP Act restricts trademarks in a very harsh manner by requiring tobacco companies to display their company names in a

58. AUSTRALIAN CONSTITUTION s 51.
59. *JT Int'l SA v Commonwealth* [2012] HCA 43 (Austl.).
60. AUSTRALIAN CONSTITUTION s 51(xxxi).
61. *JT Int'l SA* [2012] HCA ¶ 29.
62. *Bank of NSW v. Commonwealth* (1948) 76 CLR 1, 349 (Austl.).
63. *JT Int'l SA* [2012] HCA ¶ 118.
64. *Id.*
65. *Id.* ¶ 144.
66. *Id.*
67. *Id.* ¶ 198.

particular way on their tobacco product packaging.[68] However, intellectual property law and trademark law in Australia are intended to advance public policy concerns as well as protect private interests of rights-holders.[69] Thus, a balancing act must take place between public policy and rights holders to determine which interest is more compelling.

2. Highest Court Ruling

On August 15, 2012, the High Court of Australia, in a six-to-one majority, upheld the

Tobacco Plain Packaging Act 2011, thus rejecting big tobacco's challenge on plain packaging.[70] In arguing their case, the tobacco companies maintained that the Court should adopt a liberal construction of the meaning of "acquisition" in the text of section 51(xxxi).[71] However, the Court stated "[a] liberal construction cannot and does not go as far as the tobacco companies asserted, which would treat any benefit or advantage as a sufficient definition of the constitutional reference to 'property.'"[72] Relying partially on precedent set forth in *The Grain Pool of Western Australia v. The Commonwealth*,[73] *Nintendo Co. Ltd. v. Centronics Systems Pty Ltd.*,[74] and *Phonographic Performance Co. of Australia Ltd. v. The Commonwealth*,[75] the Court ruled that eliminating advertising through plain packaging does not amount to an acquisition of property.[76] Justice Hayne and Justice Bell went on to further state that "[l]egislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the Plain Packaging Act, effect no acquisition of property."[77]

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68. Brian Hendy & Steve Krouzecky, *Plain packaging tobacco products: is there a trademark issue?* INTELL. ASSET MGMT. (Nov. 23, 2011), *available at* http://www.iam-magazine.com/reports/Detail.aspx?g=33e041ff-901b-41c3-a991-db4ed821cda6 (last visited Jan. 20, 2012).

69. *JT Int'l SA* [2012] HCA ¶ 30.

70. Roxon & Plibersek, *supra* note 22.

71. *JT Int'l SA* [2012] HCA ¶ 170.

72. *Id.*

73. *The Grain Pool of Western Australia v Commonwealth*, [2000] HCA 14 (Austl.).

74. *Nintendo Co. Ltd. v Centronics Systems Pty Ltd.* [1994] HCA 27 (Austl.).

75. *Phonographic Performance Co. of Australia Ltd. v Commonwealth*, [2012] HCA 8 (Austl.).

76. Matthew Rimmer, *The High Court and the Marlboro Man: the plain packaging decision*, CONVERSATION (Oct. 18, 2012), *available at* http://theconversation.edu.au/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014 (last visited Jan. 20, 2012).

77. *Id.* (citing *JT Int'l SA* [2012] HCA 42). However, Justice Heydon, in his dissent,

Interestingly, the Court noted that the object of the TPP Act is to improve public health by discouraging people from using tobacco products, but whether this object could be met by these means was not, and could not, be presently known.[78] However, the Court did go on to say the tobacco companies did not make any effort to argue, "that the measures were not appropriate to achieve the statutory objectives or disproportionate to them, or that the legislation was enacted for purposes other than those relating to public health."[79] Further, the Court stated that this was a "rare form of regulation," because it made companies advertise that their product should not be used.[80] It will be interesting to see if the tobacco companies bring suit addressing these issues. The issues noted by the Court that were not addressed seem to be more in line with the idea of freedom of expression recognized in the United States Constitution and the Canadian Charter of Rights and Freedoms because they employ more of a balancing test to determine whether a regulation is constitutional. These protections afforded by the Canadian Charter of Rights and the United States Constitution will be discussed in detail below.[81]

B. Canada

Canada has taken many steps to try to reduce tobacco consumption.[82] In the 1980's "[p]er capita cigarette consumption [in Canada] was among the highest in the world, with over 40% of fifteen to nineteen-year olds reported to be daily smokers."[83] In an attempt to reduce tobacco consumption, Canada has, according to Sweanor, "checked all the boxes."[84] Meaning that after having imposed high taxes on cigarette sales, it has essentially eliminated all advertising and promotion of cigarettes.[85] Additionally, it has reduced the number of retail displays, it has implemented laws that require graphic health warnings, and it has required that additional health information come in

argued that the government was encroaching on the acquisition of the property clause. *JT Int'l SA* [2012] HCA § 170.

78. *JT Int'l SA* [2012] HCA ¶ 371.

79. *Id.* ¶ 372.

80. *Id.*

81. The Canadian Charter of Rights and Freedom is discussed in full in section III.B.1., *infra* pp. 16-19; The United States Constitution and free expression is discussed in full in section IV.B., *infra* pp. 24-25.

82. David Sweanor, *A Canadian's Perspective: Limits of Tobacco Regulation*, 34 WM. MITCHELL L. REV. 1595, 1596 (2008).

83. *Id.*

84. *Id.* at 1598.

85. *Id.* at 1596.

every package of tobacco.[86] By implementing all of these regulations, Canada was able to reduce its per capita consumption for fifteen to nineteen-year olds in 2006.[87] While this has no doubt been a victory for tobacco control efforts, Canada has not recently seen any major reductions in consumption.[88]

In 1995, the Federal government of Canada considered and rejected a proposal implementing plain packaging.[89] However, Canada was the first country to require tobacco companies to manufacture tobacco packaging with graphic health warnings.[90] In 2000, Canada adopted the Tobacco Products Information Regulations ("TPIR") under the Tobacco Act, which required "graphic health warnings" on tobacco packaging and "mandated the inclusion of health messages" in the tobacco packaging.[91]

Fast-forward eleven years and the TPIR has been replaced by the Tobacco Products Labelling Regulations (Cigarettes and Little Cigars) ("TPLR-CLC").[92] According to Health Canada, the TPLR-CLC is "an important component of the Federal Tobacco Control Strategy, which aims to reduce the smoking rates in Canada."[93] The TPLR-CLC sets fourth four major differences from the TPIR by requiring that: (1) graphic health warnings cover 75% of the front and back of cigarette and little cigar packages; (2) new graphic health warning messages and new health information messages, (3) a pan-Canadian toll-free quit line and web address be displayed; and (4) easy-to-understand toxic emission standards be displayed.[94] Further, both the health warning messages and the health information messages are enhanced with colors.[95]

Currently, Canada requires that 75% of the front and back of the

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86. *Id.*

87. Sweanor, *supra* note 82, at 1598.

88. *Id.* at 1596; Tilson, *supra* note 15.

89. Kelly-Gagnon & Chassin, *supra* note 23.

90. Press Release, Physicians for a Smoke-Free Can., Australian court ruling shows that governments should stand up to tobacco industry bullying, (Aug. 15, 2012), *available at* http://www.smoke-free.ca/eng_home/2012/news_press_15_Aug_2012.htm (last visited Jan. 20, 2012).

91. *Tobacco Products Information Regulations,* HEALTH CAN. (Nov. 30, 2011), *available at* http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/reg/prod/index-eng.php (last visited Jan. 22, 2014).

92. *Id.*

93. *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, HEALTH CAN. (May 7, 2012), *available at* http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/reg/label-etiquette/index-eng.php (last visited Jan. 22, 2014).

94. *Id.*

95. *Id.*

packaging contain a graphic pictorial health warning.[96] This is an increase from 2010, when graphic health warnings only covered 50% of the front and back of the packaging.[97] According to Cynthia Callard of Physicians for a Smoke-Free Canada, the government is not doing enough and has fallen behind in researching.[98] While the Canadian government has hoped to reduce litigation by not implementing plain packaging, tobacco companies have challenged the increased regulations imposed by the TPLR-CLC.[99] Tobacco companies argue that the regulation violates their constitutional right to freedom of expression, which is guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms.[100]

1. Canadian Charter of Rights and Freedoms and Freedom of Expression

"Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief,

opinion and expression, including freedom of the press and other means of communication."[101] In *Irwin Toy Ltd. v. Quebec*, the Supreme Court of Canada ruled that freedom of expression extended to commercial expression by corporations.[102] Thus, the term "everyone," referenced in 2(b) of the Charter, includes corporations.[103] The Court justified extending freedom of expression to corporations because it would allow the consumer to obtain necessary information so the consumer could make a decision about what products to purchase.[104]

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96. Kelly-Gagnon & Chassin, *supra* note 23.

97. *Id.*

98. *See* Physicians for a Smoke-Free Can., *supra* note 90.

99. *Id.*

100. *See* Leah McDaniel, *Tobacco Advertising Rules Go Back to Court. . .Again*, CENTRE FOR CONST. STUD. (May 24, 2012), *available at* http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/25-other/68-tobacco-advertising-rules-go-back-to-court-again (last visited Jan. 22, 2014).

101. Canadian Charter of Rights and Freedoms, s. 2(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.).

102. Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927 (Can. Que.). The Supreme Court of Canada further upheld the idea that freedom of expression extends to corporate speech in 2007 in *JTI-Macdonald*. Canada (Att'y Gen.) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610 (Can.).

103. Canadian Charter of Rights and Freedoms, *supra* note 101.

104. *See* Ford v. Quebec (Att'y Gen.), [1988] 2 S.C.R. 712, 766-67 (Can. Que.). Specifically, the court in *Ford* ruled that commercial expression enjoys protection from the Charter because it "plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy." *Id.* at 766.

Further, the government can only strip someone's (person or corporation) freedom of expression by providing a "demonstrably justified" reason supported by some evidence for stripping that freedom.[105] Specifically, Section 1 of the Charter states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[106]

The courts interpretation of Section 1 of the Charter puts in place a proportionality analysis to determine if the government's interest in restricting freedom of expression is justified. In order to determine if the government has satisfied its burden, the Court in *R. v. Oakes* created a proportionality test.[107] The three-part test of proportionality states:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[108]

Therefore, if the government wants to limit someone's freedom of expression it must be "demonstrably justified."[109] The "demonstrably justified" test set out in *Oakes* can be translated into a four-part test. First, the government must have an interest of "sufficient importance."[110] Second, its means must be rationally connected.[111] Third, its means must impair as little as possible.[112] Lastly, the effects of the limitation must be proportional to the objective.[113] The Court in *Oakes* went on to state that the government's objective must be

105. *See* Canadian Charter of Rights and Freedoms, *supra* note 101; *see also JTI-Macdonald Corp.*, 2 S.C.R. at 664.

106. *See* Canadian Charter of Rights and Freedoms, *supra* note 101.

107. R. v. Oakes, [1986] 1 S.C.R. 103, 139 (Can.).

108. *Id.*

109. *See* Canadian Charter of Rights and Freedoms, s. 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.); *see Oakes*, 1 S.C.R. at 139.

110. *Oakes*, 1 S.C.R. at 139.

111. *Id.*

112. *Id.*

113. *Id.*

"pressing and substantial."[114] If an act by the government does not satisfy all four elements then it is seen as unjustifiably infringing on section 2(b) of the Charter and cannot be upheld.[115]

2. The Supreme Court of Canada and the Ontario Superior Court

Imperial Tobacco Ltd. and *JTI-Macdonald Corp.* represent the most recent challenges to

the increase in size of graphic health warnings from 50% to 75% under the TPLR-CLC filed in the Ontario Superior Court.[116] It is unclear how the Ontario Superior Court will handle this new challenge. However, in 2007, the Supreme Court of Canada in *Canada (Attorney General) v. JTI-Macdonald Corp.* found the portion of the Tobacco Act that increased graphic health warnings from 33% to 50%, constitutional.[117] While the court did find that the graphic health warnings were an infringement on free expression, it stated that the restriction did not violate section 1 of the Charter because it was pressing and substantial, and "demonstrably justified in a free and democratic society."[118]

In making its decision, the Court in *JTI-Macdonald Corp.* set out three reasons why the regulation was justified.[119] First, the Court stated that the graphic health warnings were an effective way to notify the public of the health dangers associated with smoking and that this conclusion was supported by a "mass of evidence."[120] This justification satisfies the second element set out in *Oakes*.[121] The Court further saw the tobacco companies' resistance to the increase in the size of the graphic health warning as evidence that the warnings have an effect on consumers and is a threat to tobacco companies.[122] Second, the Court found that the increase in warning size was justified and reasonable because evidence demonstrated that larger warnings might have greater effects on consumption, and other countries that already required larger

114. *Id.* at 138-39.

115. *See* Canadian Charter of Rights and Freedoms, *supra* note 101; *Oakes*, 1 S.C.R. at 103.

116. McDaniel, *supra* note 100.

117. *Id.*

118. *JTI-Macdonald*, 2 S.C.R at 628. The Court went on to describe how to determine if a government objective is "demonstratively justifiable" by referencing a three part proportionality test set out in *Oakes*. *Id.* at 628-29.

119. McDaniel, *supra* note 100.

120. *JTI-Macdonald*, 2 S.C.R. ¶ 135.

121. *Oakes*, 1 S.C.R. at 139.

122. *JTI-Macdonald*, 2 S.C.R ¶ 136.

warnings than Canada supported this requirement.[123] This justification, it can be argued, satisfies the third element set out in *Oakes* because other countries have implemented more stringent regulations, therefore, the TPLR-CLC is not more extensive than necessary because it is not as extensive as other similar regulations in other countries.

Lastly, the Court found that the regulation was proportional in that "[t]he benefits flowing from the larger warnings are clear. The detriments to the manufactures' expressive interest in creative packaging are small."[124] This justification satisfies the last element set out in *Oakes* because it addresses the proportionality of the regulation in relation to its objective, deeming that based on the competing interests of public health and the interests of the tobacco companies, public health has a greater importance and deserves more protection than the tobacco companies. While the Court did not address whether the objective set out by the TPLR-CLC was "demonstrably justified" or of "sufficient importance" directly, it was not necessary because the Supreme Court of Canada had already ruled that previous graphic health warnings were constitutional.[125] Therefore, the Supreme Court already determined that reducing tobacco consumption among adults and teens was "demonstrably justified" and of "sufficient importance."

IV. TOBACCO PACKAGING IN THE UNITED STATES

This section provides a general overview of the status of tobacco packaging in the United

States. Part A discusses the FSPTCA that was passed in 2009 to regulate tobacco packaging. Next, Part B discusses the commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* and then begins the discussion of the current split between the Sixth Circuit and the D.C. Circuit on the constitutionality of the FSPTCA.Part B.1 explains the ruling in *Discount Tobacco* in regards to the FSPTCA., while Part B.2, explains the ruling in *R.J. Reynolds* in regards to the FSPTCA.

123. *Id.* ¶¶ 137-38.

124. *Id.* ¶ 139.

125. McDaniel, *supra* note 100.

A. The Family Smoking Prevention and Tobacco Control Act

On June 22, 2009, President Obama signed the FSPTCA.[126] According to the FDA the act "gives the Food and Drug Administration (FDA) the authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health."[127] Further, it requires tobacco companies to print bigger, more prominent warning labels on cigarette and smokeless tobacco packaging.[128] The goal of the FSPTCA is to "curb the trend of new users becoming addicted before they are old enough to understand the risks and ultimately dying too young of tobacco-related diseases."[129]

To further the goal of the FSPTCA, the FDA has required tobacco companies to revise their warning labels with larger font sizes and limit the "color and design of packaging and advertisements, including audio-visual advertisements."[130] It has also required that tobacco companies limit their font colors to white on black background or black on white background while also prohibiting the use of terms such as "light," "low," or "mild."[131] Further, with the implementation of the FSPTCA, tobacco companies are required to place graphic health warnings on the top 50% of the front and the back of their cigarette packaging.[132] The FDA has created nine graphic warning messages, which "must be accompanied by color graphics showing the negative health consequences of smoking cigarettes."[133] Further, these nine graphic health warnings must be "equally and randomly displayed and distributed in all areas of the United States."[134] Smokeless tobacco product packaging has similar requirements as cigarette packaging.[135] The graphic warning label must cover 30% of both principle display panels, "and the four specific required messages must be equally and

126. Stephanie Jordan Bennett, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 MISS. L.J. 1909, 1910 (2012).

127. U.S. FOOD & DRUG ADMIN., OVERVIEW OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT: CONSUMER FACT SHEET, *available at* http://www.fda.gov/tobaccoproducts/guidancecomplianceregulatoryinformation/ucm246129.htm (last visited Jan. 21, 2013) [hereinafter "FSPTCA fact sheet"].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. FSPTCA fact sheet, *supra* note 127.

133. *Id.*

134. *Id.*

135. *Id.*

randomly displayed and distributed in all areas of the United States."[136]

Currently, the status of the FSPTCA is unknown.[137] Certain provisions of the FSPTCA are being litigated to determine their constitutionality.[138] The rulings in *Discount Tobacco* and *R.J. Reynolds* are currently under appeal and, until they are resolved, the future of the FSPTCA is unknown.[139] These cases effectively created a circuit split on the issue of the constitutionality of the FSPTCA because different standards of review were applied. With such a prominent split in decisions between circuits, it is likely this issue will not be resolved until it reaches the United States Supreme Court.

B. The Central Hudson Test and the Circuit Split

On August 24, 2012, the D.C. Circuit court in *R.J. Reynolds* handed down a decision that created a split between the D.C. Circuit and the Sixth Circuit on the constitutionality of whether the FDA could require tobacco companies to print graphic health warnings on their products.[140] The court in *R.J. Reynolds* ruled that the government could not require tobacco companies to "go beyond making purely factual and accurate commercial disclosure[s] and undermine its own economic interest – in this case by making 'every single pack of cigarettes in the country [a] mini billboard' for the government's anti-smoking message" – because it would violate the First Amendment.[141] In contrast, the court in *Discount Tobacco* found that the FSPTCA was permissible under the First Amendment.[142]

Both cases analyzed the constitutionality of regulating commercial speech through provisions of the FSPTCA using the test set out in *Central Hudson*.[143] Under *Central Hudson*, the Court determined that if

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136. *Id.*

137. *Family Smoking Prevention and Tobacco Control Act Litigation Update*, *available at* http://publichealthlawcenter.org/sites/default/files/tclc-fs-tobaccocontrolact-litigation-update-4-2013_0.pdf (last visited Jan. 28, 2014)

138. *Id.*

139. *Id.*

140. Nicholas J. Wagoner, *D.C. Circuit Creates Circuit Split Over Graphic Cigarette Warning Labels*, CIRCUIT SPLITS (Aug. 27, 2012), *available at* http://www.circuitsplits.com/2012/08/dc-circuit-creates-circuit-split-over-graphic-cigarrette-warning-labels.html (last visited Jan. 22, 2014).

141. R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1212 (D.C. Cir. 2012). The D.C. Circuit, unlike the Sixth Circuit, found the requirements of the federal law to go beyond ordinary disclosure requirements and, therefore, different standards of review were applied. *Id.*

142. *Discount Tobacco*, 674 F.3d at 551.

143. *Id.*; *R.J. Reynolds* 696 F.3d at 1212.

commercial speech is to be protected under the First Amendment, the speech must first involve or concern a legal transaction.[144] If the speech meets that threshold, and is also not misleading or untruthful, then it is afforded protection under the First Amendment and the government must prove that: (1) the regulation serves a substantial interest, (2) the regulation's means directly advance that interest, and (3) the regulation's means are not more extensive than necessary.[145] If the government proves those three elements, then the regulation will likely be found constitutional. However, if a regulation deals with purely factual disclosures of product information, then the commercial speech is not afforded the same heightened protection under *Central Hudson*, and instead it is afforded rational-basis review.[146] At issue between the circuits was the difference in the standard of review applied to graphic health warnings under the FSPTCA.[147] However, both circuits addressed whether graphic health warnings directly advance the government interest and whether they are not more extensive than necessary, which are both key components to the *Central Hudson* test.[148]

C. Discount Tobacco City & Lottery, Inc.

On March 19, 2012, the Sixth Circuit issued its decision in *Discount Tobacco* upholding almost all aspects of the FSPTCA.[149] The Court concluded that tobacco marketing is a major cause of youth smoking.[150] It stated that "[the tobacco companies] would have us believe that there is no causal connection between product advertising and the consumer behavior of children, [but] such a claim stretches the bounds of credibility, even in the absence of the extensive record submitted by the government, which indicates the contrary."[151] Further, the Court stated that the massive amount of money spent on tobacco

144. Brian E. Mason, *Tobacco Manufacturers and the United States Government: Ready for Battle*, 15 SMU SCI. & TECH. L. REV. 555, 564 (2012).

145. *Id.*

146. *Id.*; *Discount Tobacco*, 674 F.3d at 558.

147. *Discount Tobacco*, 674 F.3d at 551; *R.J. Reynolds*, 696 F.3d at 1212. A discussion on the standard of review will be discussed for each case in full in sections IV.B.1. & IV.B.2., *infra* pp. 26-31.

148. *Discount Tobacco*, 674 F.3d at 551; *R.J. Reynolds*, 696 F.3d at 1233.

149. *Tobacco Product Sales Regulation*, NEW ENG. L. BOS. (Feb. 12, 2013), *available at* http://tobaccopolicycenter.org/tobacco-control/recent-cases/tobacco-product-sales-regulation (last visited Jan. 22, 2014).

150. *Discount Tobacco*, 674 F.3d at 541.

151. *Id.* at 539-40.

advertising (approximately $13 billion in 2005)[152] was largely for "(1) attracting new young adult and juvenile smokers, and (2) brand competition in the young adult and juvenile market."[153] The Court, relying on and giving substantial deference to Congress's findings, reasoned through empirical data that it was unlikely tobacco companies spent $13 billion on advertising to get adults to switch brands when in reality tobacco users were extremely brand loyal and unlikely to switch products.[154]

In reaching its decision, the Court discussed different aspects of the FSPTCA.[155] Most notably it discussed graphic health warnings, Modified Risk Tobacco Product (MRTP) Regulation, and the ban on the use of color and graphics.[156]

First, the Court, in a two-to-one decision, upheld the requirement that tobacco companies print graphic health warnings on the top 50% of cigarette packages and 20% of all tobacco advertising.[157] To come to this part of its conclusion, the Court did not apply the *Central Hudson* test because it reasoned that the tobacco companies engaged in providing misleading information to its consumers.[158] The Court stated that the tobacco companies "knowingly and actively conspired to deceive the public about health risks and addictiveness of smoking for decades."[159] Further, the Court relied on evidence gathered by Congress (through international experience)[160] to conclude, "larger warnings [including graphic health warnings] materially affect consumers' awareness of the health consequences of smoking and decisions regarding tobacco use."[161]

Second, the Court found that the MRTP did not unconstitutionally restrain commercial speech because it met the requirements set out in *Central Hudson*.[162] The Court reasoned that the government could prevent tobacco companies from placing words such as "light," "mild," "low," or similar identifiers on its packaging because it had a substantial

152. *Id.* at 540.

153. *Id.*

154. *Id.* at 521, 540.

155. *Discount Tobacco*, 674 F.3d at 520-21.

156. *Id.*

157. *Id.* at 518.

158. *Id.* at 527.

159. *Id.* at 562.

160. Mason, *supra* note 144, at 584 (stating that Congress heavily relied on the international consensus found in the World Health Organization Framework Convention on Tobacco Control in drafting the Tobacco Control Act).

161. *Discount Tobacco*, 674 F.3d at 530.

162. *Id.* at 537.

interest in protecting consumers from misunderstanding these terms by interpreting them as less harmful.[163] To determine that the government had established a substantial interest, the Court relied on Congressional evidence establishing a pattern of deceptive advertising and the likelihood of future deception.[164] Lastly, the Court found that the government had satisfied the elements under the *Central Hudson* test, requiring the regulation's means to directly advance the interest and not be more extensive than necessary because "[t]here [was] no indication that the provision suppresses non-commercial speech relating to nonspecific tobacco products."[165] The Court went on to further state that while there may be less restrictive means to deal with the harm associated with the MRTPR, the MRTPR was not more extensive than necessary.[166] The Court stated that "the government is at play in the major leagues, and the alternatives suggested by [the tobacco companies] have already been tried and found wanting."[167]

Third, the Court ruled that the ban on the use of color and graphics was too broad because it would apply in situations where the tobacco packaging would have no appeal to youth.[168] The Court stated that the government could prove that it had a "substantial interest in alleviating the effects of tobacco advertising on juvenile consumers."[169] However, it was not able to prove the second prong of the *Central Hudson* test because the restriction was too broad.[170] The Court did suggest that a more narrowly tailored provision would pass constitutional muster under *Central Hudson*.[171]

D. R.J. Reynolds Tobacco Co.

In August 2012, the D.C. Circuit ruled that the FSPTCA's requirement that tobacco companies place graphic health warnings on their packaging was unconstitutional.[172] In making its decision, the Court applied the *Central Hudson* test, arguing that this case involved compelled commercial speech.[173] The Court made this decision based

163. *Id.* at 534.
164. *Id.* at 535.
165. *Id.* at 536.
166. *Discount Tobacco*, 674 F.3d at 537.
167. *Id.*
168. *Id.* at 548.
169. *Id.*
170. *Id.*
171. *Discount Tobacco*, 674 F.3d at 548.
172. *R.J. Reynolds*, 696 F.3d at 1219.
173. *Id.* at 1217-18.

on the previous ruling in *United States v. Philip Morris*, where compelled commercial speech was entitled to intermediate scrutiny.[174] Specifically the Court in *Philip Morris* stated that "the Supreme Court's bottom line is clear: the government must affirmatively demonstrate its means are narrowly tailored to achieve a substantial government goal."[175]

Under the first prong of the *Central Hudson* test, the Court states that the FDA intended the graphic health warnings "engage current smokers to quit and dissuade other consumers from ever buying cigarettes."[176] The Court further stated that the only interest the graphic health warnings purports to have is the "substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products."[177] The Court did not address whether this interest is a "substantial government interest," but rather, assumed that the FDA's interest was substantial.[178] Therefore, the Court moved directly into determining if the FDA offered substantial evidence, meaning more than mere conjecture or speculation, demonstrating that the graphic warnings directly advanced the government's interest.[179]

Under the second prong of the *Central Hudson* test, the Court ruled that the FDA must provide evidence that the graphic health warnings would reduce smoking rates, rather than just educate consumers.[180] Stating that the "FDA has not provided a shred of evidence – much less the 'substantial evidence' required by the APA – showing that the graphic health warnings will 'directly advance' its interest in reducing the number of Americans who smoke."[181] Further, the Court was unwilling to use evidence from other countries[182] to show that the graphic health warnings would reduce smoking rates because the evidence could not demonstrate that the graphic warnings themselves directly caused the reduction in tobacco use.[183] Other tobacco control

174. *Id.*

175. United States v. Phillip Morris, 566 F.3d 1095, 1142-43 (D.C. Cir. 2009); *R.J. Reynolds* 696 F.3d at 1217.

176. *R.J. Reynolds*, 696 F.3d at 1218.

177. *Id.*

178. *Id.*

179. *Id.* at 1219.

180. *Id.*

181. *R.J. Reynolds*, 696 F.3d at 1219.

182. This is contrary to *Discount Tobacco* where the Court was willing to accept evidence provided by Congress that relied heavily on international consensus. Mason, *supra* note 144, at 584.

183. *R.J. Reynolds*, 696 F.3d at 1218-19.

measures had been put in place[184] at the same time making it impossible to differentiate between the other control measures and the graphic health warnings.[185] The Court argued that as a result, this evidence merely provided speculation and conjecture.[186]

Further, the Court stated that studies in Canada and Australia do no more than provide "mere speculation to suggest that respondents who report increased *thoughts* about quitting smoking will actually follow through on their intentions."[187] Moreover, the Court cites other Australian and Canadian studies that suggest the large graphic health warnings might convince smokers to reduce their tobacco consumption.[188] The Court is quick to note that these studies did not show that the graphic health warnings actually reduced consumption, and therefore, they were not substantial enough to show that the graphic health warnings would directly advance the FDA's interest.[189] However, by referencing other nations the Court opened the door to possible jurisprudence and recognition of foreign nations policy measures.

In conclusion, the Court stated that the government's attempt to "level the playing field" in this way was not appropriate.[190] The Court cited the recent Supreme Court case, *Sorrell v. IMS Health*, which stated that even regulations backed by persuasive evidence are subject to scrutiny before they can be permitted.[191] Therefore, the government must show a substantial interest in which the regulation directly advances in order for the regulation to pass constitutional muster.[192] In this case the government failed to present sufficient evidence that the regulation would directly advance the government interest, and as a result, the regulation did not pass constitutional muster under the *Central Hudson* test.[193]

184. When Canada implemented graphic health warnings it also mandated the inclusion of health messages within the tobacco packaging. *Tobacco Products Information Regulations*, *supra* note 91.

185. *R.J. Reynolds*, 696 F.3d at 1219.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *R.J. Reynolds*, 696 F.3d at 1221.

191. *Id.* at 1222 (citing Sorrell v. IMS Health Inc., 131 S.Ct. 2653, 2671 (2011)).

192. *Id.*

193. *Id.*

V. IS THE FAMILY SMOKING PREVENTION TOBACCO CONTROL ACT CONSTITUTIONAL?

This section discusses why the Supreme Court of the United States ("Supreme Court") should determine that the FSPTCA does not violate commercial speech protected by the First Amendment.[194] First, this section discusses whether the FSPTCA is constitutional by addressing the provision that implements graphic health warnings. Part A will discuss the policy measures set forth in Australia and how they can be applied to help establish the constitutionality of the FSPTCA. Part B will discuss the court rulings and policy measures in Canada and how they affect the constitutionality determination. Lastly, Part C will discuss graphic health warnings under the FSPTCA and why the Supreme Court should look to policy measures in Canada and Australia. Further it will discuss why deference should be given to Canadian courts to find the FSPTCA constitutional under the *Central Hudson* test.

A. Australia and Canada's Part in Determining the Constitutionality of the FSPTCA

While the FSPTCA does more than implement graphic health warnings, the split between the D.C. Circuit and the Sixth Circuit, shows that the provision addressing graphic health warnings is the most controversial. Both Australia and Canada now require graphic health warnings on all tobacco packaging.[195] While it is hard to determine whether the efforts in Australia have been effective, it is hard to deny that Canadian tobacco regulation helped reduce the amount of youth smokers within the last fifteen years.[196]

1. Australia's Plain Packaging Guides the Way for the FSPTCA

Australia has gone further than the FSPTCA in terms of regulating tobacco marketing. Australia has implemented plain packaging and graphic health warnings while the FSPTCA requires tobacco companies to print large graphic health warnings on its tobacco packaging.[197] While the Australian plain packaging provisions require graphic health warnings and strip tobacco-packaging products of any logos, trade

194. The Supreme Court usually addresses issues on which circuits are split once three circuits have addressed the issue, however, because this is a conflict over the constitutionality of an administrative regulation it may be heard sooner. Wagoner, *supra* note 140.

195. Roxon & Plibersek, *supra* note 22; Kelly-Gagnon & Chassin, *supra* note 23.

196. Sweanor, *supra* note 82, at 1597.

197. Roxon & Plibersek, *supra* note 22; FSPTCA fact sheet, *supra* note 127.

colors, descriptive words, or specialized font size and style,[198] it can be, and will likely be, a way of measuring graphic health warnings affect on tobacco consumption, especially on youth. It is unlikely the U.S. will ever go as far as Australia and implement plain packaging because the U.S. Constitution protects freedom of speech more stringently than the Australian Constitution.[199] This largely has to do with the difference in limited, as opposed to, required speech. If the government compels restrictions on commercial speech, then heightened scrutiny is necessary.[200] However, if speech is limited to simple factual disclosures, heightened scrutiny is not necessary and rather, rational-basis review is required.[201]

The High Court in Australia admitted that it was not certain whether plain packaging would advance the goals of the TPP Act.[202] Further, Australian Attorney-General, Nicola Roxon, stated that she believed plain packaging would reduce tobacco consumption, but also noted that because Australia was the first country to try this approach other countries would have to watch to determine if this was the route they wish to take.[203] It is just too soon to know whether plain packaging will have the desired effects the government hopes it will have. This uncertainty, especially among youth tobacco consumers, is precisely the problem the Court in *R.J. Reynolds* had with implementing graphic health warnings.

Presently, it is unclear whether implementing plain packaging and graphic health warnings will advance the Australian government's interest in reducing tobacco consumption. While this is currently problematic, once the TPP Act has been in place for a few years, the problem will diminish because reliable, statistical evidence will be available. Further, it should be noted that tobacco companies strongly oppose plain packaging and graphic health warnings, which does suggest that these restrictions may have a positive effect on reducing tobacco consumption. It also suggests that these efforts would directly advance the government's interest. Fortunately for the tobacco companies, the FSPTCA is not trying to implement plain packaging. Rather, the FSPTCA wants to implement graphic health warnings, a less restrictive approach, and something that has been done in Canada for

198. Tilson, *supra* note 15.
199. *Five fundamental freedoms*, *supra* note 56; U.S. CONST. amend. I.
200. *R.J. Reynolds*, 696 F.3d at 1212.
201. *Discount Tobacco*, 674 F.3d at 558.
202. *JT Int'l SA* [2012] HCA ¶ 170.
203. McGuirk, *supra* note 3.

over ten years.

2. *Canada's Graphic Health Warnings Set a Precedent for the FSPTCA*

The Canadian Charter of Rights and Freedoms is very similar to the U.S. Constitution, especially with regards to the protection of speech.[204] Further, Canadian courts implement a proportionality test similar to the *Central Hudson* test found in the U.S. to determine if the government's interest in restricting freedom of expression is justified.[205] Taking that into consideration, Canada has required tobacco companies to print graphic health warnings on their packaging for over ten years.[206] Currently, Canada's graphic health warnings cover 75% of the front and back of cigarette packaging.[207] While Canada did implement other means of reducing tobacco consumption when it implemented graphic health warnings,[208] it would be wrong to say that graphic health warnings had no effect on the reduction of tobacco consumption. While the effect that each portion of the TPLR-CLC had on tobacco consumption may not be certain, it is safe to say that the graphic health warnings had some positive effect on reducing tobacco consumption. Further, the Supreme Court of Canada found TPLR-CLC was justified.[209]

The Supreme Court of Canada applied the *Oakes* proportionality test when determining whether the TPLR-CLC violated the freedom of expression provisions contained in the Canadian Charter of Rights and Freedoms.[210] The *Oakes* test requires that the regulation be designed to achieve the state objective, "impair as little as possible," and that the means be proportional to the state objective.[211] The Court found that the TPLR-CLC was "demonstrably justified" and that the objective was "pressing and substantial."[212] Further, the Court stated that there was a "mass of evidence" to support this conclusion.[213] Canada looked to

204. Canadian Charter of Rights and Freedoms, *supra* note 101.

205. *Oakes*, 1 S.C.R. at 139.

206. Sweanor, *supra* note 82, at 1596.

207. *Tobacco Products Information Regulations*, *supra* note 91.

208. When Canada implemented graphic health warnings it also also mandated the inclusion of health messages within the tobacco packaging. *Id.*

209. McDaniel, *supra* note 100.

210. *Oakes*, 1 S.C.R. at 139.

211. *Id.*

212. *JTI-Macdonald*, 2 S.C.R 610. The Court went on to describe how to determine if a government objective is "demonstratively justifiable" by referencing a three part proportionality test set out in *Oakes*. *Id.*

213. *JTI-Macdonald*, 2 S.C.R. 601, para. 135.

other countries to determine whether the graphic health warnings were effective.[214] The Court did not know how much effect larger warnings would have on tobacco consumption but found that this notion was supported through other countries implementing larger graphic health warnings than they required.[215]

Lastly, the Court determined that the detriments of implementing larger graphic health warnings were minor in comparison to the benefits the public would receive. Thus, the larger graphic health warnings were justified.[216] One of the key points from looking at the Canadian law is that the proportionality test set out in *Oakes* is very similar to the proportionality test contained in *Central Hudson*. This is important because this directly advances the idea that the Supreme Court should consider the jurisprudence of the Canadian court decision. The other important key point is that the policy measures set out in Canada have been effective and the Supreme Court should take this into consideration when addressing the proof of direct advancement.

B. FSPTCA's Graphic Health Warnings are Constitutional

If the Supreme Court is to hear issues regarding the constitutionality of graphic health warnings it should consider foreign legal attempts to affect change and it should be influenced by and recognize jurisprudence from other countries. The issue that appears in the circuit split addresses the current law regarding corporate speech.[217] The legitimacy of the FSPTCA depends on whether it is an imposition on the freedom of expression of corporations similar to that observed in Canada. A key difference in the circuit split is the difference in the standard of review.[218] The Sixth Circuit found graphic health warnings were factual disclosures that were not entitled to the heightened scrutiny set out in *Central Hudson*,[219] while the D.C. circuit applied the more stringent standard of review set out in *Central Hudson* for compelled commercial speech.[220] Whether the more stringent standard is applied to graphic health warnings should not matter because they will likely

214. *Id.* para. 137-38 (citing policy precedent set out in Australia, Belgium, Switzerland, Finland, Singapore, Brazil and the European Union).

215. *Id.*

216. *Id.* ¶ 139.

217. Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 527 (2012); *R.J. Reynolds*, 696 F.3d at 1208.

218. *Discount Tobacco*, 674 F.3d at 527; *R.J. Reynolds*, 696 F.3d at 1217.

219. *Discount Tobacco*, 674 F.3d at 558.

220. *R.J. Reynolds*, 696 F.3d at 1234-35. The Sixth Circuit applied rational-basis review, while the D.C. Circuit applied intermediate scrutiny. *Id.*

pass constitutional muster under *Central Hudson* if the Supreme Court looks to law (both policy measures and court rulings) from other countries.[221]

Under the *Central Hudson* test, a regulation on commercial speech must serve a substantial interest, its means must directly advance the interest, and its means must not be more extensive than necessary.[222] The court in *R.J. Reynolds* did not think there was enough evidence to support the requirement of graphic health warnings in the FSPTCA.[223] However, in *R.J. Reynolds*, the Court failed to look to Canadian or Australian law to make its decision.[224] It did, however, concede that reference to other nations success is relevant to the determination of whether graphic health warnings advance the interest.[225] The issues that must be addressed to determine if the graphic health warnings under the FSPTCA pass constitutional muster under *Central Hudson* are: (1) whether the means directly advance the interest, and (2) whether the means are not more extensive than necessary.[226]

With new studies being conducted and more policies being put in place, it is only a matter of time before enough evidence is gathered to demonstrate that graphic health warnings reduce tobacco consumption. Further, this issue is not yet before the Supreme Court. Health agencies in favor of implementing graphic health warnings still have time to collect more evidence that graphic health warnings will have the desired effect. The Court in *R.J. Reynolds* was not willing to infringe on commercial speech until it was more certain that the graphic health warnings would have the desired effect. At this time, lack of evidence is the only thing standing in the way of implementing graphic health warnings. However, if deference is given to other countries' policies and judicial decisions the lack of evidence in this country becomes less persuasive.

The role of uncertainty in innovative policy making makes the application of *Central Hudson* difficult. How we determine the effectiveness of innovative legislation can be a problem. Therefore, there is a need for deference to other countries in determining whether the means (graphic health warnings) advance the government's interest.

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221. *Disount Tobacco*, 674 F.3d at 565-66.

222. Mason, *supra* note 144, at 564.

223. *R.J. Reynolds*, 696 F.3d at 1219.

224. *Id.*

225. *Id.* The D.C. Circuit stated that there was not an adeqate amount of evidence directly advancing the interest, however, it did this by direct reference to empiracal data from other countries. *Id.*

226. Mason, *supra* note 144, at 564.

The fact that the Ontario Superior Court found TPLR-CLC was justified speaks directly to how the Supreme Court should view the FSPTCA and graphic health warnings. The Supreme Court generally does not give deference to other nation's courts; however, Canada's rights on commercial speech are so similar to the U.S. that it would be negligent not to consider how its courts have ruled on the issue. Therefore, the Supreme Court should look to national court jurisprudence of other countries.

Further, the Supreme Court should look to national policy experiences of other countries. The Courts in both *Discount Tobacco* and *R.J. Reynolds* opened the door to this type of national policy analysis.[227] Canada has had great success in reducing the number of smokers through the TPLR-CLC. Further, the study just released by the BioMedical Center supports the implementation of plain packaging and graphic health warnings that Australia has adopted.[228] The BioMedical center stated that plain packaging and graphic health warnings would reduce child consumption by 2% (nearly 100,000 people) and adult consumption by 1% (nearly 500,000 people) in two years.[229] While plain packaging does more than just implement graphic health warnings, a reduction in tobacco consumption by 3% (nearly 9,417,421 people in the U.S.) is a significant number. Further, tobacco company opposition demonstrates presumed efficacy, which the Supreme Court in Canada found compelling.[230] There are significant differences between Australia's plain packaging and Canada's graphic health warnings, however, it is hard to deny that graphic health warnings will not have some impact on tobacco consumption, especially among youth.

Lastly, implementing graphic health warnings would not be more extensive than necessary.[231] Graphic health warnings are certainly not the only way to reduce tobacco consumption. Economists at the MEI point to media, peers, and family as the reason people are encouraged to use tobacco.[232] However, if you look at regulations in Australia and Canada they both have more heavily restricted tobacco packaging than the FSPTCA proposes. The U.S. has one of the least restrictive regulations on tobacco packaging. With that in mind, there is no way to conclude that a graphic health warning covering 50% of tobacco

227. *Discount Tobacco*, 674 F.3d at 565-66; *R.J. Reynolds*, 696 F.3d at 1219.
228. Pechey et al., *supra* note 33, at 1.
229. *Id.* at 3.
230. *JTI-Macdonald*, 2 S.C.R. 610, ¶ 136.
231. Mason, *supra* note 144, at 564.
232. Kelly-Gagnon & Chassin, *supra* note 23.

packaging is more extensive than necessary when other countries regulations go further. This is again a place where the role of uncertainty comes into play. Because implementation of graphic health warnings is an innovative policy in the U.S., deference to other countries is necessary.

Additionally, it is much easier to regulate the tobacco companies than to regulate an individuals peers and family. We can educate people, but what they decide to do in their personal life and how they decide to pass that on to others is entirely different.

Another option would be to restrict the sale of tobacco products to everyone born after a certain date.[233] While this could be an effective measure for future discussion, it also suggests that implementing graphic health warnings are not more extensive than necessary because other proposals to regulate tobacco consumption are more ambitious. Lastly, we have already extensively regulated the media; therefore, regulating tobacco packaging by implementing graphic health warnings is the next logical step to reducing tobacco consumption.

VI. CONCLUSION

As efforts to reduce tobacco consumption continue to grow, and more countries implement plain packaging or graphic health warnings, the question of whether these efforts are effective will become easier to answer. The reasons for implementing graphic health warnings in the U.S. are clear; there is a substantial government interest in reducing the number of people, old and young, consuming tobacco. However, some courts are still unclear about whether the means the government has set forth will achieve this substantial government interest in a manner consistent with the First Amendment. Moreover, the standard of review is debated.

Other countries have taken greater efforts to reduce tobacco consumption by implementing plain packaging and/or graphic health warnings. Canada has required tobacco companies to print graphic health warnings on their packaging for over ten years and has seen a great reduction in tobacco consumption. Further, Australia recently implemented plain packaging in its efforts to reduce tobacco consumption. While it is too early to see the full effects of plain packaging and graphic health warnings, the recent study conducted by the BioMedical Center endorsed plain packaging and graphic health

233. Richard A. Daynard, *Stubbing Out Cigarettes for Good*, N.Y. TIMES (Mar. 3, 2013), *available at* http://www.nytimes.com/2013/03/04/opinion/two-paths-to-the-gradual-abolition-of-smoking.html?_r=0 (last visited Jan. 25, 2014).

warnings by stating that plain packaging will have the desired effect of reducing tobacco consumption and will not encourage people to smoke more.[234] Further, the recent study conducted by Legacy® and the Harvard School of Public Health determined that graphic health warnings will produce the greatest reduction of tobacco consumption among all races and socio-economic statuses in the U.S.[235]

Reducing tobacco consumption is a serious issue today. Regulating commercial speech by requiring tobacco companies to put graphic health warnings on their packaging does affect our constitutional rights. However, when it comes to public health and the health of our children this becomes a more pressing issue. The court in *R.J. Reynolds* was correct to be cautious and require the government to prove its case.[236] However, as time passes and the effects of other country's polices on tobacco control can be felt, it will be clear that graphic health warnings reduce tobacco consumption. Further, the amount of opposition demonstrated by tobacco companies suggests that graphic health warnings would directly advance the government interest. With the uncertainty of the efficacy of an innovative policy such as the FSPTCA, deference to other country's policy measures and foreign court rulings is necessary. We want to ensure that our constitutional rights are not infringed without good cause, however, good cause has been shown and it is time to take action.

234. Pechey et al., *supra* note 33, at 1.
235. Harv. Sch. of Pub. Health, *supra* note 41.
236. *See R.J. Reynolds*, 696 F.3d at 1221-22.

ESTABLISHING LIABILITY FOR THE ENSLAVEMENT AND FORCED LABOR OF CHILDREN UNDER THE ALIEN TORT STATUTE

Katie Wendle[†]

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† J.D., Syracuse University College of Law (2014); B.A. Bard College (2010). The author would like to thank Professor Tara Helfman for her invaluable advice, suggestions, and insight throughout the note-writing process. Further, the author would like to thank the editors of the Syracuse Journal of International Law and Commerce for all of their efforts on this piece. Most importantly, the author would like to express her utmost gratitude to her parents, Lauren and Tom Wendle, and sister, Lily Wendle, for their endless love and encouragement, as well as Lily's help proofing this piece; her aunt and uncle, Tish Fried and Michael Loeb, for their unceasing care and support; and her grandmother, Nancy Fried, for her love and for being a most supportive advocate.

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I. INTRODUCTION

According to the International Labor Organization (ILO) there are approximately 168 million child laborers in the world.[1] Despite the overall decline in child labor, the ILO estimates that the decline in child labor has been slowing.[2] Many of these children are victims of modern slavery.[3] Modern slavery takes many different forms, including forced labor.[4] In 2012, the ILO estimated that 20.9 million people were victims of forced labor globally.[5] Of these, twenty-six percent, or 5.5 million, fell under the age of 18.[6]

The Alien Tort Statute ("ATS"), a federal statute of the United States, has emerged as a potentially powerful tool in the effort to combat child labor globally. The statute grants federal courts subject matter jurisdiction over claims arising from torts committed against non-U.S. nationals in violation of international law.[7] Since the 1980s, human rights activists and victims of human rights violations have brought ATS claims in the U.S. against the perpetrators of human rights violations.[8] Recently, a number of such claims have been brought on behalf of children who argue that international law has been violated by virtue of their subjection to labor constituting slavery or forced labor.

This paper argues that both the enslavement and forced labor of children constitute violations of customary international law, for which the ATS provides a civil remedy. The paper first introduces the ATS. It then explores how U.S. federal courts have treated slavery, forced labor, and child labor claims under the statute. Thereafter, it reviews the practice of States and the relevant sources of international law and argues that there is a norm of international law prohibiting slavery and forced labor generally, as well as the enslavement and forced labor of children. Lastly, it argues that the unique status of children within the

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1. ILO, *ILO Says Global Number of Child Labourers Down by a Third since 2000*, INTERNATIONAL LABOR ORGANIZATION (Sept. 23, 2013), *available at* http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_221568/lang--en/index.htm (last visited Jan. 22, 2014).

2. *Id.*

3. ILO, SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOR, ILO GLOBAL ESTIMATE OF FORCED LABOR 14 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf (last visited Jan. 24, 2013).

4. ILO, *Forced Labor*, *available at* http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm (last visited Jan. 23, 2014).

5. PROGRAMME TO COMBAT FORCED LABOR, *supra* note 3, at 13.

6. *Id.* at 14.

7. 28 U.S.C.A. § 1350 (West 2012).

8. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

law of nations merits a special analysis of the elements of forced labor, specifically because of children's status within the international community as persons in need of protection. Under international law, not only is children's ability to assert their rights different from that of their adult counterparts, but also children possess limited capacity to consent to certain types of labor, dependent largely on their age and the conditions of labor.

II. THE ALIEN TORT STATUTE

The Alien Tort Statute provides federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[9] While the First Congress passed the statute within the Judiciary Act of 1789, it was invoked as the basis for a court's jurisdiction in only one case in over 170 years.[10] This changed in 1980 when the Second Circuit Court of Appeals decided *Filartiga v. Peña-Irala*.[11] Reversing the district court's determination that it lacked subject matter jurisdiction, the Second Circuit held that the Alien Tort Statute provided the district court with jurisdiction over the plaintiff's wrongful death claim. The Court held that the Paraguayan plaintiffs successfully alleged conduct that violated a norm of international law, namely the Paraguayan defendant's torture of their relative.[12] There, the Court determined that "[a]mong the rights universally proclaimed by all nations. . . is the right to be free of physical torture."[13]

Following *Filartiga*, the Supreme Court held that while the ATS is a jurisdictional statute,[14] the substantive law governing ATS claims should be derived from the law of nations because "international law is a part of our [federal] law."[15] Further, in *Sosa v. Alvarez-Machain*, the Court held that federal courts possess limited discretion to recognize norms of international law.[16] However the Court emphasized that lower courts should restrain their discretion in identifying previously unrecognized violations of the law of nations. Nevertheless, since *Filartiga*, the ATS has become an important tool for human rights law, and federal courts now entertain suits by non-nationals against civil

9. 28 U.S.C.A. § 1350 (West 2012).
10. Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).
11. *See generally Filartiga*, 630 F.2d at 876.
12. *Id.* at 890.
13. *Id.*
14. *Sosa*, 542 U.S. at 694.
15. *Id.* at 730 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).
16. *Id.* at 731.

rights abusers for certain violations of human rights.[17]

Significantly, in *Filartiga* the Court recognized the potential for the change and evolution of customary international law over time.[18] In fact, it identified human rights law as a primary example of this: "In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[19] Federal courts have been fairly uniform in finding that the law of nations evolves over time.[20] Furthermore, in *Sosa v. Alvarez-Machain*, the Supreme Court endorsed this interpretation by recognizing claims brought for violations of the "*present-day* law of nations."[21]

Last year, in *Kiobel v. Royal Dutch Petroleum Company*, the Supreme Court limited the applicability of the ATS over certain claims.[22] After noting that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms," the Court held that the presumption against extraterritoriality applies to ATS claims.[23]

Yet *Kiobel's* effect on ATS litigation is far from clear, and the decision "[wa]s careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[24] Clearly, *Kiobel* restricts ATS's applicability to so-called "F-cubed [ATS] actions," actions involving non-U.S. foreigners suing a foreign defendant based

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17. Virginia Monken Gomez, *The Sosa Standard: What Does It Mean for Future ATS Litigation?*, 33 PEPP. L. REV. 469, 470 (2006).

18. *Filartiga*, 630 F.2d at 890.

19. *Id.*; *but see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 822 (D.C. Cir. 1984) (Bork, J. concurring).

20. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999); *Filartiga*, 630 F.2d at 889; Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

21. *Sosa*, 542 U.S. at 725 (emphasis added).

22. *See* Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659, 1669 (2013). The presumption against extraterritoriality "is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). Therefore, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, '[the Court] must presume it is primarily concerned with domestic conditions.'" Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010) (quoting *Arabian Am. Oil Co.*, 449 U.S. at 248).

23. *Kiobel*, 133 U.S. at 1669.

24. *Id.* at 1669 (Kennedy, J. concurring). Similarly, in a separate concurrence, Judge Alito suggested that the decision "obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach." *Id.* at 1669-70.

on conduct that occurred outside of the U.S. [25] Yet where the plaintiff or defendant is a U.S. citizen or where the conduct that gave rise to the claim occurred within the U.S., *Kiobel* will not affect ATS's applicability.[26] Further, ATS will apply to a claim even when "all the relevant conduct took place outside the United States . . . [where] the claims touch and concern the territory of the United States with sufficient force to displace the presumption."[27]

A. Identifying Norms of Customary International Law

In *Sosa v. Alvarez-Machain*, the Supreme Court established the standard used to identify a norm of customary international law, the violation of which gives rise to an actionable claim under the ATS. The standard requires "any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world."[28] Further, the norm must be "defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized."[29] Elaborating on this latter requirement, claims cannot rely on "violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted [in 1789]."[30] In considering whether a particular norm is sufficiently definite to give rise to a cause of action, a court determination "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants."[31]

Despite the Supreme Court's enunciation of a standard by which to identify norms of customary international law, lower courts' interpretation of the standard lack uniformity. They have produced a number of discrete tests regarding the identification of international norms. The most frequently-utilized standard requires norms to be sufficiently specific, universal, and obligatory. Additionally, the Second Circuit requires that norms constitute "rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[32]

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25. Matteo M. Winkler, *What Remains of the Alien Tort Statute After* Kiobel*?*, 39 N.C. J. INT'L L. & COM. REG. 171, 178 (2013).

26. *Id.* at 186.

27. *Kiobel*, 133 U.S. at 1669; s*ee also* Winkler, *supra* note 25, at 188.

28. *Sosa*, 542 U.S. at 725.

29. *Id.*

30. *Id.* at 732.

31. *Id.* at 732-33.

32. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).

The interpretation of the sufficiently specific, universal, and obligatory standard varies widely among circuits. For instance, the Seventh Circuit interprets the standard broadly, arguing that the standard "like so many statements of legal doctrine . . . is suggestive rather than precise; taken literally it could easily be refuted. No norms are truly 'universal'; 'universal' is inconsistent with 'accepted by the *civilized* world'; 'obligatory' is the conclusion not the premise; and some of the most widely accepted international norms are vague, such as 'genocide' and 'torture.'"[33] Despite its broad interpretation, which on its face undercuts the standard's effectiveness in limiting the number of norms giving rise to actionable ATS claims, the Seventh Circuit purports to employ this standard.

By contrast, at the extreme, some courts have incorporated a "lowest common denominator approach" into the specific, universal, and obligatory standard.[34] In *Doe v. Nestle*, the District Court applied the standard, suggesting, "where there are a variety of formulations [for an international norm], the court should look to the formulation that is agreed upon by all—a lowest common denominator or common 'core definition' of the norm."[35] This is probably the highest standard applied in determining whether a norm under the law of nations exists[36] and a misinterpretation of *Sosa*.

B. Sources of International Law

To determine whether a plaintiff properly alleged a violation of the law of nations, courts must review sources of international law. The United Nations enumerated the sources of international law in Article

33. Flomo v. Firestone Natural Rubber, Co., 643 F.3d 1013, 1016 (7th Cir. 2011); *see also* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 860 F. Supp. 2d 1216, 1229 (W.D. Wash. 2012), for a different interpretation of this standard.

34. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1080 (C.D. Cal. 2010); *see also* In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009). Another reason for mentioning this standard is that *Doe* is one of the four cases reviewed about domestic courts' treatment of forced child labor claims under the ATS. *Id.*

35. *Nestle*, 748 F. Supp. 2d at 1080; *see also* In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009). These cases both cite to Justice Katzmann's concurrence in Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 264 (2d Cir. 2007), in which he interpreted *Sosa* to require a "discernable core definition that commands the same level of consensus as the 18th-century crimes identified by the Supreme Court." Interestingly, Justice Katzmann in applying this standard held that a norm of aiding and abetting liability under the law of nations exists. *Khulumani*, 504 F.3d at 264 (J. Katzmann, concurring). In *Doe*, the majority came to the opposite conclusion by applying its lowest common denominator standard.

36. *See Khulumani*, 504 F.3d at 264 (J. Katzmann, concurring); *Nestle*, 748 F. Supp. 2d at 1080.

38 of the Statute of the International Court of Justice: (1) general and particular international conventions; (2) international custom; (3) general principles of law recognized by civilized nations; and, as a subsidiary source, (4) the works of the most qualified publicists.[37] Domestic courts in the U.S. have made reference to Article 38 in determining the sources of international law to which they should refer.[38] They have also cited the Restatement (Third) of Foreign Relations Law §102,[39] which defines customary international law as law "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation."[40]

In *The Paquete Habana*, the Supreme Court enumerated the sources to which courts should refer to identify a norm under the law of nations:

> For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[41]

Specifically, the Court in *The Paquete Habana*, reviewed States' historical practice,[42] States' contemporary practice, historical treaties, opinion of international tribunals, and the works of jurists regarding the wartime capture of unarmed fishing vessels from ancient to contemporary times.[43]

Although all international treaties provide some evidence of the custom and practice of nations, "a treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming

37. Statute of the International Court of Justice, June 26, 1945, art. 38(1) 33 U.N.T.S. 993. While the ICJ refers to customary international law as just one source of international law, readers of U.S. court opinions should be wary because some have used the term "customary international law" as a synonym for the "law of nations" in ATS cases. *See, e.g. Filartiga*, 630 F. 2d at 876.

38. *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 399 (4th Cir. 2011); *Kiobel*, 621 F.3d at 132; *see also Filartiga*, 630 F. 2d at 876.

39. *See, e.g.*, Karadžić v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

41. *Paquete Habana*, 175 U.S. at 700.

42. *See id.* at 697 (considering evidence not only of affirmative State practice, but also the practice's historical condemnation).

43. *Id.* at 686-700.

majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles."[44] The U.S.' failure to ratify conventions does not preclude their use as evidence of the law of nations.[45] Indeed, in certain circumstances conventions not ratified by the U.S. may not only be used as evidence of the law of nations, but also may be evidence of a norm binding upon the U.S.[46]

Material sources of international law are afforded different weight depending upon the degree to which they evidence the existence of a consensus among States.[47] Thus, a treaty may be afforded greater weight depending on the number of States that have ratified it.[48] Further, certain weight is afforded to non-binding material sources of international law, such as unratified treaties or Declarations because, although they lack binding force, they evidence the existence of a consensus among States.[49]

The analysis to determine whether a custom exists under international law, as exemplified by *The Paquete Habana*, must be a fact-specific, as well as a historically and legally intensive, process. Despite the practical difficulties that such an application poses for courts, *Filartiga* and its successors continually re-engaged the federal courts in the task of recognizing norms of customary international law grounded in human rights law.[50]

III. DOMESTIC COURTS' APPLICATION OF THE *SOSA* STANDARD TO ATS LABOR CLAIMS

This section will review the variety of treatments that domestic courts have afforded to plaintiffs who argue that defendants violated the law of nations by engaging in slavery, forced labor, and child labor. Courts seem more willing to identify a norm of customary international law prohibiting slavery or forced labor, than a norm prohibiting child labor generally.[51] Despite reluctance to identify a norm of international

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44. *Kiobel*, 621 F.3d at 137.

45. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 180 (2d Cir. 2009).

46. *See, e.g. id.* at 180-81. In *Abdullahi v. Pfizer*, the court found that conducting medical experimentation on humans without their consent violated a norm of international law, despite the United States' failure to ratify a relevant convention. *Id.*

47. JAMES CRAWFORD, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (8th ed. 2012).

48. *Id.*

49. *Id.*

50. Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1400 (1999).

51. *Compare Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1023 (7th Cir. 2011) (refusing to recognize that a norm exists prohibiting the employing of children in

law with regard to all child labor, after applying the *Sosa* standard to child labor, two courts have indicated that under certain facts, especially where an employer subjected children to slavery or forced labor, plaintiffs' claims should be actionable under the ATS.[52]

Therefore, domestic courts seem receptive to recognizing a norm of international law prohibiting the enslavement and forced labor of children under the appropriate facts. Yet in practice, primarily because of procedural obstacles and secondarily due to the reluctance of courts to recognize norms of the law of nations, plaintiffs bringing ATS claims based on child labor have largely been unsuccessful.[53]

While this should not deter prospective plaintiffs, their arguments should be structured to demonstrate that their claims are based on conduct that rises to the level of either traditional notions of slavery or more modern conceptions of forced labor. Yet this does not mean that child laborers' causes of action based on slavery or forced labor should be treated as equal to those claims brought by their adult counterparts. Instead, courts must consider claims in conjunction with children's unique status within the international community, specifically as persons in need of protection. In particular, courts should pay special attention to how this status affects children's ability to consent and assert their rights within various forms and conditions of labor.

This section first reviews domestic courts' treatment of ATS claims based on slavery and forced labor and continues by reviewing the treatment of child labor claims. It then argues that a norm of customary international law exists prohibiting child labor that is tantamount to slavery and forced labor, and that such conduct is therefore actionable under the ATS.

A. Treatment of ATS Claims Based on Slavery and Forced Labor

Domestic courts generally recognize that slavery violates the law of nations. Even in cases where slavery is not directly at issue, courts routinely refer to slavery as one of the few norms that clearly violates

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work that is harmful to their health, safety, or morals), *and* Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (holding that forced labor is so widely condemned that it has surpassed being merely a norm of customary law and has attained the status of a *jus cogens* violation); *see also infra* sections *A* and *B*. While *Unocal*'s decision was vacated, it was only vacated after the plaintiffs and Unocal settled the case for an undisclosed amount. Ron A. Ghatan, *Note: The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1276 (2011).

52. *Nestle*, 748 F. Supp. 2d at 1075; *Flomo*, 643 F.3d at 1023.

53. *See infra Treatment of ATS Claims Based on Child Labor,* at section B.

customary international law.[54] Further, some courts have also recognized that forced labor may be actionable as a violation of customary international law under the ATS.[55]

While ultimately rejecting a plaintiff's claim, in *Velez v. Sanchez*, the Second Circuit, noted that slavery "in which one human being purports to own another" violates the law of nations.[56] There, it asserted that of the norms of customary international law, the prohibition of slavery is "one of the most well-established."[57] The Court opined that over time the norm prohibiting slavery has evolved to include a variety of its modern forms, including forced labor and servitude.[58] Other courts have similarly found that forced labor constitutes a violation of customary international law.[59]

In fact, in *Unocal* the Ninth Circuit went further and held both that slavery and forced labor were *jus cogens* violations.[60] Additionally, while the Ninth Circuit strictly limits the norms of international law that may be asserted against private individuals, in *Unocal* it opined that "forced labor, like traditional variants of slave trading, is among the 'handful of crimes . . . to which the law of nations attributes *individual liability*,' such that state action is not required."[61]

B. Treatment of ATS Claims Based on Child Labor

This author found four cases in which plaintiffs alleged a violation of the law of nations based on the defendant's employment of children.[62] Of them, two were dismissed on procedural grounds.[63] In this section, an analysis of these cases is presented to demonstrate some of the procedural difficulties that ATS plaintiffs face, as well as to acquaint the reader with the wide variety of factual scenarios that have

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54. *See, e.g.*, Doe v. Unocal Corp., 963 F.Supp. 880, 891-92 (C.D. Cal. 1997) (citing Kadic v. Karadzic, 70 F. 3d 232, 239 (2d Cir. 1995)).

55. *See, e.g.*, *Unocal Corp.*, 395 F.3d at 946.

56. Velez v. Sanchez, 693 F.3d 308, 319 (2d Cir. 2012).

57. *Velez*, 693 F.3d at 319 (citing Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 310 (1999)).

58. *Velez*, 693 F.3d at 319.

59. *See Adhikari*, 697 F. Supp. 2d at 685; Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1358 (S.D. Fla. 2008); *Unocal Corp.*, 963 F.Supp. at 891-92.

60. *Unocal Corp.*, 395 F.3d at 946.

61. *Id.* at 946.

62. Specifically, these are: Mother Doe I v. Al Maktoum, 632 F. Supp. 2d 1130, 1132-34 (S.D. Fla. 2007); Ellul v. Congregation of Christian Bros., 2011 WL 1085325 (S.D.N.Y. 2011); *Flomo*, 643 F.3d at 1023; *Nestle*, 748 F. Supp. 2d at 1075.

63. *Al Maktoum*, 632 F. Supp. 2d at 1134; *Ellul*, 2011 WL 1085325.

given rise to ATS claims. In the remaining two cases, the court reached a substantive analysis of whether plaintiffs properly alleged a violation of the law of nations under *Sosa*.[64]

1. Child Labor Claims Dismissed on Procedural Grounds

This section briefly recounts some of the procedural difficulties faced by plaintiffs who have sought to recover under the ATS based on a theory that child labor violates the law of nations. It suggests that meeting the *Sosa* standard is but one obstacle for plaintiffs bringing such claims.

In *Ellul v. Christian Brothers*, plaintiffs brought a claim under the ATS in which they alleged a number of violations of customary international law, including the forced labor of children.[65] There claimants alleged that beginning in the 1940s and continuing for decades, a program created by the Australian government took children from the United Kingdom and Malta and moved them to orphanages and work camps in Australia.[66] Thereafter, the children "were treated shamelessly, abused, and neglected, subjected to forced labor, and denied education."[67] In 2011, three of the children, then adults, brought suit under the ATS.[68]

The Court dismissed their claims on a number of procedural grounds, including the tolling of the statute of limitations.[69] Firstly, the Court dismissed the claim because it lacked jurisdiction over both defendants.[70] The plaintiffs' complaint named the wrong association of Christian Brothers and failed to complete service on the correct association.[71] Further, the plaintiffs named the Christian Brothers of Rome, but failed to provide evidence that the Christian Brothers Oceania, against whom they alleged violations of customary international law, was acting under the control or authority of the Christian Brothers of Rome.[72] The plaintiffs also sued the Order of the Sisters of Mercy.[73] The court dismissed the allegations against this defendant because it found that "it is not an organization with a

64. *Flomo*, 643 F.3d at 1023; *Unocal Corp.*, 395 F.3d at 946.
65. *Ellul*, 2011 WL 1085325 at *1.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Ellul*, 2011 WL 1085325 at *1, 3-4.
71. *Id.* at *2.
72. *Id.*
73. *Id.* at *3.

structure and purpose to act as an entity. . . [and] the common purpose to which Plaintiffs point—charity—is too vague to unify these regional organizations into a single legal entity."[74]

The dismissal of these two defendants exemplifies one of the difficulties faced by ATS plaintiffs, namely a failure to obtain personal jurisdiction over defendants, a difficulty which presumably was the reason that suit was not brought directly against Christian Brothers Oceania. Further, in rare circumstances, plaintiffs may seek to recover from organizations such as the Order of the Sisters of Mercy that are not legally cognizable in the U.S.

Secondly, the Court dismissed the claim for the expiration of the statute of limitations. The ATS has no express statute of limitations, but courts have borrowed a ten-year statute of limitations from the Torture Victim Protection Act.[75] Despite this, for certain claims, courts apply equitable tolling.[76] Yet, in *Ellul*, the court noted that equitable tolling "is appropriate only in rare and exceptional cases, in which a party is 'prevented in some *extraordinary* way from exercising [its] rights.'"[77] Further, the court held that because plaintiffs were aware of the factual basis for their cause of action equitable tolling was inappropriate.

In *Doe v. Al Maktoum*, the Court dismissed a claim brought against the Finance Minister of the United Arab Emirates and other unnamed defendants for lack of personal jurisdiction.[78] There, plaintiffs alleged that defendants engaged in a number of violations of customary international law, including forced child labor.[79] The plaintiffs, former child jockeys, alleged that defendants kidnapped, trafficked, and enslaved young boys from South Asia and Africa.[80] Further, they alleged that at various times the children were "starved, deprived of sleep, injected with hormones to [halt] grow[th], and sexually abused" by the defendants.[81]

The Court held that the plaintiffs failed to establish that it had personal jurisdiction over the defendant because plaintiffs relied on the affidavit of a researcher who relied on hearsay websites and newspaper stories about the defendant's ownership of personal property in the U.S.,

74. *Id.*
75. *Ellul*, 2011 WL 1085325 at *3.
76. *See, e.g.*, Chavez v. Carranza, 559 F.3d 486, 491 (6th Cir. 2009).
77. *Ellul*, 2011 WL 1085325 at *3.
78. *Al Maktoum*, 632 F. Supp. 2d at 1134.
79. *Id.*
80. *Id.* at 1133.
81. *Id.* at 1133-34.

his purchase of race horses in Kentucky, and infrequent visits.[82] The court held that his contacts were not sufficient under the Kentucky long-arm statute because of an absence of substantial, continuous, and systematic contacts with the forum.[83]

2. *Child Labor Claims Dismissed for Failure to Allege a Violation of the Law of Nations*

Two courts have analyzed the question of whether child labor constitutes a violation of the law of nations.[84] Yet in only one case, *Flomo v. Firestone*, has a court engaged in a detailed and substantive analysis of the question. This section explores those cases.

In *Doe v. Nestle*, the Court opined that "it is clear that in some instances 'child labor' constitute[s] a violation of an international norm that is specific, universal, and well-defined."[85] Yet it dismissed the claim on other grounds[86] and exerted little effort to backup this claim. Citing to *John Roe I v. Bridgestone*,[87] the Court noted it would be difficult to distinguish between instances of child labor that violate customary international law and those that do not.

In *Flomo v. Firestone*, the Seventh Circuit Court of Appeals addressed whether child labor constitutes a violation of customary international law and, affirming the District Court's holding, found that it did not. *Flomo,* a procedurally complicated case,[88] exemplified not only the procedural difficulties facing ATS claimants, but also the difficulty of establishing a violation under *Sosa*.[89]

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82. *Id.* at 1141-43.

83. *Al Maktoum*, 632 F. Supp. 2d at 1142.

84. *Flomo*, 643 F.3d at 1023; *Nestle*, 748 F. Supp. 2d at 1075.

85. *Nestle*, 748 F. Supp. 2d at 1075.

86. There, the court ultimately held that the plaintiffs failed to demonstrate that an international norm existed for aiding and abetting liability. To establish their claim against Nestle, the plaintiffs relied on an aiding and abetting theory. *Nestle*, 748 F. Supp. 2d at 1057. Yet not all courts reject such claims. In *Unocal*, the Ninth Circuit held that ATS claims could rely on such a theory. *Unocal Corp.*, 395 F.3d at 947-53. In *Nestle*, plaintiffs alleged that the defendants knew or should have known of the child labor because of their first hand knowledge and by the "numerous, well-documented reports of child labor" by governmental and non-governmental actors. Their argument followed that despite their knowledge, defendants not only purchased the cocoa from the farms, but also provided the farms with resources "knowing that their assistance would necessarily facilitate child labor." FAC ¶ 52; *Nestle*, 748 F. Supp. 2d at 1066, 1075.

87. John Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 1020 (S.D. Ind. 2007).

88. *See* Jessica Bergman, *The Alien Tort Statute and Flomo v. Firestone Natural Rubber Company: The Key to Change in Global Child Labor Practices?*, 18 IND. J. GLOBAL LEGAL STUD. 455, 479 n.8 (2011).

89. *Id.*

In *Flomo*, the plaintiffs alleged that the defendants violated customary international law when they employed children in circumstances constituting "the worst forms of child labor."[90] By the time their claim was analyzed by the Circuit Court, the plaintiffs' allegations of slavery and forced labor had been dismissed.[91] The plaintiffs, who worked on rubber plantations in Liberia, alleged that the defendant economically coerced children into working full time by setting their fathers' daily quota of trees to tap so high that the fathers had to recruit their children to work with them in order to retain their jobs. Further, plaintiffs alleged that defendants imposed the quota knowing it could be met only "if children join[ed] their fathers . . . and work[ed] from dawn to dusk."[92]

The complaint detailed the alleged work in which children engaged. These allegations included that plaintiffs began working at 4:30 a.m. by cleaning 1,500 tapper cups; that they tapped trees with sharp tools facing the risk of blinding from raw latex; applied dangerous chemical fertilizers to the rubber trees; and carried two 75-pound buckets of latex at a time in order to be paid with their family's daily food allotment.[93]

It should be noted that, for the purposes of litigation under the ATS, the facts presented do not make this an ideal test case. First, Firestone did not directly employ the children. Instead, plaintiffs claimed Firestone coerced children into working and "actively encouraged [child labor]."[94] Secondly, this is not a case of direct liability, but instead relies on a theory of agency liability. The fathers' direct employer, Firestone Liberia, was a subsidiary of the defendant in this case, Firestone National Rubber Company (FNRC).[95] After several challenges early in the litigation, plaintiffs limited their theory of

90. *Flomo*, 643 F.3d at 1023.

91. *Id.*

92. Brief for Petitioner at ¶4, *John Roe I, et al. v. Bridgestone Corp.*, 2005 CV05-8168JFW, *available at* http://iradvocates.mayfirst.org/sites/default/files/11.17.05%20Complaint.pdf (last visited Feb. 4, 2014).

93. *Id.* One of the organizations that brought the suit on behalf of the plaintiffs, International Rights Advocates, provides videos of the children and of the Firestone Plantation. StopFirestone, *Firestone & Child Labor in Liberia*, YOUTUBE (May 29, 2008), *available at* http://www.youtube.com/watch?v=FfzvdWqVlGk (last visited Jan. 28, 2014). For images, *see Stop Firestone*, INTERNATIONAL LABOR RIGHTS FORUM, *available at* http://www.laborrights.org/stop-child-labor/stop-firestone (last visited Jan. 28, 2014).

94. Brief for Petitioners, *supra* note 92, at 4.

95. Bergman, *supra* note 88.

liability to FNRC.[96]

Despite these legal obstacles, the attorneys were probably influenced to bring the case by the great flurry of international attention directed at the situation of Liberian workers on rubber plantations in Liberia.[97] Following months of national and international scrutiny directed toward the status of human rights on Liberian rubber plantations, the Human Rights and Protection Section of the United Nations Missions in Liberia (UNMIL) released a report detailing the situation.[98] This report set rubber plantations as a priority for United Nations Missions in Liberia because "[i]n the context of Liberia's post-conflict rehabilitation, the situation . . . [they] presented significant security, political, economic and human rights challenges for the Government which have not yet been resolved."[99] Further, the report noted that "working conditions on the plantations violate fundamental human rights standards. The situation is particular [*sic*] poor in relation to child [*sic*]; child labor is indirectly encouraged by work practices and lack of access to education."[100]

In *Flomo*, the Seventh Circuit affirmed the District Court's grant of defendant's motion for summary judgment, but the Court conducted its own *Sosa* analysis to determine that no norm of customary international law prohibited child labor.[101] Yet prior to announcing its holding, the Seventh Circuit expressed disquiet over the use of customary international law as a means to recover under the ATS.[102]

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96. *Id.*

97. *See* U.N. Mission in Liberia, HUMAN RIGHTS IN LIBERIA'S RUBBER PLANTATIONS: TAPPING INTO THE FUTURE (2006), *available at* http://www.unhcr.org/refworld/docid/473dade10.html (last visited Jan. 28, 2014) [hereinafter UNMIL]. Firestone's Liberian plantation is huge, and its website stated that it has more than 6,500 employees in Liberia. *Resources, FAQs*, FIRESTONE NATURAL RUBBER COMPANY, *available at* http://www.firestonenaturalrubber.com/faqs.htm#1 (last visited Jan. 28, 2014).

98. UNMIL, *supra* note 97, at 5.

99. *Id.*

100. *Id.*

101. *Flomo*, 643 F.3d at 1016.

102. *Id.* Its argument was as follows: Its reluctance originated from problems with notice and legitimacy. In particular, the court opined that notice was a problem because norms created by custom cannot be identified as clearly as those specifically identified by a legal text. Further, customary international law's legitimacy and, in democratic countries, democratic legitimacy, was a problem because through the use of custom, the international community imposes legal duties on the independent sovereign in the form of mandatory norms. The Court reasoned that while international law is ideally created by consensus, in practice it rarely is. Yet it seemed to suggest that some of its concerns were mitigated because Congress maintained the ability to limit the scope of the ATS, and therefore "the statute. . . is not a blanket delegation of lawmaking to the democratically unaccountable

In applying *Sosa*, the Seventh Circuit examined the language of the UN Convention on the Rights of the Child, Article 32(1); Minimum Age Convention; and the Worst Forms of Child Labour Convention, Article 3(d) individually to determine whether each gave rise to a norm of customary international law. The Court concluded that child labor, with regard to all of the Conventions, was too vague and encompassing a category to give rise to a norm of customary international law.[103]

Firstly, it rejected the argument that the UN Convention on the Rights of the Child (1989), specifically Article 32 (1) gave rise to a norm of customary international law.[104] The Article provides that children have a right not to perform certain work, in particular that which is hazardous, interferes with education, or is harmful to the child's health.[105] The Court held that the language was too "vague and encompassing" to establish a norm of international law.[106] Secondly, the Court similarly rejected the Minimum Age Convention as a source of customary international law.[107] This Convention forbids children under fourteen from doing any work other than "light work."[108] The court opined that the Convention created no norm because of the vagueness of the term "light work."[109] Lastly, in evaluating the Worst Forms of Child Labour Convention, the Court noted that while it was "more promising" than the other Conventions, it found that Article 3(d) was "still pretty vague."[110] In particular, it enumerated three reasons for its vagueness, namely: (1) its failure to specify a threshold of actionable harm; (2) the "inherent vagueness of the words 'safety' and 'morals;'" and (3) its provision that the domestic law of nations determines which

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international community of custom creators." *Id.* Yet the Court noted concern that "[i]f [a democratic country] has consistently rejected the international custom, it is possible for the custom to apply to it." *Id.* Despite the court's concern, this last concern should be almost completely mitigated by the persistent objector rule, in which a country that consistently rejects an international norm will be considered a persistent objector, and therefore exempted from the rule. *See* Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 221 (2010). However, this is not the case for States that come into existence after the norm because the persistent objector rule will generally not apply to them. *Id.*

103. *Flomo*, 643 F.3d at 1022.

104. *Id.*

105. United Nations Convention on the Rights of the Child, art. 32(1), Nov. 20, 1989 [hereinafter UNCRC].

106. *Flomo*, 643 F.3d at 1022.

107. *Id.*

108. ILO Minimum Age Convention, art. 7, June 26, 1973.

109. *Flomo*, 643 F.3d at 1022.

110. *Id.*

types of work fall into Article 3(d).[111]

The Court referred to the Convention's Recommendation 190 for more detail on Article 3(d), but ultimately dismissed its importance because a Recommendation "create[s] no enforceable obligation."[112] Here, the Court failed to consider whether the Recommendation, while not binding on States, could help the Court to discern whether a custom of international law exists, and if so, its scope. The Court also held that the plaintiffs failed to provide the Court with sufficient evidence of the practices and customs of nations as to demonstrate that States perceive that they have a legal obligation to follow the norm.[113]

After this discussion, the Court found that "[g]iven the diversity of economic conditions in the world, it's impossible to distill a crisp rule from the three conventions."[114] Yet during this discussion, it was not clear whether the Court based this opinion on a cumulative consideration of all of the conventions, or whether it was based on its analysis of them individually. A proper evaluation of the plaintiffs' ATS claim would entail an explicit analysis of all of the sources taken together, which would ensure that the Court addressed whether the sources of international law give rise to a norm.

The Court concluded by enumerating a number of deficiencies in the plaintiff's factual allegations. Specifically, the Court noted that it was unaware of how frequently employees employed children to help them fill their quotas; whether Firestone took effective measures to stop children from working; how many children worked on the plantation; the ages of those children who worked on the plantation other than those who brought suit; how much work the average child did; and the difficulty of the work.[115]

The application of the *Sosa* standard aside, the Court's concluding discussion was problematic. The Court noted that its "biggest objection" to the lawsuit was that it was unaware of "the situation of Liberian children who don't live on the Firestone plantation." It reasoned that the children who work on the Firestone plantation may be

111. ILO, Worst Forms of Child Labor Convention, art. 3(d), Nov. 19, 2000, ILO No. 182 [hereinafter WFCLC].

112. *Flomo*, 643 F.3d at 1023.

113. *Id.*

114. *Id.*

115. *Id.* at 1024. It was not clear why the Court required some of this information as the Court did not fully explain its relevance. For instance, presumably had the Court found that the employment of the children violated international customary law, it would not matter how many children worked there. This is because the children who brought the claim should be entitled to recover for the torts committed against them in violation of the law of nations without reference to any other child employees of Firestone.

better off than other Liberian children because their fathers are well paid by Liberian standards. It continued by suggesting that they "would be worse off if their fathers, unable to fill their daily quotas, lost their jobs or had to pay adult helpers, thus reducing the family's income;" thus the Court did not "know the net effect on their welfare of working on the plantation."

This argument is paternalistic; completely undermines the plaintiff's autonomy and freedom to decide what is or is not better for them; and is a social, not legal, argument. While the argument may not be wholly without merit,[116] any strain put on families is irrelevant in an analysis of whether child labor constitutes a norm of international law.[117] Further, if an employer violates customary international law, it is logically perverse for a court to justify that human rights violation by suggesting that the plaintiffs would be worse off if their human rights were upheld. The Court's role here was to determine whether a norm of customary international law existed, not whether enforcing such a norm would benefit the very plaintiffs who presumably, having consented to the suit, believed that suing the defendant was in their best interests.

3. *Concluding Note on Prior ATS Cases Asserting Child Labor Claims*

While no plaintiff has successfully pled a child labor ATS claim that has survived a motion for summary judgment, domestic courts seem receptive to recognizing a norm of international law prohibiting the forced labor and slavery of children under certain facts. In *Nestle*, while dismissing the claim on other grounds, the court noted that it was "clear that in some instances 'child labor' constitutes a violation of . . . international law."[118] Further, in *Flomo*, while the court found no international norm proscribing "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health,

116. For instance, after plaintiffs served their complaint, Firestone adopted a "zero tolerance" policy with regard to child labor whereby it would fire any employee found to be employing the labor of a child. It is plausible that some workers or their families were negatively affected by this policy. Flomo v. Firestone Natural Rubber Company, 2010 WL 4174583 (S.D. Ind. 2010).

117. The best argument for its relevance is that courts have noted that when considering whether a norm of international law exists, the court must consider the practical consequences of identifying a norm. Yet the practical consequences factor is limited to a judgment about the "practical consequence of making that cause available to litigants in federal court," and not the practical consequences to present litigants. *See Sosa*, 542 U.S. at 732.

118. *Doe v. Nestle*, 748 F. Supp. 2d at 1075.

safety or morals of children;"[119] it recognized that other forms of child labor might be actionable. Specifically, it opined that evidence "that [S]tates feel themselves under a legal obligation to impose liability on employers of child labor. . . is readily available for the other types of child labor listed in ILO Convention 182, such as. . . forced child labor." Therefore, where plaintiffs overcome the procedural obstacles posed by ATS claims and furnish sufficient evidence to demonstrate that their employer engaged in slavery or forced labor, courts may be receptive to their claim.

IV. A NORM OF CUSTOMARY INTERNATIONAL LAW PROHIBITS SLAVERY AND FORCED LABOR SUCH THAT ATS CLAIMS BASED ON SLAVERY AND FORCED LABOR SHOULD BE ACTIONABLE UNDER THE ATS

This section will argue that a norm of customary international law prohibiting both slavery and forced labor has evolved within the international community.[120] Taken together, the numerous treaties and the practices of States demonstrate that the prohibition of slavery and forced labor of children satisfy the ATS's requisite elements, namely that a norm be specific, universal, obligatory, and of mutual concern.

Further, this section will argue that children's status within international law differs from that of adults, and therefore plaintiffs' pleadings asserting ATS claims based on the forced labor of children should address their unique status. In particular, plaintiffs should note their conditions of labor. In doing so, they should direct special attention to children's potential lack of capacity to consent to both employment contracts and labor that will cause long-term mental or physical harm. Also, pleadings should address children's potential difficulty in asserting their own interests over that of an adult supervisor. Further, these factors should be included in a court's analysis of whether the conditions of the labor violated a norm prohibiting child labor that is tantamount to slavery or forced labor.

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119. *Flomo*, 643 F.3d at 1023.

120. *See* Federico Lenzerini, *Suppressing Slavery Under Customary Law*, 10 ITALIAN Y.B. INT'L L. 146 (2000) (providing a comprehensive history of slavery in international law, as well as the contemporary state of customary international law regarding slavery, and argument for the recognition of a norm of customary international law prohibiting slavery and forced labor). Lenzerini argues that slavery has attained *jus cogens* status. *Id.* at 156.

A. Specificity: Defining Slavery and Forced Labor Under Customary International Law

Slavery and forced labor are specific norms whose definition can be readily determined through reference to the relevant sources of international law. The international community defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[121] This definition originated in the 1926 Slavery Convention and has not been subject to great change.[122] The international community has reaffirmed this definition in a number of main instruments dealing with slavery.[123]

International sources, [124] as well as at least one domestic court in an ATS claim,[125] define forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[126] While the treaty excepts certain forms of labor from the definition,[127] the exceptions are explicitly enumerated in the treaty and should not bar a court from finding the specificity element satisfied.

In evaluating ATS claims, courts should treat forced labor as a form of slavery.[128] Courts should distinguish between and evaluate claims of traditional slavery and forced labor using these definitions. Yet while distinguishable, these definitions are related, and courts should recognize both as violations of customary international law.

B. Universal and Obligatory: The Prohibition of the Slavery and Forced Labor of Children is a Norm Universally Practiced to which States Accede out of a Sense of Legal Obligation

Identification of a norm of customary international law requires a finding that the norm is universally practiced and acceded to out of a sense of legal obligation.[129] One element looks objectively to States'

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121. *Id.* at 158-59.

122. *Id.* at 159.

123. *Id.* (citing to United Nations, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 7, April 30, 1957, 226 U.N.T.S.3 [hereinafter Supplementary Convention]; Rome Statute of the International Criminal Court art. 7, Nov. 10, 1998, U.N. Doc. A/Conf./183/9 (1998)).

124. *See* ILO, Forced Labour Convention, art. 2(1), June 10, 1930, ILO No. 29 [hereinafter ILOFLC].

125. *Velez*, 693 F.3d at 320.

126. *See* WFCLC, *supra* note 111.

127. *See id.* art. 2(2)(a)-(e).

128. *See* Lenzerini, *supra* note 120, at 165 (treating force labor as a modern variant of slavery).

129. *Kiobel*, 621 F.3d at 131 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233,

practice, while the other evaluates States' subjective reasons for engaging in that practice. The latter element requires that States subjectively feel that they are legally obligated to practice the norm. Yet the objective and subjective elements may be interrelated. Specifically, a State may practice a norm as a result of a sense of legal obligation to abide by it, or in the alternative, a sense of legal obligation to engage in a practice may result from a State's preexisting practice thereof. Because of this interconnection, this section will consider the objective and subjective elements together.

C. State Practice: Evidence of the Universal Adherence to the Proscription of Slavery and Forced Labor

State practice demonstrates that States universally prohibit slavery.[130] The first national prohibition of slavery dates to 1794 in France.[131] Many States followed. By 1957, States had ratified at least 300 international treaties suppressing slavery and the slave trade.[132] Following World War II, global condemnation of slavery and forced labor continued and was expressed in the UN's human rights treaties entered into after the War.[133] Today States universally prohibit slavery, and slavery has been abolished in every nation of the world.[134] The long history of the global prohibition of slavery left a lasting legacy in the way that States and people understand slavery, "[R]eviving slavery has remained beyond the bounds of any contemporary movement's dreams or any [S]tate's ambition. Slavery rhetorically remains the evil of choice for any movement or government that seeks to mobilize sentiment against exploitative practices and coercive domination anywhere in the world."[135]

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248 (2d Cir. 2003)).

130. This section is meant to demonstrate that today slavery is universally prohibited. Therefore, the history provided is only meant to provide the reader with the most minimal reference as to the antislavery movement's timeline.

131. Lenzerini, *supra* note 120, at 149.

132. *Id.*

133. *Id.* at 150.

134. John D. Sutter, *Slavery's Last Stronghold*, CNN, *available at* http://www.cnn.com/interactive/2012/03/world/mauritania.slaverys.last.stronghold/index.html (last visited Feb. 14, 2014) (noting that Mauritania was the last country to abolish slavery, doing so in 1981; yet the practice was not criminalized until 2007).

135. SEYMOUR DRESCHER, ABOLITION: A HISTORY OF SLAVERY AND ANTISLAVERY 461-62 (2009).

D. Treaties: Evidence that the Proscription of Slavery and Forced Labor is Universal and Obligatory

The ratification of treaties serves as evidence of both objective State practice and the subjective State belief in the obligatory nature of a norm. Ratification serves as evidence of State practice in that States are required to comply with the treaty norm. Further, by ratifying a treaty States understand that they are legally bound by the treaty, which satisfies the subjective element. The main treaties regarding slavery, forced labor, and child labor have been ratified almost universally, suggesting that almost all States subjectively feel that they are binding. Further, their nearly universal ratification, in conjunction with the ILO's status treating them as "core" treaties, demonstrates the development of a norm of international law proscribing the slavery and forced labor of children.

1. Treaties and Declarations Addressing Slavery and Forced Labor

International treaties and declarations serve as evidence of the objective practice and subjective belief of States with regard to the prohibition of slavery and forced labor. In particular, the number of ratifications of the main treaties involving slavery and forced labor evidences States' universal subscription to the norm. Meanwhile, the number of ratifications as well as the international community's treatment of these treaties as "core" treaties evidence that States accede to the norm out of a sense of legal obligation.

Sources of international law consistently demonstrate a universal proscription of slavery in its traditional form.[136] The Universal Declaration on Human Rights and International Covenant on Civil and Political Rights recognize an affirmative right that "[n]o one should be held in slavery."[137] The International Covenant on Civil and Political

136. *See* Maria Fernanda Perez Solla, *Slavery and Human Trafficking: International Law and the Role of the World Bank*, 6 (Apr. 2009), *available at* http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0904.pdf (last visited Jan. 29, 2014) (citing United Nations, The Universal Declaration of Human Rights, art. 4, Dec. 10, 1948 [hereinafter UDHR]; United Nations, International Covenant on Civil and Political Rights, art. 8.1, Mar. 23, 1976 [hereinafter ICCPR]; European Court of Human Rights, The European Convention on Human Rights and Fundamental Freedoms, art. 4.1, Mar. 3, 1953 [hereinafter ECHR]; Organization of American States, American Convention on Human Rights art. 6.1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; United Nations, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 11.1, July 1, 2003 [hereinafter ICPRMW]).

137. UDHR, *supra* note 136, at art. 4; ICCPR, *supra* note 136, at art. 8.1.

Rights[138] reiterates the right of individuals not to be held in slavery and asserts a prohibition of slavery "in all of [its] forms."[139] It also goes further and recognizes the right of individuals not to be subjected to forced or compulsory labor.[140]

Treaties proscribing forced labor have been widely ratified. Of the most important treaties on this subject, the Forced Labour Convention (1930), has been ratified by 177 States, [141] and the Abolition of Forced Labour Convention (1957) has been ratified by 174 States.[142]

The Forced Labour Convention defines forced or compulsory labor as, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[143] The Convention provides that ratifying States must "undertake[] to suppress the use of forced or compulsory labour in all its forms within the shortest possible period." Further, the Convention requires States to criminalize forced or compulsory labor for private actors.[144]

The Abolition of Forced Labor Convention provides that ratifying States "undertake[] to suppress and not to make use of any form of forced or compulsory labour" under a number of circumstances including when it is used for political coercion, education, economic development, and labour discipline.[145] Further, States are required to "take effective measures to secure the immediate and complete abolition

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138. The United States, as well as 166 other States, has ratified the Covenant. ICCPR: Chapter IV: Human Rights, UNITED NATIONS (Dec. 16, 1966), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 29, 2014).

139. ICCPR, *supra* note 136, at art. 8(1).

140. *Id.* at art. 8(3)(a), (c)(i) (providing exceptions to the definition of compulsory labor).

141. Only eight States have not ratified the Convention. *See* ILO, Forced Labour Convention, May 1, 1932, ILO No. 29, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312174:NO (last visited Feb. 14, 2014).

142. Only eleven States have not ratified this Convention. *See* ILO, Abolition of Forced Labour Convention, Jan. 17, 1959, ILO No. 105, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11310:0::NO::P11310_INSTRUMENT_ID:312250 (last visited Feb. 14, 2014).

143. WFCLC, *supra* note 111, at art. 2(2)(1). *But see,* WFCLC, *supra* note 111, at art. 2(2)(a)-(e). (enumerating exceptions to the convention).

144. *See* Report III (Part 1B): General Survey Concerning the Forced Labor Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference 5 (2007), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf (last visited Jan. 29, 2014).

145. Abolition of Forced Labour Convention art. 1, Jan. 17, 1959.

of forced or compulsory labour."[146]

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery explicitly deals with an expanded notion of the conducts that constitute slavery.[147] The U.S., along with 122 other States, has ratified the Convention.[148] While fewer States are party to the Convention, it is still widely supported and is useful as a vehicle to explore those practices that States consider similar to slavery. It includes, but is not limited to debt bondage, serfdom, and "any institution or practice whereby a . . . young person under . . . 18 years, is delivered by either or both of his natural parents or by his guardian to another person. . . with a view to the exploitation of the . . . young person of his labor."[149]

2. Treaties and Declarations Addressing Child Labor

In recognition of the unique circumstances facing children, the ILO specifically addressed the slavery or forced labor of children in the Worst Forms of Child Labour Convention (1999). Since 1999, 174 States have ratified the Convention.[150] The U.S. was one of the first to do so.[151] "[A]ll forms of slavery or practices similar to slavery, such as . . . forced or compulsory labour" are included within the Convention's definition of the worst forms of child labor. The worst forms of child labor also include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." [152]

To demonstrate the emergence of a norm prohibiting child labor

146. *Id.* art. 2.

147. United Nations, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 7, April 30, 1957, 226 U.N.T.S. 3.

148. *Id.*

149. *Id.*

150. *List of Ratifications of International Labour Conventions*, ILO, *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-2.pdf (last visited Feb. 5, 2014). This includes some of the most populous countries that failed to ratify the Forced Labour Convention. *Compare id. with ILO Countries that Have not Ratified this Convention*, ILO, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11310:0::NO::P11310_INSTRUMENT_ID:312174 (last visited Feb. 5, 2014). Specifically, the United States, China, Afghanistan, the Republic of Korea, and Brunei Darussalam. *See id.* The only States to neither ratify the Forced Labour Convention nor the Worst Forms of Child Labour Convention are the Marshall Islands, Palau, and Tuvalu. *See id.* This suggests that only those latter States are not bound by the prohibition of child labor proscribed by each treaty individually.

151. *List of Ratifications of International Labour Conventions*, *supra* note 150.

152. WFCLC, *supra* note 111, at art. 3.

that is tantamount to slavery or forced labor, reference can be made to a number of other sources of international law.[153] While they have lesser force, because either they are not binding or because the U.S. has been a persistent objector, they should be consulted in conjunction with binding sources of international law to demonstrate the emergence of a norm of international law forbidding child labor that is tantamount to slavery or forced labor.

These sources demonstrate a consistent concern about children's participation in the workforce. The International Covenant on Economic, Social and Cultural Rights provides that employment that is "harmful to [children's] morals or health or dangerous to their life or likely to hamper their normal development" should be criminalized.[154] The Declaration of the Rights of the Child explicitly forbids not only child labor before "an appropriate minimum age," but also forbids "caus[ing] or permit[ing] [the child] to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development."[155] The Convention on the Rights of the Child also requires that States take affirmative measures to implement Article 32.[156] Specifically, it requires that they provide a minimum age of employment, regulate employees' hours and conditions of work, and establish sanctions for violations and effectively enforce the laws regarding child labor.[157]

In 1990, more world leaders gathered at the United Nations than ever before to attend the World Summit for Children.[158] There, they adopted a Declaration on the Survival, Protection and Development of Children, as well as a Plan of Action, detailing the implementation of the Declaration.[159] While the Declaration addressed a myriad of concerns, in part it committed to "work for special protection of the

153. Solla, *supra* note 136, at 10 (citing ICCPR, *supra* note 136, at art. 8(3); ECHR, *supra* note 136, at art. 4(2); ACHR, *supra* note 136, at art. 6(2); ICPRMW, *supra* note 136, at art. 11(2)).

154. International Covenant on Economic, Social and Cultural Rights, G.A. Res 2200 (XXI), U.N. GOAR, 21st Sess., U.N. Doc. A/RES/2200 (XXI), at 10 (Dec. 16, 1966). The United States is not a party.

155. Declaration of the Rights of the Child [hereinafter DRC], G.A. Res 1386 (XIV), U.N. GOAR, 14th Sess., U.N. Doc. A/RES/1386 (XIV), at 9 (Dec. 10, 1959). The United States is not a party.

156. UNCRC, *supra* note 105, at art. 32.

157. *Id.*

158. A *promise to children*, UNICEF, *available at* http://www.unicef.org/wsc/ (last visited Jan. 29, 2013).

159. *Id.*

working child and for the abolition of illegal child labor."[160] The Plan of Action reaffirmed a number of obligations of the CRC and suggested that all States should take steps to eliminate employment that is hazardous, interferes with education, or is harmful to the health and full development of children. Further, it suggested that States should seek to protect children engaging in "legitimate employment" by ensuring that they have the opportunity for a healthy and full development.[161] The Plan of Action urged specific contributions from States at the national level as well as contributions from international development agencies, regional institutions, all relevant United Nations agencies, as well as others at the international level.[162]

E. ILO's Designation of Slavery, Forced Labor, and Child Labor Conventions as "Core" Conventions

While the universal practice of the prohibition of slavery and forced labor is evidence of State's perception that the norm is obligatory, its obligatory character is also evidenced by the importance afforded to the conventions by the ILO and its member States by the conventions' designation as "core" conventions. That designation suggests that the conventions have attained a status beyond merely binding upon the parties and explains in part why states accede to them out of a sense of legal obligation, namely because they protect fundamental human rights.[163]

The ILO regards the Forced Labour Convention, Abolition of Forced Labour Convention, Worst Forms of Child Labour, and the Minimum Age Conventions as 'core' conventions.[164] Core conventions

160. *World Declaration on the Survival, Protection and Development of Children*, UNICEF ¶ 7 (Sept. 30, 1990), *available at* http://www.unicef.org/wsc/declare.htm (last visited Jan. 29, 2014).

161. *Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s*, UNICEF ¶ 23, *available at* http://www.unicef.org/wsc/plan.htm (last visited Jan. 29, 2014) [hereinafter PAIWD].

162. *Id.* at ¶¶34-35.

163. In 2000, the ILO's Director-General, Mr. Juan Somavia, commenting on the ILO having reached 1,000 ratifications of its core Conventions, said, "[T]hese ratifications move the world's workers closer to the day when the principles of these core labour standards, which we consider as fundamental human rights, are enshrined both in international law and in the domestic labour codes of all ILO member States." Press Release, ILO, ILO 'Core' Conventions Ratifications Surge Past 1,000 Mark, ILO Press Release ILO/00/36 (Sept. 22, 2000), *available at* http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_007909/lang—en/index.htm (last visited Jan. 29, 2013).

164. In fact, with only a total of eight Conventions designated as such, these Conventions represent half of the ILO's core conventions. *InFocus Programme on Promoting the Declaration*, INTERNATIONAL LABOUR ORGANIZATION'S FUNDAMENTAL

are those "fundamental to the rights of human beings at work. . . [t]hese rights are a precondition for all the others in that they provide a necessary framework from which to strive freely for the improvement of individual and collective conditions of work."[165]

Distinguishing these conventions from others, the ILO seeks to achieve global "basic human rights" and "decent work."[166] Accomplishing this goal requires the abolition of both forced labor and child labor. Describing its inclusion of child labor within the core conventions, the ILO recognized that children not only possess the same human rights as their adult counterparts, but also a right to certain measures of protection because of their age, inability to assert their own interests, and lack of experience.[167]

F. Mutual Concern: The Prohibition of Slavery and Forced Labor is a Norm of "Mutual Concern" among States

Beyond proving that a norm is specific, universal, and obligatory, the Second Circuit also requires that States abide by the norm "out of a sense. . . mutual concern."[168] The slavery and forced labor of children satisfies this element. Firstly, the international attention directed at slavery, forced labor, and child labor through treaties and declarations demonstrates that States are indeed mutually concerned about these forms of labor. In *Filartiga*, the Second Cirucit held that States' entrance into "express international accords" demonstrated that the matter was of mutual concern to States.[169] Secondly, within our global economy, labor frequently is a matter of mutual concern. While labor of a strictly domestic nature continues to exists,[170] a great deal of labor is international in nature, frequently dealing in products and services within the international stream of commerce.

CONVENTIONS 8 (2002), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf (last visited Jan. 29, 2013).

165. *Id.* at 7.

166. Press Release, *supra* note 163.

167. WFCLC, *supra* note 111, at 43. "Children enjoy the same human rights accorded to all people. But, lacking the knowledge, experience or physical development of adults and the power to defend their own interests in an adult world, children also have distinct rights to protection by virtue of their age. One of these protections is from economic exploitation and from work that is dangerous to the health and morals of children or hampers the child's development." *Id.*

168. *Flores*, 414 F.3d at 248.

169. *Filartiga*, 630 F.2d at 888.

170. Interestingly, some of the exceptions to the Minimum Age Convention, discussed below, are intranational, such as those who work in the home.

In fact, the factual allegations of each ATS child labor claim to date entails the mutual concern of States. In *Ellul*, plaintiffs alleged that defendants engaged in child trafficking and then, among other allegations, kept the children in circumstances constituting forced labor.[171] These activities are international in character because they involve the trafficking of children across nations' borders. Similarly, in *Doe v. Al Maktoum*, the plaintiffs alleged that defendants trafficked them to the United Arab Emirates as well as other Persian Gulf countries from Africa.[172] Further, they alleged that defendants enslaved them as child jockeys in Dubai and other areas, where forced labor was exacted from them.[173] This conduct was international in nature because defendants not only trafficked children to multiple countries,[174] but also compelled them to work against their will.[175] While no detailed facts are given about the camel races, it is not unlikely that they involved patrons from all over the world, especially when they took place in a city that attracts international business people and tourists, like Dubai, suggesting that the children provided a service to patrons from all over the world.

Firestone and *Nestle* involved multi-national corporations who harvested and exported the ingredients for their products, rubber and chocolate respectively, from the plantations on which plaintiffs worked. Where multi-national corporations, which send their products to numerous countries around the world, violate international law, their conduct necessarily implicates the mutual concern of States. For instance, the cost of labor in one country affects the cost of products in another. In addition, the conduct of multi-national corporations may affect international relations between States. Relations may be strained if a corporation based out of one country does business in another, exacts forced labor from its residents, and passes on the benefit from such forced, and presumably cheaper, labor in the cost of its products abroad.

171. *Ellul*, 2011 WL 1085325.

172. *Id.* Further evidence of its connection the mutual concern that this case posed is that the defendants hold high political offices in the United Arab Emerates. *Id.* at 1133. One of the defendants was both the Vice President and Prime minister of the United Arab Emirates. *Id.* Another was its Finance Minister. *Id.*

173. *Al Maktoum*, 632 F. Supp. 2d 1130, at 1133.

174. An allegation that requires that defendant was involved in an international child trafficking ring.

175. *Al Maktoum*, 632 F. Supp. 2d at 1134.

G. Application of the Elements of Forced Labor to Children's Claims Warrants Special Consideration

Forced labor claims[176] merit special analysis in the context of claims by children in light of the principles codified in international agreements concerning child labor. Ensuring that employers do not violate children's fundamental human rights poses unique challenges which the U.N. has addressed in a number of treaties and covenants previously reviewed. In particular, these international agreements provide a framework within which to evaluate the last two of the three elements of forced labor, specifically labor "for which the said person has not offered himself voluntarily" and labor that "is exacted from any person under the menace of any penalty."[177]

1. Labor Not Offered Voluntarily and Children's Incapacity to Consent to Employment Contracts and Work that Causes Harm

Whether workers enter labor agreements voluntarily merits special consideration within the context of the child laborer. Plaintiffs may contest children's capacity to consent to employment contracts, as well as their ability to consent to work that causes mental or physical harm.[178] International agreements recognize the right of children, as a class, to certain forms of protection in part because the scope of their ability to consent in certain situations is questionable.

2. Lack of Capacity to Consent to Employment Contracts

Minimum age laws are one way of determining the age at which States recognize the capacity of the child to enter employment contracts. To determine whether an international norm exists setting the permissible minimum age at which a child may consent to an employment contract, plaintiffs and courts should consult international treaties requiring the adoption of a minimum age for employment, in particular the Minimum Age Convention.[179]

Since its founding, the ILO sought to regulate the minimum age of employment. In fact, its agenda for its first General Assembly meeting

176. As previously noted, forced labor is "(1) all work or service (2) which is exacted from any person under the menace of any penalty and (3) for which the said person has not offered himself voluntarily." ILOFLC, *supra* note 111, at art. 2(1).

177. WFCLC, *supra* note 111, at art. 2(1).

178. This may occur either directly, through harm directly caused by the labor; or indirectly, through lost opportunities when the child forfeits other opportunities, in particular education, to participate in the labor force.

179. Minimum Age Convention, *supra* note 108.

in 1919 included the topic.[180] In 1959, the Declaration of the Rights of the Child explicitly prohibited child labor before "an appropriate minimum age." The International Covenant on Economic, Social, and Cultural Rights suggested States should adopt regulations setting a minimum age and violations of such laws should be punished.[181] The Convention on the Rights of the Child reaffirmed this concern and required that State parties adopt a minimum age of employment.[182]

In 1973, the ILO reviewed the issue of the minimum age of employment and expressed a renewed concern for it in the Minimum Age Convention.[183] Since then, of the 183 members of the ILO, 165 have ratified the Convention.[184] The U.S. has not ratified the Convention; nevertheless, its minimum age laws are fairly consistent with the Convention.[185]

The Convention requires ratifying Members to establish national policies designed to eradicate child labor and over time to increase the minimum age of employment "to a level consistent with the fullest physical and mental development of young persons." The Convention forbids the minimum age set by the State to be either lower than the age of completion of compulsory education or lower than the age of fifteen.[186] Yet, in recognition of the child's economic role and lack of available schooling, it recognizes an exception whereby "a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years."[187]

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180. PHILIP E. VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD 311 (1992). It also included the topic of employment that threatened children's health. *Id.*

181. International Covenant on Economic, Social, and Cultural Rights, *supra* note 154.

182. UNCRC, *supra* note 105.

183. VEERMAN, *supra* note 180, at 314-15.

184. *Ratificaitons of C138—Minimum Age Convention, 1973 (No. 138)*, ILO, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283 (last visited Jan. 28, 2014).

185. *Id.* While the U.S. allows work at fourteen, which is inconsistent with the provisions of the Convention, for the purposes of this paper what is relevant is that the minimum age laws in the U.S. do not deviate from the laws set by other States by much. The Fair Labor Standards Act sets the minimum age of employment at fourteen years of age and limits the number of hours that children under sixteen may work. *Youth & Labor*, DEP'T OF LABOR, *available at* http://www.dol.gov/dol/topic/youthlabor/agerequirements.htm (last visited Jan. 28, 2014).

186. Minimum Age Convention, *supra* note 108, at art. 2(3).

187. *Id.* art. 2(4).

The Convention also distinguishes between types of employment. For work "which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons," the minimum age is set at eighteen.[188] However, where protections are in place for children under eighteen, children may be employed in such occupations at the age of sixteen.[189]

Certain types of work are excluded from the minimum age requirements set in place by the Convention. The Convention exempts work done by children "in schools for general, vocational or technical education" and work done by children who are at least fourteen "in undertakings, where such work. . . is an integral part of" their education, a training program, or program designed to help the child choose their future occupation.[190] Further, members may choose to exclude limited categories of employment from their minimum age requirements. Despite this, the Convention forbids members from excluding work that jeopardizes children's health, safety, or morals.[191]

Child plaintiffs arguing that they did not enter into work voluntarily should refer to the Minimum Age Convention and the domestic laws of States to determine whether a norm of international law exists recognizing their lack of capacity to consent to their employment contracts. Because the Minimum Age Convention requires ratifying Members to enact minimum age laws, plaintiffs would strengthen their claims by demonstrating that States related to their claim ratified the treaty. In so doing, they would demonstrate the existence of a norm invalidating their consent to the employment contract.

Specifically, reference to the Convention and to the domestic laws of States provides greater insight into a norm concerning the minimum age of labor. An ILO Report, *Targeting the Intolerable*, presented a survey on the minimum age laws of 155 of the ILO member States.[192] It reported that while most States conformed to the minimum ages of

188. *Id.* art. 3(1).

189. *Id.* art. 3(3).

190. *Id.* art. 6.

191. Minimum Age Convention, *supra* note 185, at art. 4(3).

192. International Labour Conference, 1998, Report VI(1) Child Labour: Targeting the Intolerable, 86th Sess. at 24, *available at* http://www.ilo.org/public/libdoc/ilo/1996/96B09_344_engl.pdf (last visited Jan. 29, 2014). Please note that it is not clear whether its review of the domestic legislation included only of members who have ratified the Convention or all members. Also, this source is dated, and therefore those making claims under the ATS may need to conduct an investigation to ensure its information is up to date.

labor imposed by the Minimum Age Convention, some fell below.[193] In particular, thirty States permit children under fourteen to work, and six of these States permit the employment of children as young as twelve.[194] This suggests that a norm of customary international law may have arisen which would invalidate an employment contract between an employer and employee below the age of twelve, at least for certain types of labor. Because some States exclude certain sectors from their minimum age requirements all together, this is not the end of the inquiry.[195]

To identify a norm, plaintiffs must be attentive not only to the minimum ages set by the legislation of States, but also to the sector and circumstances of their work or employment. The Minimum Age Convention and many of its ratifying States distinguish between or exclude certain types of work or employment from their minimum age laws.[196] While this makes identifying a specific norm more difficult, diligent plaintiffs may be able to identify a norm. For instance, while States create exceptions for certain employment sectors, no state excludes "industry."[197] Therefore, a thorough analysis of minimum age laws and their exceptions suggests that at the very least a norm of international law has arisen prohibiting a child under twelve from consenting to an employment contract in the industry sector.[198]

3. *Lack of Capacity to Consent to Work That Causes Mental or Physical Harm*

Numerous international agreements recognize that children have a right to be protected from exploitation; a right that should make it impossible for child laborers to consent to exploitative work. Various treaties, including the ILO's core conventions, emphasize children's rights to development and protection from exploitation and harm. Furthermore, the treaties not only require the recognition of this right, but also a related right, a right to their own development. These issues

193. *Id.*

194. *Id.* In fact only thirty-three States have set a basic minimum age for admission to any kind of employment or work, as required by the Convention. *Id.*

195. *Id.* (reporting that the most common exclusions include family undertakings (60 States); domestic service; employment in undertaking with a limited number of employees (frequently 10); apprentices; the self employed; and in most States where a competent authority exempts an employer (135 States)).

196. Report VI(1) Child Labour: Targeting the Intolerable, *supra* note 192, at 24.

197. *Id.*

198. It is also possible that a more thorough analysis would actually put this age higher if the States that permit 12 year olds to consent to an employment contract require a higher minimum age for those children working in the industry sector.

are related because frequently exploitation necessarily occurs at the expense of development. Thus, within the discourse on the subject of child labor, critics often cite the interruption of the child's education and intellectual growth generally as short- and long-term consequences[199] of such practices.

International agreements pay a great deal of attention to these concerns. The Geneva Declaration of the Rights of Children emphasizes that children must be protected from all exploitation and provided with the means for spiritual and physical development.[200] The Declaration of the Rights of the Child provides that "[t]he child shall enjoy special protection, and shall be given opportunities and facilities. . . to enable him to develop physically, mentally, morally, spiritually and socially. . . in conditions of freedom and dignity."[201] The International Covenant on Economic, Social, and Cultural Rights[202] (1966) reiterates this concern for the exploitation of children: "Children and young persons should be protected from economic and social exploitation."[203] The Convention on the Rights of the Child[204] forbids:

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199. While the child and the child's family suffer the primary consequences, the State also suffers consequences from having its citizens' education and intellectual growth artificially stunted.

200. Geneva Declaration of the Rights of the Child, Sept. 26, 1924.

201. DRC, *supra* note 155, at art. 2.

202. There are 160 States party to the Covenant. UNITED NATIONS TREATY COLLECTION, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Jan. 28, 2014). The United States is a signatory, but has not ratified it. *Id.*

203. International Covenant on Economic, Social, and Cultural Rights, *supra* note 154, at art. 10.

204. Ratified by 192 countries, more than any other convention. UNICEF, Convention on the Rights of the Child: Frequently Asked Questions, *available at* http://www.unicef.org/crc/index_30229.html (last visited Feb. 5, 2014). It has been ratified by all states except for the United States and Somalia. *Id.* While the U.S. has not ratified it, at least one source reports that the Obama administration had, at least at one time, sought to reignite efforts to ratify the Convention. John Helprin, *Obama Administration Seeks to Join U.N. Rights of the Child Convention*, HUFFINGTON POST (June 22, 2009), *available at* http://www.huffingtonpost.com/2009/06/23/obama-administration-seek_n_219511.html (last visited Feb. 5, 2014). More importantly, it is most likely that the U.S.'s refusal to ratify the convention is fueled by a fear that it will interfere with parental rights, and not its position on child labor. Lawrece J. Cohen & Anthony T. DeBenedet, M.D., *Why is the U.S. Against Children's Rights?*, TIME (Jan. 24, 2012), *available at* http://ideas.time.com/2012/01/24/why-is-the-us-against-childrens-rights/ (last visited Feb. 5, 2014). The Convention has gained such widespread recognition, that even non-state entities have adopted it, such as the Sudan People's Liberation Army. *Id.* Yet because the U.S. has refused to ratify it, the U.S. is characterized as a persistent objector to the treaty. *Id.* Therefore, while it should be used as supplementary evidence that a norm of international law has arisen regarding children and their right to be free of forced labor, a U.S. court is

(1) the economic exploitation of children; (2) children from performing work likely to interfere or be hazardous to their education; (3) and work that is likely to be "harmful to the child's health or physical, mental, spiritual moral or social development."[205]

The concerns enumerated in these Conventions should be considered when plaintiffs claim that they did not voluntarily enter into work. Children's ability to consent to work that harms them mentally or physically is far more limited than their ability to consent to work that is not harmful to their health. For evidence of this, plaintiffs should refer back to the Minimum Age Convention to determine whether there is a higher minimum age in place for the kind of work that they performed. Upon a thorough analysis of these sources of international law, plaintiffs may be able to identify norms of international law that limit a child's capacity to consent to employment where the work is mentally or physical harmful. While the specific articulation of such a norm is beyond the scope of this paper, plaintiffs should carefully analyze the conditions of their labor to determine whether the child possessed the capacity to consent to the specific labor in which they engaged. Absent consent, such labor can only be tantamount to forced labor.

4. Labor Exacted Under the Threat of A Penalty and Children's Difficulty Asserting Their Own Interests

The question of whether labor is exacted under the threat of a penalty necessitates special considerations within the context of child labor claims. Children, as a class and as individuals, may experience difficulty asserting their interests over that of authority figures, specifically adults. Without the ability to assert one's interest over that of an adult supervisor, the child may engage in labor under the menace of penalty in a wider variety of situations than would an adult.

International agreements recognize this potential danger and affirm the child's right to protection from coercion and exploitation.[206] While evaluating the factual context of forced labor claims by children under the ATS, federal courts should be mindful of these two affirmative human rights bestowed upon a child. They should recognize that employers acting contrary to these rights are in violation of the child's affirmative rights under international law. Courts will need to determine whether the employer exacted labor under the threat of a

unlikely to give it much weight in its analysis of whether such a norm exists.

205. UNCRC, *supra* note 105.

206. *See* discussion *supra* Section IV(C)(a)(i)(2) (titled Lack of Capacity to Consent to Work That Causes Mental or Physical Harm).

penalty, but claims should be actionable when a court does indeed so determine, so long as the other elements of forced labor are satisfied.

Lastly, the elements of forced labor may be intertwined such that it is unclear whether a child's labor was exacted under the menace of penalty or not offered voluntarily. Under certain circumstances, plaintiffs should dispute the validity of an employment contract on the basis of the child's lack of capacity to consent to the labor. Yet the definition of forced labor requires both that the labor is under the menace of a penalty and not entered into voluntarily, so plaintiffs should be sure to plead both elements clearly.

V. CONCLUSION

In conclusion, child labor tantamount to slavery or forced labor violates international law, and therefore plaintiffs bringing claims alleging such conduct are entitled to recovery under the ATS. Because of the procedural and pleading obstacles, claimants will continue to have difficulty recovering under the ATS. Nevertheless, claimants are more likely to succeed if they carefully plead the elements of a forced labor claim, rather than if they rely strictly on the theory that child labor violates the law of nations.

The elements of forced labor merit special analysis with respect to the child claimant. Where possible, pleadings should specifically address how the child's conditions of labor and lack of consent to labor violate international law. Yet courts must also be careful to consider the question of whether a norm of international law exists for a particular claim, taking into consideration all relevant sources of international law cited by the plaintiff.

Whether the risk of liability from an ATS claim currently deters defendants from violating international law is a question outside of the scope of this paper. If the frequency of ATS claims increases, a deterrent effect may become noticeable.[207] Yet, this effect will be limited to those persons who foresee the possibility of a U.S. federal court maintaining personal jurisdiction over them.

While courts continue to shape the contours and scope of ATS jurisprudence,[208] it remains a powerful strategy for human rights

207. At least one author believes that potential defendants should be aware of the possibility of ATS liability. *See* Anna A. Kornikova, *International Child Labor Regulation 101: What Corporations Need to Know About Treaties Pertaining to Working Youth*, 34 BROOK. J. INT'L L. 207, 208 (2008).

208. For instance, just last year the Supreme Court held that where the conduct underlying an ATS claim occurred outside of the U.S., the presumption against extraterritoriality applies and claims must "touch and concern the territory of the United

activists to ensure compliance with international law, and therefore a possible remedy for at least some children who are victims of slavery or forced labor.

States . . . with sufficient force." *Kiobel*, 133 U.S. at 1669. Yet the parameters of *Kiobel* and what constitutes sufficient force is far from clear.