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## Assessing Effectiveness of International Private Regulations in the CSR Arena

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# ASSESSING EFFECTIVENESS OF INTERNATIONAL PRIVATE REGULATION IN THE CSR ARENA

By: *Martijn W. Scheltema*<sup>1</sup>

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## 1. INTRODUCTION

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

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

<sup>3</sup> See *infra* Part 2.2.

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

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

## 2. INTERNATIONAL PRIVATE REGULATION

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

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

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

<sup>7</sup> Arno Overmars, *Effecten van Gedragscodes: Twee Recente Cases*, in *Bestuurswetenschappen* 14, 16 (2011).

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

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

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

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



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

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

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

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

<sup>13</sup> Curtin & Senden, *supra* note 11, at 164. It is pretended that regulation should be made at the closest possible level to the regulate. See Ogus & Carbonara, *supra* note 10, at 230. In between soft law and contracts are model agreements to be used in a certain industry. See, e.g., THE MODEL MINING DEVELOPMENT AGREEMENT, MMDA (2013) available at [http://www.mmdaproject.org/presentations/MMDA1\\_0\\_110404Bookletv3.pdf](http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf). See also VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, <http://www.voluntaryprinciples.org> (last visited March 13th 2013) which is also connected to the extracting industry.

<sup>14</sup> Cf. Scott et al., *supra* note 9, at 3.

<sup>15</sup> *Id.* at 3-4.

<sup>16</sup> *Id.* at 4.

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

### 2.1 Four Types of International Private Regulation

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

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<sup>17</sup> Cafaggi, *supra* note 12, at 21.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 21-23.

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

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

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

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

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

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

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

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

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

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

<sup>27</sup> Cf. Cafaggi, *supra* note 12, at 35-38.

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

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

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

## 2.2 Public and Private Regulation

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

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

### 1) Mutual Influence.

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

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<sup>30</sup> Scott et al., *supra* note 9, at 11.

<sup>31</sup> Cafaggi, *supra* note 12, at 35.

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

<sup>33</sup> Zumbansen, *supra* note 28, at 54.

<sup>34</sup> *Id.* at 55.

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

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

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

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

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

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

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

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

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

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

## 2) Collaborative Rulemaking

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

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

<sup>41</sup> Scott et al., *supra* note 9, at 11.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> Cafaggi, *supra* note 12, at 45.

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

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

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

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

### 3) Competition

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

### 2.3 Advantages of International Private Regulation

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

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

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

<sup>48</sup> Cafaggi, *supra* note 12, at 44.

<sup>49</sup> *Id.* at 45.

<sup>50</sup> *Id.*

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

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



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

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

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

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<sup>53</sup> Cafaggi, *supra* note 12, at 26.

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

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

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

multiplication of private regimes or diverging public legislation.<sup>57</sup>

2) The weakness of public international law.

3) Change of technology.

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

4) The weakness of public international law.

5) Change of technology.

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

6) Technical standards.

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

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

<sup>58</sup> Cafaggi, *supra* note 12, at 27.

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

<sup>60</sup> Cafaggi, *supra* note 12, at 29.

7) Sometimes the capacity for oversight in a certain matter is best developed in private regulation.<sup>61</sup>

8) Flexibility.

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

#### 2.4 Disadvantages of International Private Regulation

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

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

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

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

<sup>63</sup> Cafaggi, *supra* note 12, at 48.

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

<sup>65</sup> Overmars, *supra* note 7, at 26.

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

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

### 3. ASSESSING THE EFFECTIVENESS OF INTERNATIONAL PRIVATE REGULATION

#### *3.1 The Need for Assessing Effectiveness*

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

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

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

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

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

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

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

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

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

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

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*Roundtables on Sustainable Palm Oil and Responsible Soy* 68 (2013) (unpublished Ph.D. thesis, University of Wageningen, Utrecht, The Netherlands 2013). Cf. The United Nations Forum on Sustainability Standards (UNFSS) *Voluntary Sustainability Standards: Today's Landscape and Issues & Initiatives to Reach Public Policy Objectives, Part 1: Issues*, [http://unfss.files.wordpress.com/2012/05/unfss-report-issues-1\\_draft\\_lores.pdf](http://unfss.files.wordpress.com/2012/05/unfss-report-issues-1_draft_lores.pdf) (last visited October 23rd 2013); *Part III: Annexes to the Impact Assessment Guidelines*, at 24-7, COM (2009), available at [http://ec.europa.eu/governance/impact/commission\\_guidelines/docs/iag\\_2009\\_annex\\_en.pdf](http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf). See also UTTING, *supra* note 57, at 108-09. For them too, it is of importance to achieve the objectives strived after by governmental organizations in order to minimize the risk of public regulation. . See Jodi L. Short, *Self-Regulation in the Regulatory Void: "Blue Moon" or "Bad Moon"?*, 649 *Annals Am. Acad. Pol. & Soc. Sci.* 22, 24 (2013), available at <http://ann.sagepub.com/content/649/1/22.abstract>. See Schouten, *supra* note 69, at 114-25.

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

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

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

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

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

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

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

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

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

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

<sup>76</sup> *See* Communication from the Commission, *supra* note 54, at 10.

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

<sup>78</sup> Cafaggi, *supra* note 46, at 25.

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

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

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

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<sup>80</sup> Alvarez & von Hagen, *supra* note 67, at 11.

<sup>81</sup> EU regulation prohibits the prescription of a specific label and prescribes the use of certain criteria with which the labels advertise to comply. According to EU regulations the procurer has to determine whether these criteria have been met. In the Netherlands the 'CO<sub>2</sub> Prestatieladder' is developed to assist business (and government) in assessing the carbon footprint of a tendering company. See *CO<sub>2</sub>-Prestatieladder* [CO<sub>2</sub>-Performance Ladder], SKAO, <http://www.skao.nl> (last visited April 20th 2013).

<sup>82</sup> *Voluntary Sustainability Standards*, *supra* note 75, at 15-17, 35.

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

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

<sup>85</sup> Cafaggi & Renda, *supra* note 46, at 17.



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

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

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

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<sup>86</sup> *Id.*

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

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

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

regulation. It is therefore important to assess the effectiveness of international private regulation.<sup>90</sup>

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

### 3.2 Different Ways to Assess Effectiveness

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

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<sup>90</sup> This is recognized by the joint ISEAL and FAO initiative. *SAFA Guidelines: Sustainability Assessment of Food and Agriculture Systems*, FAO (2013), available at [http://www.fao.org/fileadmin/templates/nr/sustainability\\_pathways/docs/SAFA\\_Guidelines\\_Final\\_122013.pdf](http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/SAFA_Guidelines_Final_122013.pdf). For information on this initiative, see, e.g., Cafaggi and Renda, *supra* note 46, at 23-25.

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

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

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

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

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

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<sup>93</sup> See *id.* at 14.

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

<sup>95</sup> Casey & Scott, *supra* note 66, at 91.

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

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

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

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

### 3.3 *Different Effectiveness Indicators?*

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

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<sup>98</sup> Gandara, *supra* note 25, at 225, 270.

<sup>99</sup> Cf. Cafaggi & Renda, *supra* note 46, at 17-18.

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

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

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

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

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

### *3.4 Assessment Intertwined with Assessments of Public Regulation?*

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

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

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

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

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

4.1 *Legal Approach*

From a legal point of view, the ex ante effectiveness of international private regulation is primarily connected with its ability to materialize the objectives this regulation aspires to realize.<sup>104</sup> These objectives may stem from spontaneous private regulation or government policy-induced private regulation.<sup>105</sup> However, unlike public regulation, it is often hard to assess whether these objectives have been achieved because it is unclear which specific and assessable objectives have been set. As to public regulation, this is typically clarified in the explanatory documents supporting the regulation. International private regulation often lacks such explanatory documents. As a result, the objectives of private regulation remain somewhat unclear. If private regulation aims at contributing to a better environment or human rights compatibility in doing business, it may be difficult to assess whether these objectives have been achieved. Which environmental improvement suffices, and to what extent does the human rights situation need to improve? It is important to clarify the specific and assessable objectives international private regulation aims to achieve.<sup>106</sup> Unless such objectives have been expressly articulated, it is rather difficult to assess whether international private regulation is effective in the sense that it achieves the objectives it aspires to realize.<sup>107</sup> In this

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BAARSMAN ET AL., ZELF DOEN? INVENTARISATIESTUDIE VAN ZELFREGULERINGSINSTRUMENTEN, RAPPORT NO. 664 [Do It Yourself? Inventory of the Self-Regulatory Instruments, Report No. 664] (SEO Econ. Research Apr. 2003), available at <http://www.seo.nl/pagina/article/zelf-doen-inventarisatie-van-de-zelfreguleringsinstrumenten> (finding 22 private regulation instruments for many different situations in the Netherlands and offers regulators factsheets to choose whether private regulation suits their purposes).

<sup>104</sup> Cafaggi & Renda, *supra* note 46, at 15. As far as the involvement of government is concerned, the origin of a legal system in a certain country might also be of influence on the CSR performance of corporations. See Hao Liang & Luc Renneboog, *The Foundations of Corporate Social Responsibility* (ECGI Finance, Working Paper No.394, 2013).

<sup>105</sup> Cafaggi & Renda, *supra* note 46, at 12.

<sup>106</sup> Cf. *ISEAL Code of Good Practice*, *supra* note 89, §§ 5.1.1, 6.1.1, 6.2.1. Private regulation should, according to section 6.2.1, create a logical framework entailing principles, criteria, indicators and verifiers. The indicators should not only indicate what they measure, but also how the indicators are measured and where the line is drawn between what is acceptable and what is not (verifiers). See also *MSI Evaluation Tool*, *supra* note 97, at 2. See also *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 1.4.

<sup>107</sup> See Balleisen & Eisner, *supra* note 62, at 136 (contending that such public policy goals should entail roughly measurable benchmarks).

respect, it is important that the private regulation and its supporting documents are publicized and made transparent.<sup>108</sup> Connected to this, it is important to create a transparent norm-setting process and maintain sufficient autonomy of the private rule-maker.<sup>109</sup> For instance, “divergence of interests between the regulators and the regulated” might lead the members of the rule setting body to prefer less desirable “short-term actions [with no clear long term objectives] that maximize their likelihood of being re-appointed.”<sup>110</sup>

However, this is not always true. If international private regulation is set to achieve specific public policy objectives, it might be possible to assess whether these exogenous objectives have been achieved.<sup>111</sup> This being the case, the international private regulation itself does not necessarily have to articulate such specific objectives. A legal effectiveness criterion, therefore, is whether international private regulation expresses specific and assessable objectives, which may be exogenous public policy objectives, and if so, whether they have been achieved. In this respect, international private regulation should be consistent with international public regulation or standards.<sup>112</sup> However, this does not mean it should be consistent with all national laws, because drawing such international private regulation is virtually impossible for a variety of reasons, including the fact that those national laws may be contradictory.<sup>113</sup>

Stemming from this, the private rule-maker has to assess whether effective private regulation in his area exists that achieves the public policy objectives his regulatory framework is aiming at and in what respect it might contribute to the achievement of these objec-

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<sup>108</sup> Cf. *ISEAL Code of Good Practice*, *supra* note 89, § 5.10 (providing for publication of the standards and the availability of supporting documents). See also *MSI Evaluation Tool*, *supra* note 97, at 37. In this respect, the question might arise whether the private regulation and its supporting document should be publicized in multiple languages. In my opinion, this is not necessary per se because of problems of interpretation if the norms are translated in different languages and the question arises over which is the authentic language. However, translations might be necessary for proper stakeholder engagement. See *id.* at 3.

<sup>109</sup> Balleisen & Eisner, *supra* note 62, at 131, 134-35.

<sup>110</sup> Cafaggi & Renda, *supra* note 46, at 17.

<sup>111</sup> Cf. DIMITROPOULOS, *supra* note 32, at 244.

<sup>112</sup> See also Owen E. Herrnstadt, *Are International Framework Agreements a Path to Corporate Social Responsibility*, 10 U.P.A. J. BUS. & EMP. L. (2007) 187, 196-201 (discussing International Framework Agreements on labor standards). Cf. *Principals for Better Self: and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 1.5.

<sup>113</sup> In case international private regulation is not consistent with certain national laws, effective alternatives should be implemented regarding such countries. See, e.g., UTTING, *supra* note 57, at 86.



tives.<sup>114</sup> If international private regulation exists that effectively achieves the objectives aimed at by its regulatory framework, it should refrain from rulemaking, because this would only unnecessarily complicate the legal framework in its arena. Beside this, an effective private regulatory framework entails “conflict of law” rules regarding cases in which this framework collides with other public or private regulation.<sup>115</sup>

After the drafting process, the work is not done. It is important that the norms are evaluated and, if necessary, reviewed on a regular basis. This evaluation should make use of past experiences with the norms, challenges of the norms by members or stakeholders, and should take into account grievances from stakeholders.<sup>116</sup> This process should be conducted in the same manner as the drafting process.

Furthermore, in the rule-setting process, the rule-makers have to consider whether any possibilities for enforcement exist and whether the regulatory regime provides an effective conflict resolution mechanism. These two elements are elaborated upon in the *ex post* approach below.<sup>117</sup>

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<sup>114</sup> See *MSI-Evaluation Tool*, *supra* note 97, at 36; *cf.* *ISEAL Code of Good Practice*, *supra* note 89, §§ 5.1.1, 6.1.1, 6.2.1. The public regulator might desire to assess whether certain public policy goals are met as well. See Cafaggi and Renda, *supra* note 46, at 29 (proposing a joint assessment by the public and private regulator).

<sup>115</sup> *Cf.* Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1018 (2004) (discussing the necessity and emergence of a new form of “intersystemic conflict laws”); *ISEAL Code of Good Practice*, *supra* note 89, § 6.5 (dealing with the situation in which international standards have to be adopted to local standards). Furthermore, section 6.6.1 requires the duty to inform other standard setting organizations that have developed related or similar international standards or a proposal to develop a new standard or revise an existing standard. It should also encourage the participation of this other standard setting organization. These ‘conflict of law’ rules might stem from the private rule-maker, but also from governments.

<sup>116</sup> See, e.g., *MSI-Evaluation Tool*, *supra* note 97, at 5, 39-41 (requiring review of internal governance, overall effectiveness, and awareness of affected population as well); *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principals 2.1 & 2.3; *ISEAL Code of Good Practice*, *supra* note 89, § 5.1.1 (demanding regular—every five year—review and revision of standards to assess whether they meet their stated objectives). For this it is important that the rulemaking body is accessible for external parties and organizes regular meetings with stakeholders (if necessary, on different locations). See *MSI-Evaluation Tool*, *supra* note 97, at 5-6.

<sup>117</sup> However, some of the indicators mentioned hereinafter are derived from the analysis of the means of enforcement, and therefore might be better understood after reading. See *infra* Part 4.1.

Additionally, more precise commands generally result in better behavior.<sup>118</sup> Because of this, the degree of precision has to be optimized.<sup>119</sup> It is important whether the international private regulation (i) entails clear norms/standards<sup>120</sup> that are interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), and (iv) refers to applicable international norms and treaties (e.g. in the area of human rights or the environment).<sup>121</sup> Further, the specificity relates to the topics the international private regulation is intended to cover and addresses whether it entails specific rules on all of these topics, such as international treaties on human rights, the environment, or in national regulation.<sup>122</sup> In order to achieve specificity, the existence of sufficient bureaucratic capacity and legal knowledge on the part of the regulator is required.<sup>123</sup> Effective international private regulation requires sufficient bureaucratic capacity and legal knowledge of the private rule-maker. If the private rule-maker does not have this capacity or knowledge, or is not willing to invest in it, he should refrain from participating.

The foregoing issues are largely addressed by the traditional criteria applied to public legislation, which might be helpful if a certain scheme is comparable to public regulation, such as the OECD-guidelines, but less so to supply chain arrangements.<sup>124</sup> Among others,

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<sup>118</sup> See Kaplow, *supra* note 88, at 19, 20; Kolk & van Tulder, *supra* note 22, at 9; Barbara Luppi & Francesco Parisi, *Rules Versus Standards*, in *Production of Legal Rules*, *supra* note 10, at 43; Overmars, *supra* note 7, at 17 (regarding codes of conduct); *ISEAL Code of Good Practice*, *supra* note 89, § 6.3.1.

<sup>119</sup> See Kaplow, *supra* note 88, at 19; Luppi & Parisi, *supra* note 118, at 43, 46-52 (arguing that the frequency of application of a law is a crucial determinant of the optimal level of specificity).

<sup>120</sup> Certain norms and standards might need to be adapted to local conditions. See Alvarez & von Hagen, *supra* note 67, at 21-22.

<sup>121</sup> Cf. Kolk & van Tulder, *supra* note 22, at 13, 17 (regarding codes of conduct in the area of CSR on child labor). However, regarding criterion iv., some international norms only aim at governments and not at companies. Referral to these norms might complicate the enforceability of codes of conduct vis-à-vis companies. Furthermore, referral only to the norms of the home country of a company is less effective than referral to international norms and preferably, if applicable, also to norms of host countries. See *id.* Cf. *MSI-Evaluation Tool*, *supra* note 97, at 3, 23-25.

<sup>122</sup> Cf. Kolk & van Tulder, *supra* note 22, at 14.

<sup>123</sup> Balleisen & Eisner, *supra* note 62, at 131, 134-35; see Alvarez & von Hagen, *supra* note 67, at 17, 18 (discussing sufficient capacity in general). Cf. *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 2.5.

<sup>124</sup> Cf. Cafaggi & Renda, *supra* note 46, at 13.

these criteria include necessity, proportionality, subsidiarity, transparency, accountability,<sup>125</sup> accessibility, and simplicity.<sup>126</sup> The SAFA guidelines translate these criteria in connection with private standards into relevance, simplicity, cost efficiency,<sup>127</sup> goal orientation, performance orientation, and transparency.<sup>128</sup>

The ex ante effectiveness of international private regulation depends on its ability to reach the goals, whether it entails conflict of law rules, on its enforceability, and on effective dispute resolution.<sup>129</sup> The effectiveness of international private regulation may depend on the following indicators, which have been derived from the aforementioned research:<sup>130</sup>

- (i) Whether international private regulation entails specific and assessable objectives and does not aim at objectives which are effectively achieved by other public or private regulation,
- (ii) Whether it entails “conflict of law” rules,
- (iii) Whether it entails regular evaluation of the regulation and its functioning (and if necessary) review of the regulation,
- (iv) The existence of an supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of the supervisory body to pass judgment and to impose sanctions on non-complying parties,<sup>131</sup>
- (v) The existence of a supervisory body which controls access to scarce resources,<sup>132</sup>

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<sup>125</sup> This criterion has not been mentioned in the foregoing and will be addressed in the sociological approach.

<sup>126</sup> Cafaggi & Renda, *supra* note 46, at 24.

<sup>127</sup> This criterion will be discussed in the economic approach.

<sup>128</sup> See, e.g., Cafaggi & Renda, *supra* note 46, at 24.

<sup>129</sup> Cf. GIESEN, *supra* note 8, at 106 n.137-141.

<sup>130</sup> These indicators are not exhaustive. More detailed research may reveal others.

<sup>131</sup> However, Kolk and van Tulder argue that the likelihood of compliance is higher when company codes of conduct are involved than for example codes of conduct set forward by business associations, international organizations or NGOs. See Kolk & van Tulder, *supra* note 22, at 11. This especially stems from the codes of conduct promulgated by business organizations or international organizations being less specific and abstaining from the possibility of imposing sanctions.

<sup>132</sup> Cf. KOPPELL, *supra* note 29, at 62; Mirjan Oude Vrielink, *Wanneer is Zelfregulering een Effectieve Aanvulling op Overheidsregulering?*, in RECHT VAN ONDEROP: ANTWOORDEN UIT DE RECHTSSOCIOLOGIE (Marc Hertogh ed., Wolf Legal Publishers, Nijmegen, the Netherlands, 2011) 70-73; Scott et al., *supra* note 9, at 7. Beside these indicators the existence of smaller groups with comparable views is considered to be of importance as well as a high organizational level. This how-

- (vi) Sufficient bureaucratic capacity and (legal) knowledge of the private rule maker,
- (vii) The existence of (a) serious (threat of) contractual enforcement or other means of enforcement if necessary through state legislation and/or (effective) enforcement by states,
- (viii) The specificity of the rules/standards set forward by the international private regulation,
- (ix) Whether the initiative entails an effective complaint and dispute management mechanism to prevent and deal with non-compliance,<sup>133</sup> and
- (x) The possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful.

The aforementioned indicators may be helpful to set effective international private regulation.

#### 4.2 Economic Approach

From an economic point of view it is of interest whether international private regulation potentially contributes to the economic welfare of (affected) communities and society at large as well as to the profitability of (multinational) enterprises. This research encompasses different points of view. The assessment of the potential increase or decrease in economic welfare differs along the international private regulation under consideration.<sup>134</sup> It makes a difference whether in-

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ever, in my view, refers to the sociological perspective which is going to be discussed hereinafter. Nonetheless enforcement may be easier to realize in such circumstances.

<sup>133</sup> Regarding CSR compare the communication of the European Commission of October 25th 2011, COM(2011) 681, *supra* note 54, at 10. As to CSR in an international context non-judicial mechanisms for conflict management seem to be more effective. Furthermore the prevention of conflicts become more important. Regarding dispute management compare GIESEN, *supra* note 8, at 138, 139. Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, entails an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework (some) information could be retrieved whether (effective) grievance mechanisms are in place.

<sup>134</sup> From the classical economic approach of Coase and the Chicago School of Law and Economics this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well informed parties without regulation. For this approach see, e.g. Michael Faure, *Law and Economics: Belang Voor het Privaatrecht*, 6912 Weekblad voor Privaatrecht en Notarieel Recht (2011), at 1057. To date the necessity of research of the economic

ternational private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities, or (iii) technical standardization as to sustainability is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. It is also relevant whether the economic analysis is conducted on a micro or macro level.

Assessing the existing and future economic welfare of certain stakeholders calls for a different approach than the one needed for measuring the potential increase or decrease of the economic welfare of society at large. The first assessment calls for a “bottom up” approach assessing the possible increase or decrease of welfare of certain relevant stakeholders. The second assessment, the ‘top down’ approach, necessitates an evaluation of a possible increase or decrease of welfare at the level of society at large. This second assessment seems especially necessary if international private regulation might have more than negligible impact on society at large. If international private regulation might only affect certain stakeholders in a certain industry, and hence the micro level is relevant, the *ex ante* approach seems less helpful. It is not easy to assess the impact of future international private regulation on a certain stakeholder. Therefore, the micro level analysis is especially fit for the *ex post* assessment. The future economic effects of international private regulation might be analyzed best through a macro-economic approach.

As the macro level analysis is concerned, insights derived from a (*ex ante*) economic analysis of government regulation might be helpful to analyze the economic effects of international private regulation. Economic analysis of government regulation has become quite common in the last decade. The European Commission, for example, has established the Better Regulation Framework to analyze (among others) the economic effects of EU-regulation.<sup>135</sup> This framework advances an Integrated Impact Assessment Model, an *ex-ante* tool for improving the quality and coherence of the policy development process of the European Commission (which entails an integrated approach

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effects of rules has been recognized. *See id.* at 1057, 1058. In this approach private regulation is an appropriate solution where bargaining, at low cost, can occur between risk-creators and those affected. *See* Ogus and Carbonara, *supra* note 10, at 231.

<sup>135</sup> This framework goes back to 2002. *See, e.g.*, Renda, *supra* note 94, at 46; Alberto Alemanno, *A Meeting of Minds on Impact Assessment*, 17 EUR. PUB. L. 485 (2011); Claire A. Dunlop, *Commentary on MacRae Regulatory Impact Assessment: a Panacea to Over-regulation?*, 14 J. OF RISK RES. 947, 949 (2011); Fabrizio De Francesco et al., *Implementing Regulatory Innovations in Europe: the Case of Impact Assessment*, 19 J. OF EUR. PUB. POL’Y 491, 455 (2012) (discussing the legal implications and the enforceability of this framework (i.e. through courts)).

covering the economic, social, and environmental dimensions comprehensively).<sup>136</sup>

The analysis reviews the economic impact of the selected option, mostly in terms of (i) economic growth and competitiveness, (ii) changes in compliance costs and implementation costs for public authorities, (iii) impact on the potential for innovation and technological development, (iv) changes in investment, market shares and trade patterns as well as (v) in- or decreases in consumer prices.<sup>137</sup> The social impact includes the impact of the proposal on (a) human capital, (b) human rights, (c) prospective changes in employment levels or job quality, (d) changes affecting gender equality, social exclusion and poverty, (e) impacts on health, safety, consumer rights, social capital, security, education, training and culture as well as effects on (f) the income of particular sectors, groups of consumers or workers.<sup>138</sup> The environmental dimension concerns positive and negative impacts associated with the changing status of the environment such as climate change, air, water and soil pollution, land-use change, bio-diversity loss and changes in public health.<sup>139</sup> However, the impact assessment initially focused, as the US and UK do, on business compliance costs analysis of regulation without preliminary identification of alternative regulatory options.<sup>140</sup>

As exact economic calculations were considered not to be the most important contributors to regulatory quality, the framework, became a tool which did not focus on a (sound) economic analysis but

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<sup>136</sup> See the Impact Assessment Guidelines, SEC(2009)92 of the European Commission from 15 januari 2009, <http://EUR-LEX.europa.eu> (last visited Jan. 22nd 2014).

<sup>137</sup> Renda, *supra* note 94, at 56. For information on best practices for regulatory impact assessment (and how to implement it in the decision making process) see BUILDING AN INSTITUTIONAL FRAMEWORK FOR REGULATORY IMPACT ANALYSIS, OECD (2008), available at <http://www.oecd.org/gov/regulatory-policy/buildinganinstitutionalframeworkforregulatoryimpactanalysisriaguidanceforpolicymakers.htm>.

<sup>138</sup> Renda, *supra* note 94, at 56 and 57.

<sup>139</sup> *Id.* at 57.

<sup>140</sup> *Id.* at 47, 49-54. It was suggested that a two stage impact assessment should be conducted, a preliminary one devoted to the analysis of alternative regulatory options and an extended impact assessment in which the detailed assessment of the benefits and costs of the preferred regulatory option is made. *See id.* at 54. This was implemented in the new impact assessment model of 2002. *See id.* at 55. See also CLAUDIO M. RADAELLI ET AL., HOW TO LEARN FROM THE INTERNATIONAL EXPERIENCE: IMPACT ASSESSMENT IN THE NETHERLANDS 39, 40-61 (Center for European Governance, University of Exeter, 2010), available at <http://centres.exeter.ac.uk/ceg/research/ALREG/documents/Lerningfromtheinternationalexperience.pdf> (discussing impact assessment in other countries, including the United States).

merely summarized the interests of stakeholders and tried to find a compromise between political and policy stances advanced by different stakeholders having an interest in the rules at hand.<sup>141</sup> The 2002 impact assessment as described above constituted a very complex exercise, which aspired to predict all possible consequences of the endorsement of new regulation and has been costly, burdensome, highly discretionary, and time-consuming.<sup>142</sup> Research on these extended impact assessments revealed several methodological shortcomings, entailing unclear descriptions of the problem, obscure ranking of objectives, a narrow range of policy options, an unbalanced coverage of different types of impact (economic, social, and environmental) and inadequate arrangements for external consultation.<sup>143</sup> This resulted in a paradigm shift from sustainable development to competitiveness and from integrated impact assessment to an economic assessment in 2005, however not being a mere compliance cost assessment.<sup>144</sup> The guidelines still insist on a multi-criteria assessment by keeping the three pillars (economic, social, and environmental) separate.<sup>145</sup> OECD reports have pointed at the necessity of linking impact assessment to an oversight body as a key enabler of the success of regulatory impact analysis models.<sup>146</sup> Following these reports, the Impact Assessment board was created within the Secretariat General.<sup>147</sup> In 2010, the need to improve the methodology and soundness of the economic analysis was felt, as well as the efficient use of resources devoted to impact assessment and ex post evaluation in the Commission.<sup>148</sup> The assessment of alternatives has become more systematic.<sup>149</sup>

However, the impact assessment is not considered to be very important because it is an assessment of the European Commission which rapidly becomes obsolete when the legislation is amended during the European co-decision procedure.<sup>150</sup> Often the final legislation only partly reflects the assessment conducted on the original proposal

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<sup>141</sup> Renda, *supra* note 94, at 48, 52.

<sup>142</sup> *See id.* at 57.

<sup>143</sup> *Id.* at 69.

<sup>144</sup> *Id.* at 58-60. At this point the dual stage system was abandoned. *Id.* at 58.

<sup>145</sup> *Id.* at 63.

<sup>146</sup> Cf. Oliver Fritsch et al., *Regulatory Quality in the European Commission and the UK: Old Questions and New Findings* 1 (Ctr. European Policy Studies, Working Document No. 362, 2012) available at <http://www.ceps.eu/book/regulatory-quality-european-commission-and-uk-old-questions-and-new-findings>.

<sup>147</sup> Renda, *supra* note 94, at 64-67. However some feel the need for independent oversight bodies at EU level. *See id.* at 66; Fritsch et al., *supra* note 146, at 1.

<sup>148</sup> Renda, *supra* note 94, at 67.

<sup>149</sup> *Id.* at 78.

<sup>150</sup> Renda revealed that the vast majority of impacts assessments relate to non-binding communications and policy initiatives. *See Id.* at 72-73.

of the European Commission.<sup>151</sup> The other EU institutions such as the European parliament and the Council still abstain from impact assessments.<sup>152</sup> Besides this a clear focus lacks, it is unclear whether the impact assessment should abide by any specific methodology or need for quantification.<sup>153</sup> Many impact assessment documents do not adopt a clearly recognizable viewpoint, for example a quantitative cost-benefit analysis.<sup>154</sup> Another disadvantage is the confidential nature of the impact assessments: only the final versions are published.<sup>155</sup> Nonetheless, the Commission managed to improve the quality of its impact assessments, although a lot seems to depend on the proposal at stake, bearing in mind that to date no other EU member states, excluding the UK, use such an instrument.<sup>156</sup> At the same time instruments seem to be gradually shifting towards other tools and in particular towards the Standard Cost Model for the measurement and reduction of administrative burdens as well as fitness checks covering entire policy domains.<sup>157</sup> The recently developed Impact Assessment Guidelines of the European Commission stem from this and are used by many EU and non EU-countries.<sup>158</sup> However, no conclu-

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<sup>151</sup> *Id.* at 47.

<sup>152</sup> *Id.* at 80.

<sup>153</sup> *Id.* at 81. *Cf.* Dunlop, *supra* note 135, at 949; Fritsch et al., *supra* note 146, at 3.

<sup>154</sup> Renda, *supra* note 94, at 81. However, the cost-benefit analysis has also been criticized in the recent years because it, just like economics in general, neglects human behavior. See *id.* at 102, 112, and 130-135. Nonetheless this approach has increased success in the US and in other impact assessments. See *id.*, at 140; RADAELLI ET AL., *supra* note 140, at 40-61. The critique in Europe might be invoked by the impact assessments on non-binding regulation and therefore on a much broader set of proposals, which may lead to casting doubts on the usefulness of cost-benefit analysis. The US have adopted a confined, invariable (in terms of depth and criteria) system to select proposals that should undergo an impact assessment. However, this assessment only covers secondary regulation. See Renda, *supra* note 94, at 147-148; RADAELLI ET AL., *supra* note 140, at 40-61.

<sup>155</sup> Fritsch et al., *supra* note 146, at 1-2; Renda, *supra* note 94, at 48.

<sup>156</sup> Renda, *supra* note 94, at 48. However, comparable instruments are used in other EU countries. See, e.g., RADAELLI ET AL., *supra* note 140, at 107-126 and 146-177.

<sup>157</sup> Renda, *supra* note 94, at 48 and 82. *Cf.* Dunlop, *supra* note 135, at 949.

<sup>158</sup> *Smart Regulation in the European Union*, COM (2010) 543 final (Aug. 8, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0543:FIN:EN:PDF>. *Cf.* A "Competitiveness Proofing" Toolkit for Use in Impact Assessments, SEC (2012) 91 (Jan. 27, 2012), available at [http://ec.europa.eu/smart-regulation/impact/key\\_docs/docs/sec\\_2012\\_0091\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/key_docs/docs/sec_2012_0091_en.pdf). See also Cafaggi and Renda, *supra* note 46, at 1.



sive evidence exists that countries that use the impact assessment grow faster than countries which do not.<sup>159</sup>

That said, the Impact Assessment Guidelines of the European Commission might provide some guidance as to the effects of international private regulation.<sup>160</sup> This seems to be taken as a starting point by ISEAL which launched a code for assessing the impacts of Social and Environmental Standards. This code in part resembles the impact analysis of public policy makers.<sup>161</sup> The Standard Cost Model might also be appropriate and, because it is less sophisticated, it might be easier to implement.<sup>162</sup> This Standard Cost Model is used in other countries too, like the UK and US, and measures the (reduction of) administrative burdens.

This Standard Cost Model might provide useful insights on economic effects of international private regulation.<sup>163</sup> In that respect it should be noted that international private regulation may lead to a cost transfer from states to private actors, such as enterprises.<sup>164</sup> Ob-

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<sup>159</sup> Renda, *supra* note 94, at 93.

<sup>160</sup> The former Impact Assessment tool of the European Commission seems less adequate, because of its complexity as well as its expensiveness, sometimes inconclusive and confidential nature. *See id.* at 48, 52. *Cf.* Cafaggi and Renda, *supra* note 46, at 2.

<sup>161</sup> *See Assessing the Impacts of Social and Environmental Standards Systems v1.0*, ISEAL ALLIANCE (NOV. 2010) [www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice](http://www.isealalliance.org/online-community/resources/iseal-impacts-code-of-good-practice). *See, e.g.*, Cafaggi and Renda, *supra* note 46, at 20-23. Impact assessment is also an indicator in the MSI-evaluation tool. *See MSI-Evaluation Tool*, *supra* note 97, at 37, 38.

<sup>162</sup> *Cf.* Renda, *supra* note 94, at 48, 82. However, this method is criticized too because it tends to neglect human behavior. *See id.* at 102, 112 and 130-35. Beside this, this method neglects that regulation might generate benefits outside the reduction of administrative burdens.

<sup>163</sup> However, the question arises whether the cost of compliance with private regulation that entails a code of conduct can be monetized. Compliance with a code of conduct is often considered to be intertwined with the day-by-day business and the costs thereof are not measured separately. *See, e.g.*, Oude Vrielink, *supra* note 132, at 69.

<sup>164</sup> Cafaggi, *supra* note 12, at 30. For example, the GlobalGAP framework (on good agricultural practice) assumingly imposes disproportionate costs on farmers in developing countries. *See Communication from the Commission on Agricultural Product Quality Policy*, COM (2009) 234 final (May 28, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0234:FIN:EN:PDF>. The greater the degree of precision of the norms, the greater will be the costs of formulating legal commands and applying them in adjudication and of parties interpreting them for purposes of deciding how to conform behavior to such rules. Therefore the greater the degree of precision, the greater will be the cost transfer. On the other hand, as has been elaborated before, more precise commands will generally result in better behavior.

viously, the process of establishing private regulation is more costly to industry than government legislation.<sup>165</sup> The threat of public regulation (setting new or higher standards than previously adopted by the public legislator) and relatively small (marginal) cost of private regulation induce business to engage in international private regulatory regimes.<sup>166</sup> Reporting requirements entailed in the private regulatory frameworks might increase the cost of business as well. This problem partly might be tackled by a shift in the nature of the norms of a private regulatory framework. Instead of focusing on substantive rules only, a regime might entail rules on the way stakeholders could build a (long term) relationship amongst each other.<sup>167</sup> Private regulation might have network effects. The costs of participating in an international private regulatory framework decrease with the number of participants.<sup>168</sup> Such costs are likely to be rather high in the early stages of the formation of a new regulatory framework.<sup>169</sup> Enforcement of private regulation is costly too, although necessary. Without enforcement, free-riding, where participants enjoy the benefits of the regulatory framework but disobey the rules, is possibly very frequent.

The costs of enforcement might discourage new members to join the network.<sup>170</sup> From the outset of the regime the (future) costs of enforcement are borne by the regulatees (or the overarching body).<sup>171</sup> However, these costs might be reduced if an overarching body, as referred to in the foregoing paragraph, exists and if these costs are shared by many participants.<sup>172</sup> Hence, if a private regulatory framework is set, it is efficient to aim at involving a higher number of participants in order to reduce the enforcement costs to be paid by the

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<sup>165</sup> Cf. Overmars, *supra* note 7, at 20. Furthermore, it is contended that delegation of public rulemaking power to private regulatory framework can lead to adverse welfare effects, especially if monopoly power is granted to one regulatory framework. See Ogus & Carbonara, *supra* note 10, at 241, 242.

<sup>166</sup> Ogus and Carbonara, *supra* note 10, at 236. Cf. Kolk & van Tulder, *supra* note 22, at 4.

<sup>167</sup> However, a regime might not be confined to the latter rules. This might especially jeopardize the public interest if the interests of the stakeholders do not coincide with it.

<sup>168</sup> *Id.* at 243. See Gandara, *supra* note 25, at 224 in connection with eco-labels.

<sup>169</sup> Cf. Ogus and Carbonara, *supra* note 10, at 231. Hence, it could be considered not to promulgate yet another private regulatory framework, but to build on and improve existing frameworks. Cf. *id.* at 232.

<sup>170</sup> *Id.* at 232, 237.

<sup>171</sup> *Id.* at 237.

<sup>172</sup> *Id.* at 233, 237 (contending that the information costs for the formulation and interpretation of the standards are lower and such bodies will emerge if monitoring costs for such a body are low). Compare, in connection with eco-labels, Gandara, *supra* note 25, at 112.

individual participants.<sup>173</sup> In that respect the scope of the private regime is of importance: the more global in scope, the higher the number of potential participants.<sup>174</sup> International private regulation has an international impact and may lead to a cost transfer from Western developed economies to southern developing economies.<sup>175</sup> This may contribute to the welfare of (Western) society at large, but might have adverse effects on developing economies.

That said, the Standard Cost Model might be the predominant indicator in the ex ante economic avenue which could be applied in practice, although some other indicators (such as the potential number of participants in a regulatory regime and other impact assessments tools) might be relevant as well.<sup>176</sup>

### 4.3 Sociological Approach

The (ex ante) effectiveness of international private regulation might be described from a sociological point of view too.<sup>177</sup> Important in this respect is how and when private regulation will be accepted by a certain group and why. Acceptance within a certain group might enhance compliance with regulation and thus might render private regulation (more) effective.

There is however no single answer to the question of how various norms crystallize (and thus might produce binding effects upon actors to whom they are addressed). They may be accepted through a variety of mechanisms.<sup>178</sup> The following factors, which relate to the institutionalization of regulatory norms, might provide some guidance.

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<sup>173</sup> Although research has revealed that it is very tempting to engage a whole industry in a private regulatory framework, even if adequate enforcement is implemented. Cf. Ogus and Carbonara, *supra* note 10, at 237 (contending that the framework has to provide economic incentives for free riders to participate).

<sup>174</sup> Kolk & van Tulder, *supra* note 22, at 10. This might be true for a code of conduct within a company if this is spread at a global level through its subsidiaries in other countries or through supply chains. The size of the company is of importance in that respect. Cf. *id.* at 21, 22.

<sup>175</sup> Cafaggi, *supra* note 12, at 30.

<sup>176</sup> However, one should realize that public regulation also might have consequences, for example if highly influential stakeholders manage to make politicians set rules which (are beneficial to these stakeholders but) have consequences for the competition on a certain market, which is of course inefficient from an economic point of view. It might well be that international private regulation is susceptible to such influence too, and maybe even more so than government regulation.

<sup>177</sup> See also Oude Vrielink, *supra* note 132, at 61-78.

<sup>178</sup> Casey & Scott, *supra* note 66, at 82; KOPPELL, *supra* note 29, at 41-44; Jan Eijsbouts, Corporate Responsibility, Beyond Voluntarism 17-22 (Maastricht University, Oct. 20 2011) (discussing anti-bribery norms).

However, these parameters do not establish a very clear distinction (which might be assessed in an empirical way) between norms which have been accepted and those which have not. Relevant factors are (i) the extent to and the way in which a norm has been distributed and is applied, (ii) the degree of acceptance of a norm, and (iii) the mode of transmission.<sup>179</sup> In connection with the degree of acceptance of a norm, the inclusiveness (of the norm setting process) vis-à-vis stakeholders is of essence. This will be elaborated as a separate issue under (iv).

Analysis of (i) distribution relates to the extent to and the way in which a norm is known and applied. Knowledge is not only a product of its promulgation. Training and education for those involved in applying the norm and sometimes information campaigns and notices also play a role in such knowledge building.<sup>180</sup> Mass media also plays a pivotal role in this process. Governments are particularly cognizant of this dimension of making norms effective.<sup>181</sup> However, it is of importance that not only the norm itself, but also the background endorsing it, as well as the objectives aimed at, are explained in such campaigns. Purchasers, for example, need to be convinced that the standard not only enhances efficiency but also achieves the objective it pursues.<sup>182</sup> It is even argued that social norms by their nature imply that what ought to be done is known by the community in which norms operate.<sup>183</sup> Traditional (public) legislation has the disadvantage that it does not always reach the actors it is meant for.<sup>184</sup> As a result, the Dutch government has searched for alternative ways, such as in “Bruikbare rechtsorde” and “Vertrouwen in wetgeving.”<sup>185</sup>

Acceptance (ii) of a norm may involve consideration of both the process through which it emerges, its content, and its likely effects. Crystallization of norms is therefore heavily reliant upon the instruments which can transmit information which educates actors about not only the substantive content of rules, but also the objectives which

<sup>179</sup> Casey & Scott, *supra* note 66, at 78 n.82 (referring to the typology of Morris).

<sup>180</sup> *Id.* at 82. Cf. Alvarez & von Hagen, *supra* note 67, at 24; RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 54-55, (Yale University Press, 2008). See for example on International Framework Agreements on labor standards Herrnsstadt, *supra* note 112, at 201, 202. Therefore, the MSI-evaluation tool demands for a continuous learning program for relevant stakeholders. See *MSI-Evaluation Tool*, *supra* note 97, at 21, 22, 25-27, 32 and 33.

<sup>181</sup> Casey & Scott, *supra* note 66, at 84.

<sup>182</sup> Compare, on guarantees of product safety, *id.* at 91-92.

<sup>183</sup> *Id.* at 82.

<sup>184</sup> Overmars, *supra* note 7, at 16.

<sup>185</sup> Documents of The Dutch Parliament Second Chamber 2003/04, 29 279, 9; 2008/09, 31 731, 1 and 2, <http://www.overheid.nl> (last visited Jan 22nd 2014). See also Overmars, *supra* note 7, at 17.

underlie norms, the substantive regulatory process, and methods by which norms can be complied with.<sup>186</sup> Trust in obedience by other members and social incentives to comply are needed.<sup>187</sup> The acceptance of private regulation might increase if regulation is established by an industry instead of being promulgated by the government.<sup>188</sup> In this respect a stable group of participants and a slow changing environment are helpful.<sup>189</sup> A tradition of and experience with private rulemaking might enhance acceptance of a new private regulatory regime.<sup>190</sup> Therefore, private regulation may be successfully established only if the stakeholders are willing to collaborate and to address relevant issues in an industry.<sup>191</sup>

Beside this, it is helpful if an industry has a shared vision on and responsibility towards societal issues.<sup>192</sup> In this respect the relevance of norms is deemed to be important for the acceptance thereof.<sup>193</sup> In terms of commitment, it is important whether the private regulation fits within the strategic choices and dilemmas faced by the companies and their managers, partly determined by norms that emerge within markets.<sup>194</sup> These norms are classically set through the interaction of many buyers and sellers.<sup>195</sup> The success of a standard is largely determined by its take-up within a particular market through, for instance, its (voluntary) adoption both in production processes and

<sup>186</sup> Jacco Bomhoff & Anne Meuwese, *The Meta-regulation of Transnational Private Regulation*, 38 J. OF L. & Soc'y. 138, 159; Casey & Scott, *supra* note 66, at 82.

<sup>187</sup> Overmars, *supra* note 7, at 21. For compliance, an independent body might be helpful. *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> Alvarez & von Hagen, *supra* note 67, at 27; Oude Vrielink, *supra* note 132, at 72.

<sup>190</sup> Oude Vrielink, *supra* note 132, at 72. *Cf.* Alvarez & von Hagen, *supra* note 67, at IX.

<sup>191</sup> Oude Vrielink, *supra* note 132, at 72; Overmars, *supra* note 7, at 20; *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 3 (adding that participants have to commit real effort to success).

<sup>192</sup> Oude Vrielink, *supra* note 132, at 72. *See also* Overmars, *supra* note 7, at 20, 26 (arguing for an intermediate organization to assist in this and contends that such an organization is lacking regarding the Dutch corporate governance code).

<sup>193</sup> *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 9, 19, 21, 29 and 32.

<sup>194</sup> *See* Oude Vrielink, *supra* note 132, at 72. *See also* Kolk & van Tulder, *supra* note 22, at 20.

<sup>195</sup> For example, the rating mechanism of eBay incentivizes compliance and permits sellers who build up strong ratings to sell successfully. *See* Casey & Scott, *supra* note 66, at 81.

the specification within supply chains.<sup>196</sup> Beside this, entities are more willing to accept norms if they are in their own interest.<sup>197</sup>

Acceptance of a norm is intertwined with the legitimacy of those norms.<sup>198</sup> Linkage to electoral politics is a central mechanism of legitimating *public* regulation.<sup>199</sup> Legitimacy of public regulation is assessed by reference to certain predetermined standards and criteria.<sup>200</sup> These criteria include assessing whether the regulatory norms are (i) constitutional (for example fair procedures, due process, consistency, coherence, proportionality, and the existence of oversight from constitutionally established bodies such as national courts, legislatures, or executives and international organizations) and (ii) democratic (the extent and effectiveness of participation, transparency, accountability, and deliberation in the norm-formation process).<sup>201</sup>

Criteria for assessing legitimacy are also found in (iii) functionality and being performance based (degree of expert involvement and effectiveness and efficiency of the norm in achieving the objectives which they pursue) and (iv) being value and objectives-based (fair trade, good agricultural practices, market efficiencies, and sustainable development).<sup>202</sup> Obviously, *international private regulation* does not meet these requirements of legitimacy in the traditional sense. It rarely takes the form of formal and informal delegation of rule-making by public entities. It uses a broad range of regulatory devices that may be of a rather soft legal nature, such as codes, but also of a hard legal nature, such as contracts.<sup>203</sup> However, private regulation may operate as a complement to public rules to specify and tailor them to specific markets.<sup>204</sup> In this respect (public) legislation lends legitimacy (in the

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<sup>196</sup> *Id.* at 81; Overmars, *supra* note 7, at 19 (on prevention of child labor in the garment and toys industry). Corporate governance systems in different countries play a role as to willingness of companies to implement codes of conduct (in the CSR area) too. See Kolk & van Tulder, *supra* note 22, at 8, 9. This might, for example, also result in closer relationships between buyers and sellers in a supply chain. See Alvarez & von Hagen, *supra* note 67, at 26, 27.

<sup>197</sup> Oude Vrielink, *supra* note 132, at 72; Schouten, *supra* note 69, at 71.

<sup>198</sup> Casey & Scott, *supra* note 66, at 86; Schouten, *supra* note 69, at 61. *Cf.* Alvarez & von Hagen, *supra* note 67, at IX, 19, and 20. Sometimes this kind of legitimacy is referred to as authority as an opposite of legitimacy (of governments) in the legal sense. See, e.g., KOPPELL, *supra* note 29, at 56.

<sup>199</sup> *Cf.* Casey & Scott, *supra* note 66, at 86.

<sup>200</sup> *Id.* at 87. On legitimacy see also KOPPELL, *supra* note 29, at 45-48.

<sup>201</sup> See, e.g. Casey & Scott, *supra* note 66, at 87.

<sup>202</sup> *Id.*

<sup>203</sup> Curtin & Senden, *supra* note 11, at 164.

<sup>204</sup> Cafaggi, *supra* note 12, at 42, 43. Compare on this (sometimes complicated) interaction in connection with bio fuels, Schouten, *supra* note 69, at 106, 107, and 112-125. For example, in countries with weak governance structures or corruption issues international private regulation might enhance compliance. *Cf. id.* at 139.

traditional sense) to international private regulation.<sup>205</sup> Therefore, criteria (i) and (ii) might be complied with where private regulation consolidates in combination with strong public institutions operating with public regulation.<sup>206</sup> It is also possible that private regulation precedes the creation of public regimes if, in order to bridge regulatory gaps, private organizations design new markets and new institutions to be later supplanted by hybrid regimes.<sup>207</sup> Furthermore, it is argued a wide range of activities which might once have been thought of as private should be regarded as public in character and therefore amenable to (future) public-law controls either at the domestic or global level.<sup>208</sup> This also provides some (future) legitimacy in the traditional sense.

Obviously, legitimacy of international private regulation beyond domestic legislation, or in the absence of such domestic regulation, is not derived from state legislation.<sup>209</sup> However, the linkage to electoral politics is quite distant on a global level if an international body like the UN is reviewed. Its decision-making process is quite diffuse and solely based on a rather indirect linkage to electoral politics. Therefore, it is difficult to adopt global regulation/legislation which has legitimacy in the traditional sense.<sup>210</sup> Beside this, international private regulation is not always comparable with public legislation as has been elaborated hereinabove. Private regulation might have less impact than public legislation and on smaller groups, for example, as it is deployed in supply chains.<sup>211</sup>

Does this mean that legitimacy is of no importance as international private regulation is concerned? Scott, Caffagi, and Senden con-

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<sup>205</sup> Cafaggi, *supra* note 12, at 42, 47. However, *cf.* Schouten, *supra* note 69, at 125, 126, 136, and 137 (contending that public regulation might also water down private standards in connection with bio fuels). Furthermore, international private regulation may contribute to the strengthening of the legitimacy of public regimes as well. For example national governments make use of transnational corporate capacity by enrolling airlines in immigration control and banks and (legal) practitioners in monitoring and reporting money laundering. See Cafaggi, *supra* note 12, at 41; Scott et al., *supra* note 9, at 18. *Cf.* Overmars, *supra* note 7, at 29.

<sup>206</sup> *Cf.* Cafaggi, *supra* note 12, at 24, 47, and 48; Schouten, *supra* note 69, at 60, 81.

<sup>207</sup> Cafaggi, *supra* note 12, at 24.

<sup>208</sup> Scott et al., *supra* note 9, at 15.

<sup>209</sup> However, international private regulation might have some electoral elements that partly resemble legitimation of public norms. Within private regulation regulatees may choose their regulators. For example, consumers may have choices as to which self-regulatory regime they want to be protected by. *See id.* at 17.

<sup>210</sup> Exempt from global treaties which are binding in all states. However, the number of treaties meeting this requirement is very limited.

<sup>211</sup> In such smaller communities other forms of legitimation are conceivable. *Cf.* LORD LLOYD OF HAMPSTEAD & MICHAEL D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 411 (Stevens & Sons, London 1985).

tend a more pluralist conception of constitutionalism which gives greater recognition to the diversity of institutional structures should be adopted.<sup>212</sup> The alternative forms of legitimacy better reflect the current social situation in which social media gains importance in the policy making of multinational enterprises. Hence, other mechanisms may be considered to bridge the legitimacy-gap as private regulation is proposed, including drafting proper procedures and potentially judicial accountability.<sup>213</sup> Regardless, support for international private regulation from governments might enhance acceptance, although (inhabitants of) non-western countries might consider support from western countries to be a protectionist measure in some instances.<sup>214</sup>

Striving after alternative forms of legitimacy is tempting in supply chain regulatory regimes such as, for example, those tied to CSR. In supply chains a purchaser requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.<sup>215</sup> Bilateral contracts within supply chains present significant problems for the management of legitimacy in terms of both substantive norms/processes and identifying the level at which such issues are managed.<sup>216</sup> In a worst case scenario, the supplies are likely to coercively experience the international private regulation adopted in a supply chain contract. This is especially true if multinational enterprises prescribe the norms vis-à-vis smaller and medium corporations. International human rights and environmental principles might in other (non-western) countries be suspected as part of alleged protectionist measures concerning its own national industry. Third party monitoring increases complexity and diffuses the responsibility for legitimacy. However, third parties may be part of a legitimation strategy not only regarding suppliers but also in respect of the ultimate consumers. To the extent that issues of consumer confidence are significant, there may be strong incentives to make use of third party assurance.<sup>217</sup>

It is not unreasonable to assume that the combination of direct participation of market actors and the inclusion of both NGOs and governments has the potential to combine advantages for acceptance as

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<sup>212</sup> Scott et al., *supra* note 9, at 2. Cf. Cafaggi, *supra* note 12, at 43; Pauwelyn et al., *supra* note 59, at 511-519; Schouten, *supra* note 69, at 57 and 109.

<sup>213</sup> Scott et al., *supra* note 9, at 1; Schouten, *supra* note 69, at 82, 83, 106-110, 128-132, and 134-137.

<sup>214</sup> Compare, on the role of governments, Alvarez & von Hagen, *supra* note 67, at 17 and 18. Compare, in connection with global agri-food chains, Schouten, *supra* note 69, at 67, 68.

<sup>215</sup> Casey & Scott, *supra* note 66, at 93.

<sup>216</sup> *Id.* at 93.

<sup>217</sup> *Id.* at 94.



compared with inter-governmental regimes.<sup>218</sup> In fact, government support might enhance acceptance.<sup>219</sup> From the importance of acceptance of private international regulation one could infer that an initiative is more effective as the level of acceptance increases and that the lack of legitimacy of international private regulation in the traditional sense might be partially compensated for by acceptance (in a sociological sense). If regulates and other stakeholders accept the norms, this acceptance proves at least a slight degree of legitimacy.<sup>220</sup>

As to (iii) the mode of transmission of norms, some modes are more effective to induce acceptance than others. Supply chain contracts are often used to import norms developed in other contexts which are less than fully institutionalized.<sup>221</sup> The standards set by the FSC were adopted by major retailers in their supply chain contracts because of market pressure to show strong environmental performance.<sup>222</sup> This is transparent to the parties and has been subject to well-developed mechanisms of monitoring and enforcement.<sup>223</sup> In such circumstances knowledge and acceptance of a norm is part of the process of entering into a contract.<sup>224</sup> The dimension of socialization and reinforcement then occurs largely through market processes.<sup>225</sup> Hence, if a private regulatory regime applies more effective modes of transmission this indicates more effectiveness from a sociological point of view.

As to (iv) the inclusiveness of the norm setting process (which is closely tied to acceptance), it is of importance that the relevant stakeholders are involved in the production of the rules of the private regulatory framework. In this respect, rules on stakeholder engagement in public legislation might be helpful. Dutch law provides an interesting example. Section 25 of the Dutch Privacy Act grants the Dutch Privacy Authority the power to take an administrative decision on the compatibility with the Privacy Act of a certain code of conduct

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<sup>218</sup> Scott et al., *supra* note 9, at 19.

<sup>219</sup> Compare, in connection with global agri-food chains, Schouten, *supra* note 69, at 67 and 68.

<sup>220</sup> Cf. HAMPSTEAD AND FREEMAN, *supra* note 211, at 411.

<sup>221</sup> Casey & Scott, *supra* note 66, at 85. Cf. Oude Vrielink, *supra* note 132, at 72.

<sup>222</sup> Casey & Scott, *supra* note 66, at 85.

<sup>223</sup> This for example takes place through third party certification. *See id.* at 85. These mechanisms often encompass a high degree of institutionalization. *See id.*

<sup>224</sup> *Id.* The more vertically (one entity controls multiple processes along the chain) and horizontally (fewer entities at each stage) integrated a chain is, the more effective the transmission appears to be. Compare, in connection with global agri-food chains Schouten, *supra* note 69, at 46 and 47.

<sup>225</sup> Casey & Scott, *supra* note 66, at 86.

(on privacy) set forth by a certain industry.<sup>226</sup> Section 25 of the Dutch Privacy Act requires the Privacy Authority to enable relevant stakeholders to comment on this code of conduct before it reaches its decision.<sup>227</sup> This procedure enhances the acceptance of the code of conduct. Stakeholders have the opportunity to comment on intended secondary regulation in the United States. These proceedings might enhance acceptance as well. If such stakeholder engagement measures are put in place, this might be effective in terms of acceptance of certain international private regulation.<sup>228</sup> By and large, international private regulation is more effective in sociological terms if relevant stakeholders are involved in the rule making process in such a manner that they may contribute effectively to the norm setting process.<sup>229</sup>

This is shown by a survey carried out by ISEAL in 2007 which has shown that inclusiveness, participation, and fair representation is pivotal in connection with the credibility of standards.<sup>230</sup> Non-inclusiveness might induce (not included) stakeholders to (strongly) oppose

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<sup>226</sup> Which according to section 25 subsection 3 of the Dutch Privacy Act has to demonstrate its representativeness.

<sup>227</sup> In connection with standardization in the EU see Council Regulation 12/1025, § 4 subsection 3, 2012 O.J. (L316) (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> (requiring a notice and comment procedure regarding draft standards).

<sup>228</sup> However, Scott et al., contend that the legitimacy of monitoring and enforcing functions is amenable to being addressed not only through participation, but also through institutionalization both of process and norms for scrutiny. See Scott et al., *supra* note 9, at 15.

<sup>229</sup> See *MSI-Evaluation Tool*, *supra* note 97, at 8-11; Schouten, *supra* note 69, at 84 and 85. Cf. *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 9, 19, 21, 29, and 32. See also Council Directive 98/34, 1998 O.J. (204) 37 (EC) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:204:0037:0048:EN:PDF>. In the report is proposed to change directive 98/34/EC in line with the provisions of the Service Directive 2006/123/EC. See the report, at 32. In this respect the report (at 9 and 23) also refers to the ISO code of ethics (to ensure impartiality) and the WTO Code of Good Practice for the Preparation, Adoption and Application of Standards. In (technical) standardization the regulator is supposed to be independent from the industry and its legitimacy is based on expertise. See Cafaggi, *supra* note 12, at 35. Moreover, independency from members of an initiative seems important for this in general. This poses amongst others limits to funding by members to an initiative and allocation of resources. See, e.g. *MSI-Evaluation Tool*, *supra* note 97, at 6 and 7.

<sup>230</sup> Casey & Scott, *supra* note 66, at 89. Compare, regarding round table initiatives in global agri-food chains Schouten, *supra* note 69, at 36-38. This might be a specific risk in long supply chains with multiple actors. Cf. Alvarez & von Hagen, *supra* note 67, at 11.

international private regulation.<sup>231</sup> Inclusiveness regarding relevant stakeholders provides insight in the preferences of others, the varieties of perspectives on the problem the regime addresses, and provides potential for rethinking not only the rules and instruments of the regime but also its objectives.<sup>232</sup> If only one group of stakeholder(s) is represented in the governing body, this decreases the acceptance of such mechanism for others.<sup>233</sup> Therefore, the multi-stakeholder model seems more effective because it aspires to engage the relevant stakeholders in the rulemaking process and is therefore able to embody all interests.<sup>234</sup> This might, however, not be true in all circumstances. For example, market failures associated with the excessive depletion of natural resources or climate change may be effectively addressed through action by the same market actors whose conduct caused the problem.<sup>235</sup>

As to the way in which relevant stakeholders should be involved, four features of rule-making might be of importance: (i) formality (how precisely is the rule-making process stipulated in organization documents, either formal or informal), (ii) decision calculus (what is the nature of deliberations regarding proposed rules, either technical or political), (iii) decision rule (how is the decision to approve a new rule made: majoritarian, supermajoritarian, special powers, consensus), and (iv) inclusiveness (how open is the rule-making process to participation by nonmembers, either self-contained or participatory).<sup>236</sup>

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<sup>231</sup> See, in connection with global agri-food chains, Schouten, *supra* note 69, at 43-45.

<sup>232</sup> Scott et al., *supra* note 9, at 18.

<sup>233</sup> Cf. UTTING, *supra* note 57, at 103.

<sup>234</sup> Cf. KOPPELL, *supra* note 29, at 57; Overmars, *supra* note 7, at 20; Scott et al., *supra* note 9, at 6; Pauwelyn et al., *supra* note 59, at 521-526; UTTING, *supra* note 57, at 103. On International Framework Agreements on labor standards see Herrstadt, *supra* note 112, at 187. This is also common in respect of traditional rule-making.

<sup>235</sup> Scott et al., *supra* note 9, at 7; Kolk & van Tulder, *supra* note 22, at 23.

<sup>236</sup> KOPPELL, *supra* note 29, at 145. See also *MSI-Evaluation Tool*, *supra* note 97, at 11-13; section 5.2 of the Iseal Code of Good Practice, *supra* note 89, which demands for providing public information on the decision-making procedures of standard setting processes. Section 5.5.1 prescribes that participation in the standards consultation as a principle should be open to all interested parties and that the decision making reflects a balance of interests among interested parties. Cf. also *MSI-Evaluation Tool*, *supra* note 97, at 37. Section 5.5.3 of the ISEAL code of good practice prescribes that if decision-making is limited to members the membership criteria and application procedures shall be transparent and non-discriminatory. *ISEAL Code of Good Practice*, *supra* note 89, §5.5.3. Section 5.9 aims at consensus but provides for alternative decision-making procedures if this is not possible. It prescribes that decision-making procedures should be established and documented

That said, engaging relevant stakeholders is rather complicated.<sup>237</sup> For example, in the global setting it is troublesome to find the relevant stakeholders because the relevant community is ambiguous and contested.<sup>238</sup> (Global) administrative procedural requirements might be included (which might even be assessed by third parties).<sup>239</sup> This is especially true in assessing the relevant stakeholders and engaging them,<sup>240</sup> assessing the (different) interests of these stakeholders, and providing these stakeholders with adequate information in a timely fashion and in such a manner that they are able to understand it. For example, inviting (representatives of) indigenous people from a country in Latin America to attend a rule setting conference of multinational corporations at a venue in the United States which is difficult to reach, and providing them a day in advance with extensive information through a web portal which they have no access to (because they do not have Internet access), and in English, a language they may not understand, is rather ineffective.

Effective stakeholder engagement entails (i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule setting process (with sufficient resources), preferably through (with administrative procedures comparable) engagement rules, (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it, and (iv) sufficient documentation

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which make it impossible for one group to dominate or to be dominated in the decision-making process. *Id.* § 5.8. Compare, regarding (practical difficulties in) global agri-food chains Schouten, *supra* note 69, at 64-67 and 85-87, who refers to a methodology to assess the quality of deliberation (Discourse Quality Index).

<sup>237</sup> See, e.g., Cafaggi, *supra* note 12, at 38; Cafaggi & Renda, *supra* note 46, at 6; UTTING, *supra* note 57, at 62, 63, 103-105. Cf. also Scott et al., *supra* note 9, at 10.

<sup>238</sup> Alvarez & von Hagen, *supra* note 67, at 20; KOPPELL, *supra* note 29, at 69. The Iseal Code of Good Practice provides for an opportunity for interested parties to comment on the public summary for a proposed standard and its terms of reference in section 5.2.2. *ISEAL Code of Good Practice*, *supra* note 89, § 5.2.2.

<sup>239</sup> Benedict Kingsbury et al., 68 *LAW & CONTEMP. PROBS.* 15, 16, 17, and 58 (2004-2005); Curtin & Senden, *supra* note 11, at 179. On these procedural requirements see Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 *LAW & CONTEMP. PROBS.* 109, 133 (2004-2005). It might be feasible to start with a smaller group of stakeholders to build trust and to expand this group afterwards. See in connection with global agri-food chains. Schouten, *supra* note 69, at 46.

<sup>240</sup> It might be conceivable to introduce threshold criteria in terms of being affected. See Tim Corthaut et al., *Operationalizing Accountability of IN-LAW Mechanisms*, in *INFORMAL INTERNATIONAL LAWMAKING* 310, 316 (Joost Pauwelyn ed., Oxford University Press, 2012).

of the process and reporting to the stakeholders.<sup>241</sup> NGOs might play a role in capacity building of local communities especially in non-western countries.<sup>242</sup> These communities should not feel bound by decisions made by (western) outsiders (only). As to criterion (i) diversity (in terms of gender and background), for example, has to be safeguarded and no relevant stakeholder should be marginalized.<sup>243</sup> Furthermore, if the stakeholders are quite diverse, several selection processes and different bodies of engagement for different stakeholders might be necessary. Beside this, the degree of participation might be variable.<sup>244</sup> There is no need to put too much emphasis on membership.<sup>245</sup>

Several examples show the importance of stakeholder engagement in connection with the effectiveness of international private regulation. For example the Marine Stewardship Council ("MSC"), established by the World Wildlife Fund and Unilever in 1996, was initially criticized due to perceived industry capture and lack of transparency and participation in its standard-setting procedures. The MSC became a fully independent non-profit organization in 1998 and undertook a comprehensive governance reform to enhance participa-

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<sup>241</sup> Cf. *ISEAL Code of Good Practice*, *supra* note 89, §§ 5.2, 5.3, 5.5, 5.6 and 5.7. Sections 5.2 and 5.3 entail a stakeholder mapping exercise which includes defining which interest sectors are relevant and why and what means of communications will best reach them. Furthermore key stakeholders should proactively be approached and the standard setting body should establish participation goals. According to section 5.5.2 relevant stakeholders are those who have an expertise relevant to the subject matter of the standard, those who are affected by the standard and those that could influence the standard. Materially affected stakeholders should make up a meaningful segment of the participants. Furthermore, section 5.6 prescribes a public consultation phase of 60 days in two rounds (if new standards are set or existing standards are substantially modified). Section 5.7 prescribes that interested parties shall be provided with meaningful opportunities to contribute and if a balanced group of stakeholders participate all interested parties should have an equal opportunity to be part of that group. Furthermore, the standard setting organization should identify parties who will be directly affected and not adequately represented and proactively seek their contributions (section 5.7.2). If necessary, funding or other means to facilitate participation (especially for disadvantaged groups directly affected by the standards) should be provided by the standard setting body (section 5.7.3). Cf. *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principals 1.2 & 2.5.

<sup>242</sup> UTTING, *supra* note 57, at 105-07.

<sup>243</sup> See, e.g. *MSI-Evaluation Tool*, *supra* note 97, at 8-11.

<sup>244</sup> Cassese et al., *supra* note 239, at 17.

<sup>245</sup> Imelda Maher, *Competition Law and Transnational Private Regulatory Regimes: Marking the Cartel Boundary*, 38 J. L. & Soc'y 119, 135 (2011).

tion, representation, and transparency.<sup>246</sup> The Forest Stewardship Council (“FSC”) has been one of the most active private regulation regimes in the institutionalization of processes aspiring to increase its legitimacy relating to responsible forest management.<sup>247</sup> It institutionalized an elaborate governance structure which is based upon participation, democracy, and equality. It established a tripartite governance structure composed of social, environmental, and economic chambers which have equal voting rights. In each chamber there are north and south sub chambers with equal voting rights regardless of the number of members. In order for a decision to be made there is a requirement of a two-thirds vote, which necessitates agreement not only between social, environmental, and economic interests, but also between northern and southern interests.<sup>248</sup>

Concluding this section, one might argue that the more relevant stakeholders are effectively engaged in the rulemaking process, the more effective an initiative deems to be. From the above, one might infer, from a sociological perspective, that the effectiveness of international private regulation is intertwined with:

- (i) The degree of knowledge and application,
- (ii) Acceptance thereof, which, *inter alia*, depends on:
  - a. A stable group of stakeholders,
  - b. A willingness to collaborate and to address relevant issues,
  - c. A shared vision on relevant issues,
  - d. The degree to which the actions of a governing body, if any, are aligned with this shared vision,
  - e. A tradition of and experience with private rulemaking,
  - f. The way the regulation fits within the strategic choices and dilemmas faced by the regulatees,
  - g. The existence of an own interest in the regulation,
  - h. A slow changing environment,
  - i. Support from governments,
- (iii) The mode of transmission, and
- (iv) Inclusiveness *vis-à-vis* stakeholders and effective stakeholder engagement.<sup>249</sup>

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<sup>246</sup> Casey & Scott, *supra* note 66, at 90.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*; Schouten, *supra* note 69, at 65. Sometimes outside the CSR area, for example in GLOBALGAP, a private regulation regime in the sphere of food safety and quality, processes are initiated to enhance participation in its standards setting by notice and comment procedures, but the board is still composed of retailer and producer representatives. See Casey & Scott, *supra* note 66, at 90.

<sup>249</sup> This indicator refers to the legitimacy of the process, elaborated in para 2.4 *supra*, as well.

The social perspective could be used *ex ante* to predict whether a favorable environment exists for a private regulatory framework to be accepted. Obviously, acceptance itself cannot be assessed *ex ante*. It is also relevant to include the most effective ways of communication and transmission of the framework in the rule setting process and the promulgation of the framework. The same goes for the inclusiveness of the rule setting process vis-à-vis relevant stakeholders.

#### 4.4 Behavioral Approach

The psychological approach aspires to assess (*ex ante*) whether envisioned international private regulation influences human behavior effectively.<sup>250</sup> However, legal (either private or public) rules are not the predominant steering mechanisms which guide an actor's behavior in many situations. For example, social norms which emanate from communities govern much human behavior too.<sup>251</sup> If a range of (either private or public) norms is designed to govern an actor's conduct, this does not automatically mean these norms actually govern that actor's behavior.<sup>252</sup> Empirical research has shown that in particular contexts, both contractual and regulatory, legal rules are not relied upon to steer the conduct of a social actor, despite the fact these legal rules are applicable to a specific action of a certain social actor, for instance through contractual agreements or legislation.<sup>253</sup> For example, contracting parties frequently do not rely on the law or lawyers in resolving disputes over breaches.<sup>254</sup> In such cases, social norms may guide the specific conduct of the actor.<sup>255</sup> Therefore, it is of importance to enhance, as much as possible, the crystallization of international private regulation in such a manner it actually governs behavior.

Another problem is that research has raised serious questions about the rationality of many judgments and decisions that people make.<sup>256</sup> For example, people tend to overestimate the predictability of

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<sup>250</sup> In this respect especially, insights derived from cognitive psychology (which deals with the human decision making process) are relevant and those derived from social psychology (the interaction between people and the way this influences decision making) are less relevant. The psychological approach is also concerned with the issue whether decision-making may as well be influenced by other (proper) measures than regulation.

<sup>251</sup> Casey & Scott, *supra* note 66, at 79.

<sup>252</sup> *Id.* at 81.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 86.

<sup>255</sup> *Id.* at 82.

<sup>256</sup> THALER & SUNSTEIN, *supra* note 180, at 7.

past events (the “hindsight bias”).<sup>257</sup> Furthermore, people tend to go along with the status quo or default option.<sup>258</sup> Therefore, if public officials think that one policy produces better outcomes, they can influence the outcome by choosing it as a default.<sup>259</sup> Following the default option might stem from a choice/information overload. Research suggests that past a certain point, if provided with more choice and information, humans either walk away from markets, choose the default option, or choose randomly.<sup>260</sup> For example, in connection with eco-labels, consumers might attempt to simplify rather (complex) environmental information and aggregate other people’s opinions.<sup>261</sup> They might expect eco-labeled foods to taste better because the environmental benefit is not observable.<sup>262</sup> Furthermore, a consumer tends to accept information which is in line with previous knowledge.<sup>263</sup> Consumers might also overestimate the environmental improvement of an eco-labeled product or consider brands or companies which engage in eco-labels as entirely green.<sup>264</sup> Even their expectations about a product’s (environmental) quality makes a product better or worse. If their impression is positive, negative information will be ignored.<sup>265</sup>

A higher price enhances the credibility of the product too.<sup>266</sup> Because eco-labels are oriented towards providing (certain) environmental information, consumers might tend to overestimate the effects of these environmental problems in favor of less exposed environmental problems.<sup>267</sup> Beside this, a problem has to be individualized or separated into smaller manageable parts: if it becomes too broad, such as climate change, an individual contribution is rather small. Therefore,

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<sup>257</sup> Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 24 (2007-2008); Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 Judicature 44, 47 (2002-2003).

<sup>258</sup> THALER & SUNSTEIN, *supra* note 180, at 8, 34.

<sup>259</sup> Eric J. Johnson & Daniel G. Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338 (2003); THALER & SUNSTEIN, *supra* note 180, at 8, 86. For example, countries in which people have to object to providing organs have a higher rate of donors compared to countries in which people have to consent.

<sup>260</sup> Renda, *supra* note 94, at 110. See Gandara, *supra* note 25, at 190 -192. This might explain the popularity of websites which assist people in making choices (for example in the area of (health-care) insurance, consumer goods and financial products).

<sup>261</sup> Gandara, *supra* note 25, at 129, 193-94.

<sup>262</sup> *Id.* at 129.

<sup>263</sup> *See id.* at 194.

<sup>264</sup> *Id.* at 129, 162, and 205. Obviously, this conclusion is false. If a company adheres to a carbon reduction label it does not necessarily follow that the company performs well in other areas such as water and waste management. *See id.* at 207.

<sup>265</sup> Gandara, *supra* note 25, at 130-31.

<sup>266</sup> *Id.* at 132.

<sup>267</sup> *Id.* at 181.



people are likely to neglect it emotionally.<sup>268</sup> If an informational deficit results in neglecting the information altogether, international private regulation might not function. For example, eco-labels are informational tools aiming at nudging consumers to buy environmentally friendly products. Hence, neglecting the information provided by them (as well as distrusting such information or being unaware of it) renders them ineffective.<sup>269</sup> Eco-labels should preserve a good reputation and avoid negative emotions (of consumers) in order to attract attention.<sup>270</sup> In this respect competition between (too many) eco-labels might result in confusion, especially if false eco-labels or frivolous environmental claims exist as well.<sup>271</sup>

Additionally, losing something makes people twice as miserable as gaining the same thing makes them happy. We, therefore, are loss averse.<sup>272</sup> Thus the personal severity, the perceived severity of negative consequence or outcome which could result from assuming no behavioral action and the salience of a certain topic to an individual, influences decision making.<sup>273</sup> Beside this, inconsistency between attitudes (preferences, beliefs, or norms) may result in an uncomfortable state (cognitive dissonance) which an individual tries to resolve.<sup>274</sup> Eco-labels might assist in this because they enable an individual to change his behavior (through buying an eco-labeled product) and align it with his moral (environmental) preferences.<sup>275</sup>

From the above, it becomes clear that individuals exhibit bounded rationality, which means that their mental resources are limited and depart from the expected utility theory. People make choices sometimes which are not in their long-term (financial) interest or are even harmful to them.<sup>276</sup> These biases might also lead to shifting focus towards measurable and immediate benefits, rather than long-term social welfare.<sup>277</sup> Therefore, in designing private regulation, one

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<sup>268</sup> *Id.* at 183.

<sup>269</sup> *Id.* at 200-02.

<sup>270</sup> Gandara, *supra* note 25, at 203. In this respect they should also review their supply chain. The eco friendlier it is (if made public), the better their reputation. *See id.* at 208-09.

<sup>271</sup> *Id.* at 205, 206, 209, 268 and 269.

<sup>272</sup> *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, *supra* note 257, at 46-47; THALER & SUNSTEIN, *supra* note 180, at 33; Sanne B. Pape, *Warnings and Product Liability* (Ph.D. Thesis Rotterdam (The Netherlands 2011), 173.

<sup>273</sup> Pape, *supra* note 272, at 104.

<sup>274</sup> Gandara, *supra* note 25, at 198.

<sup>275</sup> *Id.* at 199.

<sup>276</sup> *See, e.g.* THALER & SUNSTEIN, *supra* note 180, at 8 and 34; Renda, *supra* note 94, at 112.

<sup>277</sup> Cafaggi and Renda, *supra* note 46, at 17.

should take into account that human decision making is not impeccable.<sup>278</sup> One could toy with designing regulation which entails no choice. However, sometimes the most equitable system is where a choice is required.<sup>279</sup> Many (more or less) open norms contain an element of choice.

But, as discussed above, this may not be a good idea or it might not even be feasible with highly complex choices.<sup>280</sup> Good private regulation also helps people to select options that will make them better off, by providing information for example.<sup>281</sup> One way of doing this is to make the information about various options more comprehensible.<sup>282</sup> As choices become more numerous and/or vary on more dimensions, people are more likely to adopt simplifying strategies.<sup>283</sup> Then the choice architecture has to provide structure.<sup>284</sup> It should provide feedback too.<sup>285</sup> Incentives might be used, but it is important to put the right incentives on the right people and make them notice the incentive.<sup>286</sup> Many people will take whatever option requires the least effort or the path of least resistance.<sup>287</sup> Therefore, a rule is required that determines what happens to the decision maker if he does nothing.<sup>288</sup>

The question arises whether these insights also pertain to decision making by companies, for example on market regulation or environmental protection.<sup>289</sup> Obviously, individuals within a company might be hampered by the biases described above, for example if international private regulation prescribes a risk assessment. In making such an assessment, this individual within the company might be hampered by the hindsight bias or the fact that humans tend to be risk

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<sup>278</sup> THALER & SUNSTEIN, *supra* note 180, at 87.

<sup>279</sup> *Id.* at 86.

<sup>280</sup> *Id.* at 87.

<sup>281</sup> *Cf.* Renda, *supra* note 94, at 158 and 159; THALER & SUNSTEIN, *supra* note 180, at 92.

<sup>282</sup> THALER & SUNSTEIN, *supra* note 180, at 92.

<sup>283</sup> *Id.* at 95.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 90. See, e.g., on feedback with eBay, which provides a judgment system of sellers Vincent Buskens, *Between Hobbes' Leviathan and Smith's Invisible Hand 29-34* (Inaugural lecture Rotterdam, Eleven, Den Haag (The Netherlands) 2011).

<sup>286</sup> THALER & SUNSTEIN, *supra* note 180, at 97-98.

<sup>287</sup> *Id.* at 83.

<sup>288</sup> Renda, *supra* note 94, at 158; THALER & SUNSTEIN, *supra* note 180, at 83. However, choosing a default option might in itself pose (for example ethical) questions and might raise legitimacy issues. Notwithstanding this, the private regulator has to consider what happens if no choice is made.

<sup>289</sup> Renda, *supra* note 94, at 160.

averse.<sup>290</sup> However, this conclusion does not answer the question whether the organizational design of a company influences decision making. A shift of perspective is necessary in order to answer that question. The focus shifts from individual decision making to group behavior.<sup>291</sup>

Research has revealed that organizational design of enterprises does indeed influence group behavior. Different types of organizations make different types of decisions and errors. A variety of different organizational structures may be classified into hierarchies and polyarchies for the purposes of modeling, taking a decision-making rule as a criterion. Under the hierarchy, a project to be passed should first be accepted by one level of managers and after their positive evaluation it should get an approval of the other level of managers. So it requires the approval of all the managers. In contrast, a polyarchy allows a project to be passed if it is accepted by at least one manager. A polyarchy accepts a larger number of projects because managers can accept them independently from each other. Assuming that different projects are divided into good and bad ones, Sah and Stiglitz showed that hierarchies and polyarchies are prone to different kinds of errors. Hierarchies reject good projects more often than polyarchies, while polyarchies accept more bad projects than hierarchies.<sup>292</sup> Alternatively, a model may be based on the comparison of different organizational structures, similar to the structures used in the models of Franckx and De Vries<sup>293</sup> or Besanko, Regibeau, and Rockett.<sup>294</sup> Their models are used to analyze the product-based organizational structure and the functional one in relation to accident prevention.

This approach may, however, be useful to analyze decision making incentivized by international private regulation too. Private international regulation should fit to market conditions in a certain

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<sup>290</sup> Despite this risk might be missed as well. See, for a clear example, Balleisen & Eisner, *supra* note 62, at 128.

<sup>291</sup> In this respect especially, insights derived from social psychology (the interaction between people and the way this influences decision making) are important, whereas cognitive psychology, which has been discussed hereinabove, is concerned with individual decision making.

<sup>292</sup> Raaj Kumar Sah & Joseph E. Stiglitz, *Human Fallibility and Economic Organization*, 75 AM. ECON. REV. (Papers & Proceedings), 293 (1985); Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV., 108 (2006).

<sup>293</sup> Laurent Franckx & Frans P. de Vries, *Environmental Liability and Organizational Structure* 1 (Energy, Transport and Environment Working Papers (Series) 04-01 2004).

<sup>294</sup> David Besanko et al., *A Multi-Task Principal-Agent Approach to Organizational Form*, 53(4) J. Indust. Econ., 437 (2005).

industry or country. The way the majority of enterprises are organized, for example, may influence the market conditions. The product-based organizational structure implies that a division of an organization into departments is made along the lines of the products manufactured. Thus, the first department is responsible for all functions related to the product A, the second department of the product B, and so on. By contrast, the functional organizational structure is based on a type of activity. The typical activities include production, marketing, research and development, human resources, and internal audit. This division principle encourages the managers of the product-based structure to practice a complex approach to their broad tasks and assumes more autonomy at a department level, whereas the functional structure makes the managers rather narrow professionals in their specific functional field and more centralized guiding is provided across different product lines. Therefore, effective international private regulation has to take into account the (prevailing) organizational model of the regulated organizations.

In designing international private regulation, the aforementioned insights should be taken into account.<sup>295</sup> From an ex ante psychological perspective, international private regulation has the best chance to be effective if:

- (i) It takes into account that human decision making is not flawless and expects failures,
- (ii) Structures complex choices, amongst others by:
  - a. Restricting the number of choices,
  - b. Providing information which assists people in making proper decisions, and
  - c. Demanding transparency as to the consequences of a choice,
- (iii) Entails a default option which is beneficial to the majority of regulatees,
- (iv) If business is involved, takes into account the organizational model of the regulatees,
- (v) It enhances crystallization so as to govern behavior.

Instead of promulgating new private regulation, policymakers might consider establishing nudges that direct people in the desired direction. A nudge is a choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. Regulation might not be the right instrument to change behavior, for example because it is necessarily not tailor made, because of the distance between a regulator and an indi-

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<sup>295</sup> Thaler and Sunstein promulgate that the aforementioned features can easily be enlisted by private and public nudgers. See THALER & SUNSTEIN, *supra* note 180, at 71.

vidual and because the help of intermediaries (for example companies) is necessary to influence behavior. In such circumstances a nudge might be more effective, provided that this intervention is easy and cheap to avoid.<sup>296</sup> Especially rare, difficult choices with delayed effects are good candidates for nudges according to Thaler and Sunstein, for example in situations lacking direct feedback or where feedback did not work.<sup>297</sup>

The psychological avenue might thus provide an *ex ante* tool to assess the effectiveness of international private regulation, next to the legal, economic and sociological avenues.

## 5. COMPARING EFFECTIVENESS OF EXISTING INTERNATIONAL PRIVATE REGULATION (EX POST APPROACH)

### 5.1 *Legal Approach*

After discussing the *ex ante* indicators which are helpful in the rule setting process, I will turn to the effectiveness of existing international private regulation. In this respect, the legal and economic avenues are especially important, combined with a more limited role for the sociological avenue. From a legal point of view, the effectiveness of existing international private regulation is, amongst others, questioned because it is deemed to be less enforceable than public regulation. This is supposedly caused by the lack of public instruments to enforce private regulation. Furthermore, as elucidated above, other indicators are important to assess the effectiveness of existing international private regulation, such as an effective conflict resolution mechanism.

However, research has not confirmed the assumption that private enforcement is less effective in the Netherlands. Research has been conducted in connection with effectiveness of private and public enforcement regarding regulation on consumer protection against unfair trade practices (the sections 6:193a-j of the Dutch Civil Code).<sup>298</sup> For example, misleading product information is considered an unfair trade practice (section 6:193c subsection 1 under b and section 6:193d subsection 3 Dutch Civil Code).<sup>299</sup> These rules in the Dutch Civil Code are enforced by public instruments, such as fines. This public enforcement was evaluated in 2007 and 2008, but the evaluation did not confirm public enforcement being more effective than private

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<sup>296</sup> *Id.* at 6.

<sup>297</sup> *Id.* at 75.

<sup>298</sup> *See, e.g.*, Burgerlijk Wetboek [BW] [Civil Code] art. 6:193b-j (Neth.) (listing various different practices considered misleading by the Dutch government), available at <http://dutchcivillaw.com/legislation/dcctitle6633.htm#sec0633a>.

<sup>299</sup> *Id.*

enforcement.<sup>300</sup> That said, enforcement by states is deemed to be necessary if violations of norms have a low probability of detection. Then more severe public sanctions are needed in order to compensate for this low probability. Furthermore, a public entity may have an informational advantage over private supervisors. However, this does not mean that enforcement should be a prerogative of states. The capacity to steer transnational actors may arguably be even greater for inter-governmental actors than it is for national governments.<sup>301</sup> This is mainly caused by the fact that no global overarching (public) supervisor (with instruments to enforce) exists. Therefore, alternative mechanisms to enforce international private regulation have to be considered.

According to Casey and Scott, “[a]nalysis of enforcement of a private norm is concerned with the rewards and punishment associated with following the norm, the mechanisms and extent of enforcement, the source of authority, and the degree of internalization.”<sup>302</sup> Research has not demonstrated the frequent use of enforcement processes connected to international private regulation involving the stringent application of regulatory rules. Casey and Scott also point out that “a wide range of approaches, often involving education and advice to those found in breach, are utilized ahead of more stringent approaches—warnings, civil or criminal penalties, and license revocations.”<sup>303</sup> Studies have even been conducted combining the empirical evidence of the practice of escalating sanctions with game-theory arguments as to how and when such escalation should occur.<sup>304</sup> The application of the enforcement pyramid is intended to ensure that regulatees who are fundamentally oriented towards legal compliance receive appropriate advice to enable them to achieve this objective.<sup>305</sup>

On the other hand, the credible threat of escalation encourages the subjects who only comply when this is consistent with financial incentives to comply at the lowest level of the pyramid, because non-compliance would be more costly.<sup>306</sup> When social norms are persistently breached there is the potential for an escalating set of sanctions

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<sup>300</sup> See E.L.M. Mout-Vos, *Het duale stelsel van handhaving van de Wet handhaving consumentenbescherming (Whc), een tussenstand*, Tijdschrift voor Consumentenrecht en handelspraktijken 258, 265 (2010). However, the author contends public enforcement cannot be missed in order to impose punitive sanctions.

<sup>301</sup> Scott et al., *supra* note 9, at 8.

<sup>302</sup> Casey & Scott, *supra* note 66, at 83.

<sup>303</sup> *Id.* at 83.

<sup>304</sup> *Id.*

<sup>305</sup> Nevertheless, imposing sanctions is not necessary in many instances. Business disputes are often settled without the use of judicial enforcement mechanisms.

<sup>306</sup> Casey & Scott, *supra* note 66, at 83. Nonetheless, especially regarding punitive sanctions, public legislation is deemed to be essential. A need for such enforcement

against the deviant, (starting with social sanctions such as negative gossip), and which eventually may reach a formal legal claim.<sup>307</sup> Social norms likely underpin the operation of parties to a private regulatory regime, however, often because of the possibility or threat of reinforcement through market sanctions and/or the possibility of legal sanctions for significant or harmful deviation from such norms.<sup>308</sup> If the threat of effective enforcement exists, it may not be necessary to make use of the whole pyramid. Beside this, it must be noted that enforcement is not only tied to sanctions and the accompanying costs, but also to other means, such as providing information on the regime and education.

International private regulation is often associated with a high sense of freedom to opt in or out of a certain sphere.<sup>309</sup> Parties who wish to join the regulatory bodies participating in the regime are free to do so. Therefore, private enforcement is considered less effective. However, this is not necessarily so. Once entities have implemented a private regulatory regime, they are legally bound by it and violation of the rules might subject them to legal sanctions imposed by an overarching body or arising from contractual provisions.<sup>310</sup> The more severe the threat of possible sanctions, the more effective the private regime is.<sup>311</sup>

Furthermore, incentives may exist to participate. Participation in a private regime and compliance with its standards might be a condition for access to this or other regimes which provide market opportunities for the regulated entities. Some standards are even *de facto* compulsory for market actors, whether promulgated by individual actors (for example Microsoft or ICANN<sup>312</sup>) or by standardization bodies (like ISO).<sup>313</sup> The foregoing standards promulgated by individual ac-

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mechanisms may exist if the possibilities for the detection of violations of the private regime are limited.

<sup>307</sup> *Id.* at 84.

<sup>308</sup> *Id.*; Overmars, *supra* note 7, at 17. *But cf.* Hernstadt, *supra* note 112, at 202–07 (on International Framework Agreements for labor standards).

<sup>309</sup> Balleisen & Eisner, *supra* note 62, at 131; Curtin & Senden, *supra* note 11, at 168.

<sup>310</sup> *See, e.g.*, GIESEN, *supra* note 8, at 93-106, who discerns three grounds for the binding nature of private regulatory regimes. These are national legislation, agreement, and open norms in national legislation. *See, e.g.*, *MSI-evaluation tool*, *supra* note 97, at 33–36 (on sanctions by an overarching body).

<sup>311</sup> *Cf.* Kolk & van Tulder, *supra* note 22, at 10–11. They contend that codes promulgated by business associations perform weakly in the CSR area amongst others in this respect.

<sup>312</sup> KOPPELL, *supra* note 29, at 52.

<sup>313</sup> *But cf.* Maher, *supra* note 245, at 135. However, this raises the question whether such a regime violates public regulation on competition. If companies cre-

tors, either individual companies or overarching bodies, both provide access to scarce resources. This enhances the possibilities of setting forth private regimes and enforcing these regimes.<sup>314</sup> Another example is connected with the IFC guidelines. If a company does not comply with these standards, it is much more difficult to raise capital.<sup>315</sup>

The enforceability of international private regulation is connected with its specificity, which has been elucidated above. More precise commands will generally result in better behavior.<sup>316</sup> Market incentives may exist to develop and follow standards, too, while the market punishes those who do not follow them.<sup>317</sup> Pressure to comply with private norms may be exerted by consumers, NGOs, investors, or stock markets.<sup>318</sup> Incentives might also exist within a company. For example, a company listed on a stock exchange might increase the bonuses of its board members if it raises its position in the sustainability index. That said, it is important that an overarching body exists which has the power to inform the public about the implementation of and

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ate a level playing field amongst each other in order to enhance CSR-compliance, one might favor such a regime because it contributes to social welfare, unlike most actions which restrict competition. Unfortunately, to date European competition law does not seem to provide an exemption for such regimes. If such an exemption is deemed feasible, public supervision might be desirable to assess whether these regimes restrict competition in a proportional manner. Reference could be made to section 25 of the Dutch Data Protection Law, which creates the power of the Dutch Data Protection Agency to decide whether codes of conduct on data protection meet the requirements set forth by the Data Protection Law. Competition authorities might be attributed a comparable power to assess whether private regulation on CSR does not restrict competition unnecessarily. Compare in this respect the proposed section 2 of the policy of the Dutch Department of Economic Affairs which provides for guidelines to the Competition Authority as to which cases an exemption to section 6 subsection 3 of the Dutch Competition Act (which prohibits acts which hamper competition) should be granted in connection with sustainable business.

<sup>314</sup> *But cf.* KOPPELL, *supra* note 29, at 62; Vrieling, *supra* note 132, at 70–73; Scott et al., *supra* note 9, at 7.

<sup>315</sup> *See* KOPPELL, *supra* note 29, at 63 (showing outside the CSR area on the accounting standards of the ISAB).

<sup>316</sup> *See* Kaplow, *supra* note 88, at 19–20. *Cf.* Kolk & van Tulder, *supra* note 22, at 9; Luppi & Parisi, *supra* note 118, at 43; Overmars, *supra* note 7, at 17 (regarding codes of conduct); UTTING, *supra* note 57, at 82; *ISEAL Code of Good Practice*, *supra* note 89, at § 6.3.1.

<sup>317</sup> Scott et al., *supra* note 9, at 7.

<sup>318</sup> *Id.* at 10; Kolk & van Tulder, *supra* note 22, at 21; KOPPELL, *supra* note 29, at 61; UTTING, *supra* note 57, at 90, 111–12. Koppell gives some examples of NGOs being quite successful in such private enforcement.



compliance with the transnational private regulation by its members.<sup>319</sup>

Sometimes private regulation addresses reputational issues<sup>320</sup> because of the ease of access to information on the internet or in newspapers, for example, on the violation of CSR standards or codes of conduct.<sup>321</sup> This seems necessary in such cases because the problem of enforcing CSR standards appears to function so that unless strong pressure is exercised by consumers, some significantly sized retailers might not have sufficient incentives to monitor and enforce violations.<sup>322</sup> Without being pressured, companies with weak records might gravitate toward undemanding programs to enhance their reputation without changing their practices. This might drive companies seeking to make credible efforts out of these non-demanding regimes. On the other hand, demanding (and, consequently, more effective) initiatives tend to attract companies with stronger performance records, but might not be implemented by weaker companies.<sup>323</sup> In some sectors, this problem is partially solved by NGOs, which find ways to address these problems, regarding human rights or the environment, for example.<sup>324</sup>

If market incentives drive compliance, the norms of a private regime often are reflected in contractual arrangements and reinforced through participation in markets.<sup>325</sup> Contractual arrangements might

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<sup>319</sup> See, e.g., *MSI-Evaluation Tool*, *supra* note 97, at 20–21.

<sup>320</sup> *But cf.* Balleisen & Eisner, *supra* note 62, at 131–33; Ogus & Carbonara, *supra* note 10, at 244–45; Scott *et al.*, *supra* note 9, at 7. Reputational damage raises the cost of non-compliance with the private regulatory framework. Ogus & Carbonara, *supra* note 10, at 244–45. In the Netherlands, naming and shaming is considered to be one of the possibilities regarding repeated or severe violations of the corporate governance code. See Letter from the Minister of Economic Affairs to The Second Chamber (Jan. 30, 2012) at 5.

<sup>321</sup> *But cf.* Liesbeth F.H. Enneking, *Foreign Direct Liability and Beyond* 398–401, 439 (Ph.D. thesis, Utrecht, Eleven Publ. 2012) (elaborating on the possibility of codes of conduct becoming trade practice too).

<sup>322</sup> Cafaggi, *supra* note 12, at 38.

<sup>323</sup> Balleisen & Eisner, *supra* note 62, at 132–33.

<sup>324</sup> Scott *et al.*, *supra* note 9, at 8.

<sup>325</sup> Casey & Scott, *supra* note 66, at 83. For example the Equator-principles, which have been adopted by the Equator-principles Financial Institutions, are relied upon in project financing and advisory activities (if the total project capital costs exceed US\$ 10 million). These principles, among others, require the use of the social screening criteria and environmental, health, and safety guidelines of the International Finance Corporation (IFC) and prescribe a risk assessment by the borrower, a grievance mechanism as well as independent monitoring and reporting. THE EQUATOR PRINCIPLES, Principals 1, 2, 6, and 9, June 2013, [http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf). The principles also entail an annual reporting requirement of the financing entity regarding the im-

even be used to enforce international private regulation without the existence of market incentives. Nonetheless, many enterprises comply with CSR standards voluntarily and do not need such incentives. This is important because the more enterprises accept this regulation and comply voluntarily, the less enforcement is necessary. Conflict, and thus the need for enforcement, is most likely when (i) the distribution of interests among the stakeholders to be governed is heterogeneous,<sup>326</sup> (ii) a governing body does not have coercive tools at its disposal, and (iii) a governing body lacks control over a valuable resource.<sup>327</sup>

Furthermore, certification or monitoring by a third party is a common tool to assess whether entities act in compliance with a certain international standard.<sup>328</sup> Certification is partly connected to reporting requirements. It generally entails (i) establishment of standards, (ii) certification assessment for compliance with the standards, (iii) a certification seal or label, (iv) accreditation of the certifier by the certification body, and (v) compliance monitoring.<sup>329</sup> If a private regulatory regime entails reporting requirements, it is easier for third parties to determine whether regulatees comply with this regulatory framework.<sup>330</sup>

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plementing process and its experiences. *Id.* at Principal 10. In such instances, the crystallization of social norms within particular professional or commercial groupings is often involved. A shared responsibility towards societal issues is needed. For this, an intermediate organization may be necessary, which the IFC regards as its Sustainability Framework. *See generally*, Overmars, *supra* note 7, at 20. Next to this, smaller groups of companies and a high organizational rate seem to be beneficial. However, in my view, the latter requirements are more closely connected with acceptance from a sociological point of view, which I elaborate later on in this contribution. Nonetheless, if these requirements are met, enforcement of a private regime might improve.

<sup>326</sup> *But cf.* Ogus & Carbonara, *supra* note 10, at 234.

<sup>327</sup> KOPPELL, *supra* note 29, at 62.

<sup>328</sup> *But cf.* Balleisen & Eisner, *supra* note 62, at 136; Ogus & Carbonara, *supra* note 10, at 245; Gandara, *supra* note 25, at 152. *Cf.* Schouten, *supra* note 69, at 41–43 (in connection with standards in global agri-food chains).

<sup>329</sup> *See*, Gandara, *supra* note 25, at 51–52 (in connection with eco-labels). *See, e.g.*, DIMITROPOULOS, *supra* note 32, at 224 (on certification in general). Dimitropoulos contends international certificates should be recognized throughout the world and national governments should supervise the certification process. *Id.* at 237, 241, and 246.

<sup>330</sup> *But cf.* United Nations Forum on Sustainability Standards (UNFSS), *Today's Landscape and Issues & Initiatives to Reach Public Policy Objectives*, at 52–54, available at <http://unfss.org/documentation/general-documentation> (in connection with traceability of products through a supply chain in order to assess conformity with a standard) [hereafter UNFSS Landscape Report].

Certification seems a very useful instrument to enforce compliance with standards.<sup>331</sup> It is frequently used in connection with eco-labels.<sup>332</sup> Eco-labels have different appearances, such as: words, logos, and brand names. They are used for communicating certain environmental and social claims. These claims may be used only if those environmental or social standards have been complied with, and compliance with them has been certified.<sup>333</sup> However, the effectiveness of certification may be a little disappointing in practice. In many countries, severe competition exists between certification bodies, thus putting pressure on the reliability of the certification process.<sup>334</sup> Furthermore, the certification bodies fund their own supervising authority in the certification process, therefore it is not as independent as it could be.<sup>335</sup> Beside this, certification is costly, and procedural aspects (such as, the review of documentation) might prevail over assessing actual improvement of quality in an organization or changes in

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<sup>331</sup> See extensively on advantages and disadvantages in connection with certification regarding environmental and social aspects Resolv, *Toward Sustainability, The Roles and Limitations of Certification*, available at [www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf](http://www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf). It might become even more effective if certification is used to prove that requirements set by public regulation are met. *But cf.* Schouten, *supra* note 69, at 116-17 (in connection with bio fuels). Certification might also be incorporated in supply chains contracts or might be connected to them. See Cafaggi, *supra* note 10, at 1561, 1566, 1580, 1601-11. The indicators used in certification might even be more detailed and specific than the ones used by courts to assess compliance with public regulation. See *id.* at 1607.

<sup>332</sup> See Gandara, *supra* note 25, at 22. Some of these labels not only include environmental issues but social matters as well. Certification (in connection with eco-labels) provides the proof consumers need about a product/service's environmental attributes. This is necessary because eco-labels are credence goods which do not reflect the product's physical or other identifiable characteristics. *Id.* at 260-61.

<sup>333</sup> Many eco-labels have an overarching body (being the "owner" of the eco-label in which stakeholders might be represented) as well as authorized or subordinated certification bodies. See, e.g., Gandara, *supra* note 25, at 25. Eco-labels by and large are (or should be) certification marks and have three purposes (i) to achieve operational improvements in social and environmental arenas, (ii) to provide credible assurance around sustainability to consumers and (iii) to increase the demand by modifying purchasing decisions and behavior by communicating sustainability performance to consumers at the point of purchase. *Id.* at 26, 61, 106-12.

<sup>334</sup> See, e.g., Dimitropoulos, *supra* note 32, at 224 (on certification). He contends international certificates should be recognized throughout the world. *Id.* at 237, 246. He also contends that national governments should supervise the certification process. *Id.* 241; see Gandara, *supra* note 25, at 224 (in connection with eco labels).

<sup>335</sup> See Council Regulation 765/08, 2008 O.J. (L 218/30) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:EN:PDF> (concerning norms for these supervising authorities in the EU).

environmental impact.<sup>336</sup> Furthermore, employees of certifying bodies might lack sufficient knowledge, and certification criteria might be unspecified or unclear.<sup>337</sup> Research has revealed that certification works best if buyers are willing to pay for quality, better environment or social performance, and certification bodies compete with each other amongst others by referring to the quality of their assessments.<sup>338</sup>

Other forms of third party monitoring are conceivable too.<sup>339</sup> To be effective, this monitoring should preferably be carried out by skilled and independent third parties.<sup>340</sup> Such monitoring should also connect with accountability of enterprises which have adopted certain international private regulation to an overarching body.<sup>341</sup> Accountability in general may be defined as “a relationship between an actor and a forum (i) in which the actor has an obligation (ii) to explain and justify (iii) his or her conduct (iv), the forum can pose questions (v) and pass judgment (vi) and the actor may face consequences (vii).”<sup>342</sup> The forum can be an individual (ex. minister, journalist) or an agency (par-

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<sup>336</sup> *But cf.* UTTING, *supra* note 57, at 93 (concerning the cost of certification). It should be noted that certification is not provided for in connection with the ISO-standard on CSR, the ISO 26000 standard. *See* Schouten, *supra* note 69, at 132–33 (concerning the effectiveness of certification in connection with global agri-food standards).

<sup>337</sup> Alvarez & von Hagen, *supra* note 67, at 25–26.

<sup>338</sup> *Cf.* Timothy D. Lytton, *Kosher: Private Regulation in the Age of Industrial Food* 28–29 (Harvard University Press 2013).

<sup>339</sup> Kolk and van Tulder discern between second party (e.g. trade associations) and third party (external professionals paid by the company) assessment. They argue that second party assessment is less effective than third party assessment. *See* Kolk & van Tulder, *supra* note 22, at 10. In my opinion, this is not necessarily the case depending on the way these assessments are designed. *See* Herrnstadt, *supra* note 112, at 202–04 (concerning internal and external monitoring of International Framework Agreements on labor standards). Apart from this type of monitoring, monitoring of the transnational regime itself (by an independent evaluator) is conceivable. *See* MSI Evaluation Tool, *supra* note 97.

<sup>340</sup> *See* MSI Evaluation Tool, *supra* note 97, at 15–18. However, retrieving the relevant information is tempting, for example, because business might not want to share certain information. *See, e.g.*, UTTING, *supra* note 57, at 63. Effectiveness of international private regulation therefore might gain relevance if it entails transparency obligations. *See, e.g.*, MSI Evaluation Tool, *supra* note 97, at 19–20.

<sup>341</sup> *Cf.* Balleisen & Eisner, *supra* note 62, at 131, 137 (contending such body should be a public entity with vigorous enforcement programs).

<sup>342</sup> Curtin & Senden, *supra* note 11, at 181. In connection with international private regulation, *see* Balleisen & Eisner, *supra* note 62, at 142; Curtin & Senden, *supra* note 11, at 185. Balleisen and Eisner contend that the level of accountability should equal the level of accountability public regulation imposes. *See* Balleisen & Eisner, *supra* note 62, at 145–46. *See generally*, Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, 13 *Eur. L. J.* 447 (2007) (concerning accountability).

liament, court, audit office and NGO).<sup>343</sup> Regarding international private regulation, the identification of the accountability relationship is difficult because of the many actors and different backgrounds and interests.<sup>344</sup> This problem is especially salient in the transnational context with regulatory regimes of a diffuse, hybrid public-private nature which include many different (public and private), often-organizationally-disconnected, actors at various moments in time.<sup>345</sup> Another example is a supply chain contract.<sup>346</sup> Furthermore, the question might be to whom an actor should be accountable: a government, an overarching private body, or another type of NGO.<sup>347</sup> Many effective private regulatory regimes therefore have multiple accountability relationships.<sup>348</sup> However, sometimes actors focus their accountability on one set of stakeholders at the expense of others.<sup>349</sup> Consequently, a need exists for balanced accountability, not only towards the powerful stakeholders.<sup>350</sup>

If independent third parties are involved in assessing compliance (and preferably impose sanctions in cases of non-compliance), this indicates more effectiveness vis-à-vis private regulatory regimes which lack such third party assessment.<sup>351</sup> In this respect, it is important that the third parties are allowed to share information about the actors with the (overarching) body to which the actors are accountable in order to pass judgment on the behavior of the actors.

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<sup>343</sup> Curtin & Senden, *supra* note 11, at 182. (discussing that the relationship between the actor and the forum does not necessarily need to have a principal-agent character).

<sup>344</sup> *Id.*; cf. Corthaut et al., *supra* note 240, at 314.

<sup>345</sup> Cf. Corthaut et al., *supra* note 240, at 313–22.

<sup>346</sup> Curtin & Senden, *supra* note 11, at 182; UTTING, *supra* note 57, at 83. In connection with traceability of products through a supply chain in order to assess conformity, see UNFSS Landscape Report, *supra* note 330, at 52–54; Alvarez & von Hagen, *supra* note 67, at 11–12.

<sup>347</sup> Balleisen & Eisner, *supra* note 62, at 137; Curtin & Senden, *supra* note 11, at 183.

<sup>348</sup> Curtin & Senden, *supra* note 11, at 183. This type of accountability is not deemed effective by Balleisen & Eisner, *supra* note 62, at 137. Furthermore, obligations to account are not comparable to political accountability, but they exist in private regulatory regimes, sometimes however only of a voluntary or moral nature. See Curtin & Senden, *supra* note 11, at 184.

<sup>349</sup> Curtin & Senden, *supra* note 11, at 187.

<sup>350</sup> *Id.*

<sup>351</sup> Cf. ISEAL Code of Good Practice, *supra* note 89, at §6.2.2; *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principal 3.2; Cf. also Balleisen & Eisner, *supra* note 62, at 131; Kolk & van Tulder, *supra* note 22, at 10; Herrnstadt, *supra* note 112, at 202–04; UTTING, *supra* note 57, at 82–88 .

Public intervention might change the regime from voluntary to compulsory.<sup>352</sup> Public intervention is, amongst others, deemed to be necessary to address the free-rider issue. Free-riders benefit from international private regulation without adopting or implementing it. One of the ways in which they might benefit is the enforcement of international private regulation in a certain market against entities which have adopted this regulation but violate it.<sup>353</sup> Because of the existence of the international private regulation which is enforced (publicly), consumers, for example, might (erroneously) trust all market participants to have adopted this regulation.

Public intervention has many faces. International private regulation could be adopted as international “soft law” initially, but redeployed by international organizations and implemented through “hard law” at the continental (*e.g.*, EU) or state level, through contract, tort and/or company law.<sup>354</sup> If the private regulation is implemented through contract and/or tort law, domestic courts recognize privately produced standards as part of customary public or private international law.<sup>355</sup> Contractual mechanisms for example are deployed in supply chains (possibly through purchase or license-agreements) or in financial arrangements in which a purchaser or financial entity requires adoption of the applicable standards and engages in monitoring and enforcement either directly or through contracting third party assurance organizations.<sup>356</sup> Furthermore, legislation on unfair trade

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<sup>352</sup> Cafaggi, *supra* note 12, at 22. On the necessity of public intervention, see Alvarez & von Hagen, *supra* note 67, at 16–17. *Cf.* DIMITROPOULOS, *supra* note 32, at 227, 229–32 (contending that international policy objectives might be realized through national recognition of certificates). Public intervention might also take more ‘soft’ modes as support for private regulation *e.g.* through incentivizing companies to engage in it. This might enhance effectiveness as well. See Lily Hsueh & Aseem Prakash, *Incentivizing Self-Regulation: Federal vs. State-Level Voluntary Programs in US Climate Change Policies*, 6 Reg. & Governance 445, 445 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2012.01140.x/full>.

<sup>353</sup> Ogus & Carbonara, *supra* note 10, at 231.

<sup>354</sup> Curtin & Senden, *supra* note 11, at 168. In connection with foreign direct liability see generally Enneking, *supra* note 321, at 439, 474, 506–12, 519–21, 560; *Cf.* Casey & Scott, *supra* note 66, at 85; See also the example of the ISAB in Europe. In the Netherlands, Article 2:8 of the Civil Code, which deals with good faith and fair dealing in company law, is applied to incorporate the corporate governance code into norms which are enforceable through national courts. See Pauwelyn et al., *supra* note 59, at 509.

<sup>355</sup> Cafaggi, *supra* note 12, at 22; Enneking, *supra* note 321, at 439, 474, 506–12, 519–21, 560.

<sup>356</sup> Casey & Scott, *supra* note 66, at 93. On initiatives in supply chains, see, *e.g.*, IDH SUSTAINABLE TRADE INITIATIVE, <http://www.idhsustainabletrade.com> (last visited Feb. 23, 2014); and on labor standards, see ETHICAL TRADING INITIATIVE

practices or unsupported claims may play a role in this. For example, if a company advertises a certain product referring to an eco-label while it in fact does not meet the requirements of that label, this could be considered an unfair trade practice.<sup>357</sup> The US, UK, New Zealand, and Australia have endorsed public guidelines on environmental claims, enforced by the public trade or environmental authorities.<sup>358</sup> If an environmental claim is made based on an eco-label, the public authority might ask for sufficient documentary evidence to support this claim.<sup>359</sup> In specific cases, legislation on misrepresentation might also be of use to redress false environmental claims made by eco-labels.<sup>360</sup> Other forms of public supervision are conceivable as well.<sup>361</sup> Additionally, legislation might impose a due diligence obligation on a supply chain.<sup>362</sup>

However, contractual enforcement through national courts is often costly. Litigation in national courts might depend on the willingness of domestic citizens to take action, courts to recognize such ac-

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(ETI), <http://www.ethicaltrade.org> (last visited Feb. 23, 2014). On International Framework Agreements on labor standards, see Herrnstadt, *supra* note 112, at 194–96. On supply chain initiatives and their problems, see generally Cafaggi & Renda, *supra* note 46, at 18–20. However, if an overarching entity exists, membership with it might also be determined as a contractual relationship, although of a different nature than investment, lending, or supply chain contracts. See Cafaggi, *supra* note 10, at 1564. In case of investments (or lending agreements), third party rating agencies are engaged by investors to assess whether these privately set rules are implemented and adhered to by entities invested in (or lenders). These rating agencies make this assessment irrespective of the public or private nature of the regulation. Furthermore, there are contractual remedies in these supply chain contracts, which are by and large aimed at enhancing compliance (or ultimately possibly termination) in connection with CSR issues instead of damages and in which reputational sanctions might perform a role. *Id.* at 1614–15, 1617.

<sup>357</sup> See, e.g., BW § 6:193g (Neth.) (based on the European unfair trade practices directive, which considers such an advertisement to be an unfair trade practice).

<sup>358</sup> Gandara, *supra* note 25, at 215–16. The guidelines resemble the ISO 14021 standard on environmental claims. See *id.* at 214–15. Absolute or wide range claims such as ‘environmentally friendly’ or ‘100% recyclable’ are considered to be deceptive per se. *Id.* at 216.

<sup>359</sup> *Id.* at 216–338. However, Gandara contends that the current regulation is insufficient to deter greenwashing. *Id.* at 343, 348.

<sup>360</sup> *Id.* at 226.

<sup>361</sup> For example, the Dutch Financial Markets Authority supervises whether the annual reports of companies listed at the Dutch stock exchange entail the main elements of CSR issues that are relevant to the company. See Dutch Corporate Governance Code, Principle II.1.2.d, available at <http://commissiecorporategovernance.nl/download/?id=606>.

<sup>362</sup> See, e.g., Council Regulation 995/2010, Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market, art. 4, 2010 O.J. (L295) 23, 27 (aiming for the global prevention of illegal deforestation).

tions and governments to set a framework which enables such actions.<sup>363</sup> Because of the international nature of litigation in national courts tied to international private regulation, these trials might result in time-consuming and costly proceedings in many different jurisdictions, bringing about the risk of multiple (and even contradicting) decisions. Furthermore, the question may be raised whether national courts are equipped to deal with difficult international matters in the CSR arena.<sup>364</sup> Enforcement is rather complicated too in such circumstances. Coordination among national courts enforcing the same regime is required in order to avoid too much differentiation.<sup>365</sup> This could be established by applying a duty of loyal cooperation which exists in the domain of public institutions, but such a system is obviously difficult to enforce.<sup>366</sup>

Other forms of public intervention exist as well, including both governmental and non-state actors, and also multi-level actors, *i.e.*, national, European, and international levels.<sup>367</sup> In these systems, engagement of stakeholders in the promulgation of self-regulatory codes is encouraged, and member states of the EU are required to penalize businesses' abuse of self-regulatory codes through legislation.<sup>368</sup>

National corporate law regimes embody some of the CSR requirements.<sup>369</sup> Oversight and enforcement is, however, left to the companies themselves.<sup>370</sup> Ethical committees, independent from the management, have been put in place and shareholders can also help steer companies towards compliance with key corporate governance norms. The increasing importance of private regulation has promoted important changes in the corporate governance structure of multinational enterprises to promote responsiveness towards stakeholders affected by the activity of the corporation.<sup>371</sup> Also, governments have increasingly sought to assert at least limited enforcement capacity over companies' compliance with privately promulgated corporate governance norms. Such rules might however give rise to a "tick the box" mentality. Some enterprises tend to follow the rules in a rather formal

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<sup>363</sup> See, *e.g.*, Enneking, *supra* note 321, at 487, 490–504, 510, 574, 595. On eco-labels, see Gandara, *supra* note 25, at 300.

<sup>364</sup> Enneking, *supra* note 321, at 620, 642 (proposing future solutions).

<sup>365</sup> Cafaggi, *supra* note 12, at 49.

<sup>366</sup> *Id.*

<sup>367</sup> Scott et al., *supra* note 9, at 8.

<sup>368</sup> Enneking, *supra* note 321, at 455–59; Scott et al., *supra* note 9, at 8–9. See, *e.g.*, Council Regulation 2005/29, Unfair Trade Practices Directive, art. 6(2)(b), 2005 O.J. (L 149) 22 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>.

<sup>369</sup> Scott et al., *supra* note 9, at 9.

<sup>370</sup> *Id.* at 10.

<sup>371</sup> *Id.*



way instead of internalizing them. Furthermore, it could be beneficial for individual suppliers to make use of the increase of trust in the industry but not comply with underwriting the code.<sup>372</sup> Beside this, a code of conduct may create a false impression with consumers that the government monitors the industry and enforces the code.<sup>373</sup>

Another hybrid system is connected to trademark law. Especially in some Anglo-American countries, like the UK and Australia, certification marks might be registered. For example, some eco-labels have been registered as such.<sup>374</sup> The proprietor of a certification mark is an overarching, standard-setting body.<sup>375</sup> The mark has to be granted to every applicant who meets the standards of the eco-label and is certified.<sup>376</sup> The proprietor is not allowed to use the mark for its own goods or services and an environmental supervisory governmental body assesses whether the implemented standards contribute to environmental improvements (unlike collective marks and geographical indications).<sup>377</sup> If a company advertises a product referring to such an eco-label while it is not granted permission to use the certification mark, all usual means to redress the infringement of a trademark might be invoked by the proprietor of the certification mark. The same applies if a company is granted the use of the certification mark but fails to meet its standards or is no longer certified, while the permission to use the mark may then be revoked.

The aforementioned hybrid regimes typically comprise both hard and soft law instruments where a public dimension to corporate activities is recognized.<sup>378</sup> Conventional private law devices have been transformed to perform regulatory functions at the global level.<sup>379</sup> This model has been extended in ways which are promising for hybrid governance regimes to recognize the potential for third party enforcement. Businesses, trade associations, and NGOs become involved in enforcing by using powers delegated by legislative bodies or rights assigned to them under contracts.<sup>380</sup> This is limited, however, because businesses tend to adopt standards voluntarily, and they are in a sense judged by the market in terms of their compliance. Nevertheless, many regimes recognize the importance of checking for compliance,

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<sup>372</sup> Overmars, *supra* note 7, at 18.

<sup>373</sup> *Id.*

<sup>374</sup> Gandara, *supra* note 25, at 230.

<sup>375</sup> *See, e.g., id.* at 82.

<sup>376</sup> *See, e.g., id.* at 253.

<sup>377</sup> *Id.* at 82.

<sup>378</sup> *See* Scott et al., *supra* note 9, at 292.

<sup>379</sup> *Id.* at 10.

<sup>380</sup> *Id.* at 11.

and it is not unusual to find contractual requirements that businesses engage third parties to certify compliance.<sup>381</sup>

However, if governments are engaged in enforcement of international private regulation because of the existence of hybrid systems, this does not necessarily indicate greater effectiveness of private regulation. For example, because of elections, government officials might have a short-term perspective instead of a long-term vision required for effective sustainable solutions. Furthermore, corruption might hamper effective enforcement by a government.

Beside these issues of a more practical nature, if both private and public sanctions might be imposed at the same time, the accumulation of sanctions becomes an issue.<sup>382</sup> It is questionable whether both these ways of enforcement may be used at the same time. It stands to reason that they could reinforce each other, but this may not be desirable in all circumstances. Unlike public sanctions which are imposed at the same time, where public bodies are often legally bound to coordinate their actions and accumulation is governed by law, coordination between private and public enforcement is more troubling, not only because the supervising public and private bodies may not be aware of the actions taken by the other body, but also because legal barriers to the exchange of information might exist.

Another aspect of effectiveness is an effective complaint mechanism and effective resolution of disputes if they arise.<sup>383</sup> If disputes cannot be solved effectively, adequate enforcement is difficult, if not impossible.<sup>384</sup> Moreover, defective conflict resolution might result in unnecessary cost.<sup>385</sup> Effective dispute resolution is not confined to judicial mechanisms, such as litigation in national courts or arbitration,

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<sup>381</sup> *Id.* at 12. More conventional bilateral monitoring and enforcement may also apply, but this is usually carried out on a national or sub-national level.

<sup>382</sup> See also GIESEN, *supra* note 8, at 141.

<sup>383</sup> This is true for the international private regime itself as well as for its members. The private regime should require them to have their own grievance mechanism. Cf. *MSI-Evaluation Tool*, *supra* note 97, at 27–31; *ISEAL Code of Good Practice*, *supra* note 89, §4.4 (regarding the standard setting process itself); *Principals for Better Self- and Co-Regulation and Establishment of a Community Practice*, *supra* note 89, Principle 2.4.

<sup>384</sup> See, e.g., UTTING, *supra* note 57, at 113–15. It is important to notice that the aforementioned certification marks may only be registered if they have a dispute settlement procedure regarding the certification of the goods and/or services. See Gandara, *supra* note 25, at 248; see also Herrnstadt, *supra* note 112, at 204–07 (concerning International Framework Agreements on labor standards);

<sup>385</sup> Cf. Rachel Davis & Daniel M. Franks, *The Cost of Conflict with Local Communities in the Extractive Industry*, Shift, First International Seminar on Social Responsibility in Mining, 1, 2 (2011), available at [http://shiftproject.org/sites/default/files/Davis%20&%20Franks\\_Costs%20of%20Conflict\\_SRM.pdf](http://shiftproject.org/sites/default/files/Davis%20&%20Franks_Costs%20of%20Conflict_SRM.pdf).

on the contrary. A growing interest in non-judicial conflict management mechanisms exists in the CSR arena. In other areas, governments are engaged in improving their conflict resolution mechanisms by making use of non-judicial mechanisms too. As to conflict resolution in the human rights arena, Ruggie emphasized the need to improve the patchwork of current non-judicial mechanisms in the third pillar of his framework.<sup>386</sup> He and others have speculated that litigation might be rather ineffective because applicable (legal) norms are unclear, because of jurisdictional issues, and because it might encompass parallel litigation in many jurisdictions.<sup>387</sup> Litigation in many national courts has adverse effects: it is slow, costly, not always predictable, and it might cause legal uncertainty. Apart from jurisdictional issues, it might entail litigation and enforcement in several countries, the difficult process of assessing applicable norms (if possible at all) and difficulties in gathering sufficient evidence. Furthermore, enforcement of awards or settlements stemming from litigation is difficult.

Human rights may not be the only area where litigation in national courts is unproductive: this might also be true in other CSR areas such as in connection with the environment. Different environmental challenges exist in different countries: public rules differ, different stakeholders are involved in different industries, and no global public supervisor exists. Hence, enterprises might have to be geared towards non-judicial dispute resolution and prevention mechanisms to resolve CSR issues, for example regarding the compliance with international private regulation in this arena, instead of instigating or engaging in (parallel) litigation in several jurisdictions. Of importance in this respect is to assist enterprises, (representatives of) local communities, NGO's, and other international bodies, like the World Bank, to find their way through the existing non-judicial mechanisms. Currently many stakeholders experience difficulty in finding the proper and effective mechanisms. However, the necessity of non-judicial mechanisms does not unravel the effectiveness thereof. Beside this, in some instances the need for judicial mechanisms still is felt, for

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<sup>386</sup> Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, at 24, UN Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie), available at [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf) [hereinafter *Protect, Respect, and Remedy*].

<sup>387</sup> David Kovick & Caroline Rees, *International Support for Effective Dispute Resolution Between Companies and Their Stakeholders: Assessing Needs, Interests, and Models* 3-4 (Corp. Social Responsibility Initiative, Working Paper No. 63, 2011), available at [http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workinpaper\\_63\\_rees%20kovick\\_june%202011.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workinpaper_63_rees%20kovick_june%202011.pdf).

example to enforce governmental regulation (either entailing open norms or of another nature) which entails or refers to private regulation in the CSR arena, if some stakeholders are not willing to engage in non-judicial mechanisms and in connection with gross human right violations. However, by and large such judicial mechanisms cannot be implemented in international private regulation as they are, apart from arbitration,<sup>388</sup> government prerogatives.

As to the effectiveness of judicial mechanisms, the notion of effective remedy is a well-known and reasonably developed concept in connection with international human rights law, which is included in many regional and international human rights treaties (such as art. 2(3) ICCPR<sup>389</sup> and art. 13 ECHR<sup>390</sup>). This might apply more generally in the CSR arena. Broadly speaking, it entails access to an impartial decision-maker or mechanism with the power to hear and investigate complaints and, where appropriate, to provide reparation. In this respect, it is important to distinguish between the procedural aspects involving “access to justice” (which refers to the effectiveness of the remedial mechanisms in place and whether victims have both the opportunity and ability to access them), and the substantive “reparation,” which means the type or quantum of relief afforded.

Other aspects of the right to a remedy have evolved out of international humanitarian law requirements regarding, for instance, the recording and passing on of information about the wounded, sick, and the dead. In addition, human rights cases concerning amongst other things enforced disappearances have stressed the importance of the victim’s right to information about the violation, particularly where the claimant is not the direct victim but another affected individual closely linked to them, for example, a member of their family.<sup>391</sup> Similar views have been expressed by a number of global and regional human rights treaty bodies. With respect to the United Nations treaty

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<sup>388</sup> And other possibilities for third (non-government related) parties to pass judgment. An arbitral clause might be entailed (included/implemented by) in a model or supply chain agreement. Therefore, judicial mechanisms might be set forth by international private regulation in such circumstances.

<sup>389</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966 (entered into force Mar. 23, 1976), *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>390</sup> European Convention on Human Rights, *available at* [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>391</sup> Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Addendum Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 29, UN Doc. A/HRC/11/13/Add.1 (May 15, 2009) (by John Ruggie) [hereinafter Addendum to the Ruggie Framework].

bodies, some common strands can be identified in their approach to State obligations to provide access to remedy for human rights abuses, whether committed by public or private actors.<sup>392</sup> They have emphasized the importance of both procedural elements: (i) conducting prompt, thorough, and fair investigations, (ii) providing access to prompt, effective, and independent remedial mechanisms, established through judicial, administrative, legislative, and other appropriate means.<sup>393</sup> Furthermore, outcome-oriented elements are deemed to be important such as (iii) imposing appropriate sanctions, including criminalizing conduct and pursuing prosecutions where abuses amount to international crimes, (iv) providing a range of forms of appropriate reparation, such as compensation, restitution, rehabilitation, and changes in relevant laws.<sup>394</sup> The concept of effective remedy has been strongly influenced by the law of state responsibility and, as a general rule, follows its emphasis on compensatory justice, which means putting the victim back in (or as close to) the position it would have been in but for the violation.<sup>395</sup> Thus, appropriate reparation in each case will turn on the right at issue and nature of the violation.

The obvious question is whether this concept of effective remedy might be transposed wholesale to *non-judicial* grievance mechanisms (either related to human rights violations or to other CSR disputes) without further consideration. A number of considerations suggest not. Judicial mechanisms within any jurisdiction will offer similar processes, or at least processes that are highly aligned with each other. With regard to human rights violations, they are intended to provide reparation for victims insofar as the human rights in question are reflected in applicable law; to create a level of deterrence to others who may commit similar violations; and—at least in the case of criminal proceedings—to provide wider justice and protections for society. This reflects the broader role of judicial mechanisms in ensuring the rule of law.

Non-judicial mechanisms can vary widely in their location, form, and process, including:<sup>396</sup>

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<sup>392</sup> *Id.* at 2.

<sup>393</sup> *Id.* at 2-3.

<sup>394</sup> *Id.* at 3.

<sup>395</sup> *Id.* at 2.

<sup>396</sup> *See, e.g.*, Caroline Rees & David Vermijs, Mapping Grievance Mechanisms in the Business and Human Rights Arena (Corporate Social Responsibility Initiative, Harvard University, January 2008).

- (i) Mechanisms at the company or project-level to which impacted individuals and groups (for example, workers, communities, etc.) can bring complaints;<sup>397</sup>
- (ii) Mechanisms linked to industry and multi-stakeholder initiatives (for example, the Fair Labor Association, Ethical Trading Initiative, Social Accountability International, International Council of Toy Industries, Voluntary Principles on Security and Human Rights, Global Framework Agreements);
- (iii) National mechanisms based in government (for example, National Contact Points of OECD Member States, consumer complaints bodies);
- (iv) National mechanisms that are state-supported but independent of government (for example, ombudsman offices, labor dispute resolution offices, national human rights institutions); and
- (v) Regional and international mechanisms (for example, ILO-based mechanisms, the Compliance Advisor/Ombudsman (CAO) of the World Bank Group).

As this reflects, although some non-judicial grievance mechanisms lack any state involvement, the state or a state agency administrator and others—to the extent they are effective—contribute to the implementation of the state duty to protect against human rights abuses. In addition, some non-judicial mechanisms, both state-based and non-state-based, entail investigatory and quasi-adjudicative processes that involve reaching findings or conclusions and recommendations. These mechanisms come closer to resembling judicial mechanisms through this quasi-adjudicative function, than do those mechanisms that are premised primarily on seeking dialogue-based solutions.<sup>398</sup>

This suggests that some of the criteria or definitions for effective remedy in relation to judicial mechanisms may be applicable in the case of non-judicial mechanisms. Others would clearly not be, such as criminal punishment or sanctions. Moreover, the necessity of enforcement of the outcomes of judicial mechanisms does not exist in connection with all non-judicial grievance mechanisms and enforceability is sometimes not even strived after. Furthermore, some state-based non-judicial mechanisms are voluntary in the sense that stakeholders

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<sup>397</sup> For an extensive analysis of these mechanisms, see Emma Wilson & Emma Blackmore, *Dispute or Dialogue? Community Perspectives on Company-led Grievance Mechanisms* (2013), available at <http://pubs.iied.org/16529IIED.html>.

<sup>398</sup> However, it should be noted that some of the mechanisms might perform both functions, i.e. dialogue based and quasi-adjudicative (e.g. the CAO/World Bank ombudsman and the NCPs).

cannot be forced to take use or take part in the mechanism or to be bound by its outcomes without their consent, unlike judicial mechanisms which by their nature might provide redress against the will of a perpetrator.<sup>399</sup>

As to the effectiveness of non-judicial mechanisms, we might consider two approaches: the effectiveness of the mechanisms themselves (or their procedure) or the effectiveness of their outcomes. As to the effectiveness of non-judicial mechanisms themselves (and their procedure), extensive research has been conducted.<sup>400</sup> Guiding principle 31 of the Ruggie framework deals with this topic and states:

In order to ensure their effectiveness, both State-based and non-State-based non-judicial grievance mechanisms should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

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<sup>399</sup> However, some non-judicial mechanisms also resemble judicial mechanisms, like those of national human rights institutions, or mechanisms relevant to some industries that are run by parts of government and might provide redress which resembles judicial mechanisms.

<sup>400</sup> See generally Caroline Rees, *Grievance Mechanisms for Business and Human Rights* (Corp. Social Responsibility Initiative, Working Paper No. 4, 2008); Caroline Rees, *Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms* (Corp. Social Responsibility Initiative, Report No. 32, 2008); and Martijn Scheltema, *Does CSR Need More (Effective) Private Regulation in the Future?*, in *The Law of the Future and the Future of Law II* 389 (Sam Muller et al. eds., 2012).

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as the means to address and resolve grievances.<sup>401</sup>

The commentary to this principle elucidates that a grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it, and are able to use it. The aforementioned criteria provide a benchmark for designing, revising, or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance among affected stakeholders by heightening their sense of disempowerment and disrespect by the process. This is also true regarding other non-judicial mechanisms in the CSR arena. If these requirements are met, some proof of effectiveness of the mechanism itself is provided. However, assessing whether these requirements have been met is complex. For example, should the requirement of transparency entail the publication of documents relied upon in the non-judicial process? Obviously, these documents should be made available to the parties in the non-judicial process, but not necessarily to other stakeholders. Furthermore, effectiveness of non-judicial dispute prevention and resolution mechanisms is connected with ongoing dispute resolution if new complaints or disputes arise.<sup>402</sup>

As to the effectiveness of the outcome of non-judicial mechanisms, the question that arises is whether it is possible to determine overarching, common elements of effectiveness of non-judicial mechanisms or only for certain types of mechanisms. In this respect, one should bear in mind that a large variety of different possible remedy outcomes of non-judicial mechanisms are conceivable. The outcomes might, for example, range from a final statement of an NCP, to strengthening of the human rights policy and due diligence process of a company, continuous dialogue between a company and a local com-

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<sup>401</sup> *Protect, Respect and Remedy*, *supra* note 386, at 26.

<sup>402</sup> This ongoing dispute resolution might entail judicial mechanisms like arbitration.



munity, a Stop Order from the government, improvements in care and income generating projects to support alternative livelihood, monetary redress, and a general memorandum of understanding.<sup>403</sup> Non-judicial remedial outcomes need to have certain features in order to qualify as effective. Therefore, it becomes necessary to describe what these features are, including whether they are necessarily objective (for example alignment with national law), necessarily subjective (for example based on the perspective of those impacted), or may be a mixture of both. In my opinion, elements or indicators of effectiveness are:

- (i) The consistency of an outcome with national and international human rights laws and regulations,
- (ii) The rights-compatibility of an outcome (see Guiding principle 31(f)),
- (iii) Whether an outcome falls within a certain predefined range of options (such as compensation, restitution, guarantees of non-repetition and providing relevant information),
- (iv) Whether business and/or local communities (and/or their representatives) involved in a case perceive a certain outcome or set of outcomes as effective,
- (v) Whether states classify certain outcomes as effective or support them as outcomes of a non-judicial grievance mechanism,
- (vi) Whether companies increase their efforts to respect human rights because of the existence of such mechanisms,
- (vii) Whether the outcome of a certain mechanism restores a particular individual to the enjoyment of their human rights,
- (viii) Whether the outcome of a certain mechanism improves the human rights, environmental or social situation and whether it helps prevent or reduce future grievances and harms,
- (ix) Whether the outcomes of a certain mechanism are implemented in practice and are enforceable (the enforcement of the outcome of non-judicial mechanisms might be realized through state mechanisms (for example through enforcing an agreement which has resulted from a non-

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<sup>403</sup> For an extensive case analysis of company based non-judicial mechanisms, see WILSON & BLACKMORE, *supra* note 397.

judicial mechanism)<sup>404</sup> or through arbitration after an agreement has been reached (if agreed upon)<sup>405</sup>, and

- (x) Whether the outcome of a certain mechanism is aligned with the (possible) outcomes of other non-judicial and judicial mechanisms which stakeholders are engaged in and/or can contribute to effective remedy in combination with the outcomes of other processes.

This list of elements that might define the effectiveness of outcomes reflects a mix of objective and subjective considerations. Arguably, the more of them that are fulfilled, the more likely it is that the remedial outcome will be generally deemed to be effective.

The foregoing has shown that the ex post effectiveness of international private regulation amongst others, such as the indicators mentioned in para 3.1, depends on its enforceability and on effective dispute resolution.<sup>406</sup> Effectiveness of international private regulation may depend on the following indicators, which have been derived from the abovementioned research:<sup>407</sup>

- (i) Whether international private regulation entails specific and assessable objectives (and if so, whether they have been achieved) and does not aim at objectives which are effectively achieved by other public or private regulation,
- (ii) Whether it entails 'conflict of law' rules,
- (iii) The regular evaluation of the regulation and its functioning (and if necessary) review of the regulation,
- (iv) The existence of a supervisory body to which the parties to the regulatory regime are accountable (and have to provide relevant information to this body), the power of

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<sup>404</sup> For example, the Mediation Directive has been promulgated in the European Union. See Directive 2008/52/EU, 2008 O.J. (L 136/3) (EC), available at <http://Eur-Lex.europa.eu>. This directive is applicable to cross border conflicts (as mentioned in section 2), in which at least one party (in human rights related conflicts, this is by and large a company) has its seat in the EU. Section 6 subsection 1 is especially of importance. It imposes a duty on EU-member states to render agreements resulting from mediation/facilitation enforceable if parties consent to this and so long as/provided that the result is not contradictory to national law.

<sup>405</sup> Because of Article V of the *New York Convention* (which many developing countries also have adopted), the enforcement of arbitral awards is easier than foreign judgments in member states because that article prevents member states from imposing other barriers on enforcement than those adopted for national arbitral awards. United Nations Conference on International Commercial Arbitration, N.Y., May 20 – June 10, 1958, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V, 330 U.N.T.S. 3 (June 7, 1959).

<sup>406</sup> Cf. GIESEN, *supra* note 8, at 106, 137–41.

<sup>407</sup> These indicators are not exhaustive. More detailed research may reveal others.

- the supervisory body to pass judgment and to impose sanctions on non-complying parties,<sup>408</sup>
- (v) The existence of a supervisory body which controls access to scarce resources,<sup>409</sup>
  - (vi) The existence of a serious threat of contractual enforcement or other means of enforcement or endorsement of the private regulation if necessary through state legislation and/or (effective) enforcement by states,<sup>410</sup>
  - (vii) The specificity of the rules/standards set forward by the international private regulation,
  - (viii) The existence of an effective complaint and dispute management mechanism to prevent and deal with non-compliance,<sup>411</sup>
  - (ix) The possibility of certification or assessment of compliance by independent third parties whereby reporting requirements in the regulatory framework are helpful, and susceptibility of a certain business to negative (social) media attention and active NGOs or other organizations

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<sup>408</sup> However, Kolk and van Tulder argue that the likelihood of compliance is higher where company codes of conduct are involved than those set forward by business associations, international organizations, or NGOs. See, Kolk & van Tulder, *supra* note 22, at 11. This especially stems from the fact that codes of conduct promulgated by business organizations or international organizations are less specific and abstain from the possibility of imposing sanctions.

<sup>409</sup> Cf. Scott et al., *supra* note 9, at 7. Beside these indicators, the existence of smaller groups with comparable views is considered to be of importance as well as a high organizational level. This however, in my view, refers to the sociological perspective which is going to be discussed hereinafter. Nonetheless, enforcement may be easier to realize in such circumstances.

<sup>410</sup> However, public enforcement as a fall back option in connection with certification is only effective if certain requirements are met. See Paul Verbruggen, *Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation*, 7 Reg. & Governance 512, 514-15 (2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/rego.12026/abstract>.

<sup>411</sup> As to CSR in an international context, non-judicial mechanisms for conflict management seem to be more effective. Furthermore, the prevention of conflicts becomes more important. Cf. GIESEN, *supra* note 8, at 138-39 (regarding dispute management). Furthermore, the Global Reporting Initiative framework, which is discussed below in the economic approach and to which companies may adhere, entails an indicator which requires companies to state whether they provide a grievance mechanism regarding human rights violations and how many complaints have been received through this mechanism. From this framework, some information could be retrieved as to whether effective grievance mechanisms are in place.

monitoring this business if at least a moderate chance of detection exists.<sup>412</sup>

These are the predominant indicators. However, in the ex post approach the clarity of the rules and a “conflict of laws” provision as well as the answer to the question whether the international private regulation is able to reach its objectives might be of importance.

## 5.2 Economic Approach (Impact Assessment)

From an economic point of view, it is of interest to learn whether existing international private regulation contributes to the economic welfare of affected communities, and society at large as well as to the profitability of multinational enterprises.<sup>413</sup> This economic assessment is also referred to as impact assessment. This research encompasses different points of view. The assessment of the increase or decrease in economic welfare differs along the international private regulation under consideration.<sup>414</sup> It makes a difference whether international private regulation on (i) biodiversity, (ii) prevention of (environmental) damage to local communities, or (iii) technical standardization regarding environmental issues is considered. These three areas differ as to the stakeholders involved and the relevant economic issues. Furthermore it is, as explained above, relevant whether the economic analysis is on a macro or micro level.

On the macro level one may, for example, consider the economic effects of international private regulation on economic growth. This kind of research regards private standard setting or standardization in France, the UK and Germany.<sup>415</sup> However, international pri-

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<sup>412</sup> For example, with many (single issue) eco-labels, this chance of detection of non-compliance is deemed low. See Gandara, *supra* note 25, at 37. Conversely, companies with strong brands seem more susceptible to negative media attention.

<sup>413</sup> See Faure, *supra* note 134, at 1056–64.

<sup>414</sup> From the classical economic approach of Coase and the Chicago School of Law and Economics this starting point does not have merit. They contend that a market is able to reach efficient outcomes through negotiations between well informed parties without regulation. See Faure, *supra* note 134, at 1057. To date, the necessity of research of the economic effects of rules has been recognized. See *id.* at 1057–58. In this approach, private regulation is an appropriate solution where bargaining, at low cost, can occur between risk-creators and those affected. See Ogus & Carbonara, *supra* note 10, at 231.

<sup>415</sup> Elizabeth Gasiorowski-Denis, *Standards: Economic and Social Impact*, ISO Focus, June 2010, at 17, available at <http://digital.iso.org/Olive/ODE/ISO-Focus-Plus-Org/?href=ISOFP/2010/06/01>. However, the main source of growth in France is technological improvement. See *id.* at 18. On the U.K. and Germany, see *Standardization for a Competitive and Innovative Europe: A Vision for 2020*, *supra* note 64, at 29.

vate regulation might not be beneficial to consumers.<sup>416</sup> If the quality imposed by an overarching body exceeds consumers' preferences, consumers bear the excessive cost.<sup>417</sup> However, externalities might legitimize an increase in price paid by consumers.<sup>418</sup> For example, an increase in the price of products with an eco-label arguably attracts more producers (who comply with the certified standards and presumably makes consumers who favor the environment more willing to buy such products) and thus might benefit the environment.<sup>419</sup>

Other types of consumer detriment are conceivable as well. Privately set standards might, particularly if the standard setting industry has bargaining power, induce more lenient public regulation, which, if adopted, might have external consequences for consumers.<sup>420</sup> Furthermore, if sanctions are publicly imposed on a regulatee, this might lead consumers to update their beliefs on the behavior of all regulatees, reducing the perceived quality of the goods provided by them (especially if credence goods are involved), which might induce the group of regulatees (or the overarching body) to refrain from punishment.<sup>421</sup> This might be detrimental to consumers as well.

Therefore, it is important to assess consumer detriment because private regulation tends to optimize the benefits of the regulatees, but to lose track of the consumer detriment (and other external consequences) resulting from it. However, to date, no one has researched the (detrimental) effects of international private regulation on consumers. Notwithstanding this, insights may derive from research instigated by the European Commission on consumer detriment arising from (intended) European legislation.<sup>422</sup> The main indicators for measuring consumer detriment (relevant in connection with international private regulation) are: (i) market power indicators,

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<sup>416</sup> Cf. Ogus & Carbonara, *supra* note 10, at 233–34.

<sup>417</sup> *Id.* at 234, 242.

<sup>418</sup> *But cf. id.*

<sup>419</sup> Gandara, *supra* note 25, at 25, 112–33. See also UNFSS Landscape Report, *supra* note 330, at 30–33 (Concerning the relation between price increase and environmental benefits). Price-premiums might vary over time. See Alvarez & von Hagen, *supra* note 67, at 11.

<sup>420</sup> Ogus & Carbonara, *supra* note 10, at 235–36.

<sup>421</sup> *Id.* at 238 (contending that an effective overarching body might counter this problem).

<sup>422</sup> EUROPE ECONOMICS, AN ANALYSIS OF THE ISSUE OF CONSUMER DETRIMENT AND THE MOST APPROPRIATE METHODOLOGIES TO ESTIMATE IT 351 (July 2007), [http://ec.europa.eu/consumers/strategy/docs/study\\_consumer\\_detriment.pdf](http://ec.europa.eu/consumers/strategy/docs/study_consumer_detriment.pdf) [hereinafter Consumer Detriment]

(ii) information deficit indicators,<sup>423</sup> and (iii) consumer complaint indicators.<sup>424</sup>

Market power indicators (i) are likely to be sensitive to the definition of the market to which they are applied.<sup>425</sup> Carrying out a robust market definition exercise can be a resource-intensive and time-consuming process.<sup>426</sup> In competition cases, where market definition is an important first stage of analysis, substantial resources are sometimes devoted to this issue.<sup>427</sup> If available, such indicators may point at consumer detriment.

As to information deficit indicators (ii), the occurrence of certain market conditions may result in consumer detriment. These market conditions are: (a) high search costs, (b) “focal” competition, (c) bundled goods or after-markets, (d) complex products, (e) infrequent purchases, (f) credence goods, and (g) commission payments to salespeople.<sup>428</sup> This information deficit for example exists in connection with

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<sup>423</sup> For example, in the area of CSR, the European Commission has found misleading marketing related to the environmental impacts of products (so-called ‘green-washing’) in the context of the report on the application of the Unfair Commercial Practices Directive foreseen for 2012, and considers the need for possible specific measures on this issue. See Communication from the Commission on a Renewed EU strategy 2011-14 for Corporate Social Responsibility of October 25, 2011, *supra* note 54, at 9.

<sup>424</sup> See Consumer Detriment, *supra* note 422, at 568. However the research reveals that measuring consumer detriment is very complicated and may involve many different techniques such as consumer surveys, mystery shopping, complaints with adjustments, various market models, evidence from awards in court cases. See *id.* at 223. However, none of the individual methods can be applied sufficiently widely to be useful as a simple generic tool to assess the impact of policy on consumers because all methods can only deal with certain specific sources of detriment and/or are only applicable under certain limited conditions. *Id.* at 225–26. It is furthermore difficult to assess consumer detriment because differences between countries exists in terms of pricing, market power, information problems, and trade barriers. See *id.* at 231–34. Beside these issues there are practical problems. For example, should wholesale or retail prices be compared; should these prices include taxes, and if prices differ between customer groups within a country, which customer group should be considered? See *id.* at 234–35. Furthermore some indicators should be accorded greater weight than others, depending on: (a) the priority placed on the type of problem market which the indicator is designed to identify; (b) the extent to which the indicator reliably identifies a particular type of problem market; (c) the extent to which the available data is a good proxy for what the indicator is meant to measure. The study presents results using an illustrative weighting scheme. See *id.* at 301–02, 307. See *id.* at 385, 387 (describing the possible impact of certain directive measures using these factors).

<sup>425</sup> Consumer Detriment, *supra* note 422, at 351.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> See also, Gandara, *supra* note 25, at 64–77.

environmental information. Eco-labels play a role in bridging this gap and lower the cost of information gathering.<sup>429</sup> However, eco-labels by and large use pricing to distinguish themselves from other products. This might have adverse effects because the consumers might perceive a higher price as a sign of higher (environmental) quality and overall prices might be higher in a market with an eco-label segment.<sup>430</sup> Separating and clarifying the nature of the increase in price might counter this problem.<sup>431</sup>

As to the consumer complaint indicators (iii), consumer surveys may assess consumer detriment.<sup>432</sup> For example, this method is used in the INRA/Deloitte methodology for measuring consumer satisfaction.<sup>433</sup> The core questionnaire consists of seven different “blocks” of questions.<sup>434</sup> Another survey has been carried out by Taylor Nelson Sofres (TNS) and involved a sample of 2,220 UK adults.<sup>435</sup> The questionnaire consisted of 45 questions, of which 31 relate to consumer experiences involving some kind of detriment, and 14 relate to demographic factors.<sup>436</sup> The 31 questions relating to detriment divide into different sub-headings.<sup>437</sup>

Both of these surveys in essence are posing comparable questions, but it is hard to infer economic detriment from the aggregate answers if one looks beyond the level of an individual consumer. However, if the aggregate answers show a low consumer satisfaction, this may serve as an indication of consumer detriment.<sup>438</sup> Therefore, anal-

<sup>429</sup> See Gandara, *supra* note 25, at 73–77, 121, 128–33, 337.

<sup>430</sup> *Id.* at 116, 124.

<sup>431</sup> *Id.* at 118.

<sup>432</sup> See Consumer Detriment, *supra* note 422, at 240–41.

<sup>433</sup> *Id.* at 241.

<sup>434</sup> *Id.* It covered the following variables:(a) overall satisfaction,(b) evaluation of quality, (c) evaluation of price, (d) image perception, (e) market and personal factors, (f) consumer commitment, and (g) complaint behavior.

<sup>435</sup> *Id.* at 245.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 245–46. These were : (a) have you had a problem with goods or services in the last 12 months, (b) what products or services gave rise to problems, (c) how many problems in each category of goods and services, (d) when did it/they start, (e) who has to deal with the problem(s), (f) who is/was affected, (g) what type of problem was it (e.g. safety, unreliability, late delivery), (h) how long did the problem take to be resolved (or how long has it been going on if unresolved), (i) how much money was involved in the initial purchase, (j) what action did you take to deal with the problem, (k) how much time and money did you spent to resolve the problem (or how much so far), (l) actions taken by the supplier, (m) interviewee’s criticisms of the supplier, (n) compensation received or expected, and (o) interviewee’s propensity to complain.

<sup>438</sup> However, the problem is that a small number of consumers reported very large financial losses. Therefore, one should increase the statistical robustness of esti-

ysis of consumer complaint data provides significant value. In particular, where sufficiently detailed data is available, it can provide indications of:

- (a) the sectors where consumers are experiencing detriment,
- (b) the nature of that detriment,
- (c) how detriment breaks down between different methods of purchase, and
- (d) the potential scope for financial detriment associated with different complaints (based on the value of the transaction).<sup>439</sup>

Indicators (i)-(iii)(market power, information deficit and consumer complaint) may assess whether international private regulation is detrimental to consumers, provided they are a stakeholder in connection with certain international private regulation. If private international regulation, for example, causes a shift in market power to the consumers' detriment, private regulation may be less efficient. Information deficit is an important issue regarding international private regulation too, but in a slightly different way. Often consumers are not directly involved in the rule-making process and it is even harder for them to assess which rules apply and whether others comply with the rules than for the governing body or other stakeholders. This may be economically detrimental to consumers. Hence, as elaborated before, transparency (also to consumers) is important. Consumer complaints may also indicate consumer detriment caused by international private regulation. However, not all of these indicators are fit to assess the detriment to consumers.

Quantifying detriment seems possible regarding adversarial market power, because this may, for example, cause an increase in pricing. Also, information deficits may cause consumers to pay too high a price for certain products/services, buy products/services they do not need, or suffer loss because of unclear products/services. However, as to consumer complaints, not all of the factors mentioned above

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mates of financial detriment. In order to do this, the survey needs to pick up more cases of large financial detriment and verify that the data is correct when respondents report very high figures for financial costs. Achieving statistically robust results could be established by: (a) Increasing the overall sample size used in the survey, as suggested by the OFT (but a large enough sample would be prohibitively expensive); (b) splitting the sample, and asking (for instance) half of the respondents about the most recent problem and half about the worst problem; (c) using filter questions inserted into an Omnibus survey to build up a database of consumers who have experienced problems which gave rise to large financial costs, and then including them within a separate full-scale quantitative survey; and (d) side-stepping the problem by focusing on other types of data or analysis. *See id.* at 272-76.

<sup>439</sup> *Id.* at 408-09.



under (iii) are available. From the Taylor Nelson Sofres survey, the abovementioned factors (k), (l), and (n) may be used. The factors derived from the IRNA/Deloitte research are hard to quantify and thus less suited for the purpose of quantification. Therefore detriment to consumers may be defined as:

$$dC = \pi M, I, C$$

Whereby the abbreviations mean:

- dC: aggregate detriment to consumers
- $\pi$ : is depending on
- M: aggregate consumer detriment caused by market power created by international private regulation
- I: aggregate consumer detriment caused by informational deficits created by international private regulation
- C: aggregate consumer detriment caused by unsolved complaints caused by international private regulation

Furthermore, international private regulation might have a detrimental impact on competitiveness, innovation, trade, or markets.<sup>440</sup> For example, contracts between competitors on CSR in order to create a level playing field or eco-labels might disrupt competition.<sup>441</sup> For example, if certification in connection with eco-labeling brings about high costs,<sup>442</sup> small companies might not have the means to engage in such eco-labels or remain certified, although this might be profitable to other (larger) companies.<sup>443</sup>

Moreover, international private regulation, especially if it is adopted in supply chains, might put undue pressure on smaller and medium suppliers vis-à-vis multinational enterprises imposing this

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<sup>440</sup> See WTO, Agreement on Technical Barriers to Trade, annex 3, [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm) (entailing the best practices for standard setting in order to counter trade barriers) (last visited Mar. 17 2014). This annex amongst others entails the obligation to consult WTO-members on draft standards. See also UNFSS Landscape Report, *supra* note 330, part 1, at 18-25 (connecting with sustainability standards and trade barriers). Cf. ISEAL Code of Good Practice, *supra* note 89, §§ 6.1.2, 6.3.1-6.3.2; European Commission, *Annexes to the Impact Assessment Guidelines of the European Commission of 2009*, 24 (Jan/ 15, 2009), [http://ec.europa.eu/governance/impact/commission\\_guidelines/docs/iag\\_2009\\_annex\\_en.pdf](http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_annex_en.pdf). See also, The Communication of the European Commission on the applicability of section 101 TFEU on horizontal agreements O.J. 2011 C 11/55-64, <http://www.Eur-Lex.europa.eu> (dealing with agreements between competitors in the EU).

<sup>441</sup> See Gandara, *supra* note 25, at 92-96, 105-06.

<sup>442</sup> It by and large does. See *id.* at 164, 268.

<sup>443</sup> *Id.* at 120. See generally, UTTING, *supra* note 57, at 98; UNFSS Landscape Report, *supra* note 330, at 27-28; Alvarez & von Hagen, *supra* note 67, at 12, 14, 22-23.

regulation and turning it into a competitive advantage for larger companies.<sup>444</sup> Furthermore, because of the informational failures regarding the environmental attributes of a certain product, free-riders might reap benefits of the environmental market created by eco-labels without incurring any of the costs by using terms with no clear meaning like “all natural” or “eco-friendly.”<sup>445</sup> This results in unfair competition between free-riders and the companies investing in certified eco-labels and might jeopardize eco-labels because they lose their advantage on the environmental market.<sup>446</sup> International private regulation might also exclude or complicate access to a certain market.<sup>447</sup> For example, certain standards might favor producers in developed countries because they use production methods which are close to or compliant with these standards, whereas these methods are less common in developing countries.<sup>448</sup> Innovation might be hampered if certain international private regulation (for example in supply chains or in an eco-label) demands the application of certain (non-innovative) techniques, which some consider beneficial to the environment.<sup>449</sup>

Besides economic effects on stakeholders, such as consumers and companies, one should also take into account the economic consequences of international private regulation to the public interest, such as the environment or labor conditions. Certain international private regulation may prove beneficial to its stakeholders, for example businesses and consumers, but may have adverse effects on the environment or workers.<sup>450</sup> Environmental damage as well as bad labor conditions obviously should be prevented as much as possible. In addi-

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<sup>444</sup> UTTING, *supra* note 57, at 107.

<sup>445</sup> Gandara, *supra* note 25, at 133–42, 269, 271–74. (referring to this phenomena as ‘greenwashing’.) Other types of greenwashing exist, for example using false labels; making claims of environmental performance, which has been proscribed by law; and false environmental claims. Whether greenwashing takes place might depend on the type of purchasers in the supply chain and whether alignment with other initiatives is established. See Alvarez & von Hagen, *supra* note 67, at 23–25.

<sup>446</sup> See, e.g., UNFSS Landscape Report, *supra* note 330, at 30–33, (on different types of price premiums which do not always increase profit depending on the position of the entity in e.g. a supply chain).

<sup>447</sup> See, e.g., Gandara, *supra* note 25, at 159.

<sup>448</sup> See Alvarez & von Hagen, *supra* note 67, at 13–14.

<sup>449</sup> This might also disrupt competition. See Gandara, *supra* note 25, at 105.

<sup>450</sup> See Renda, *supra* note 94, at 132 (providing some indicators to assess such detriment). These however do not consider improvement of the environment also for future generations and portions of the territory that are not regularly inhabited, and therefore are not considered to be good indicators. See *id.* at 132–33. More useful is the cheapest cost provider model, which requires four discrete steps: (i) identifying the possible actors who can influence the outcome (polluters, pollutees or the government), (ii) identifying alternative ways in which the outcome can be altered, (iii) assessing the minimum costs of the various methods fig-

tion, governments might have to make costs to monitor the industry at an arms' length.<sup>451</sup> Therefore the damage to the public interest or to labor conditions has to be assessed too.

However, the public interest might also benefit from international private regulation. It may benefit because a standard contributes to sustainability. For example, eco-labels might benefit the environment. However, the actual impact of private standards, such as entailed in eco-labels, on the environment is not easy to assess.<sup>452</sup> Different, intertwined factors generally cause environmental problems.<sup>453</sup> To assess the effectiveness of a standard, we must assess these factors. Furthermore, if private standards and other policy instruments compete, it might be difficult to assess the influence of each individual label or instrument.<sup>454</sup> It is contended that the quality of the standards or criteria (of the eco-label) and its credibility might function as a proxy indicator of actual (beneficial) environmental impact.<sup>455</sup> Important aspects are whether (i) the environmental issue has not been addressed more efficiently through government regulation (in which case the standards are superfluous), (ii) they address more than a single environmental issue (because single issue labels tend to lose sight of other environmental detriment generated by a product), (iii) they use a lifecycle analysis of a product instead of the impact of the production only, (iv) they are performance based (as opposed to process based because changes to the processes (of the producer) do not necessarily generate an improved environmental performance), (v) the standards are raised regularly (so that they meet the newest environmental requirements and insights), (vi) they entail specific standards for specific

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ured out and (iv) identifying the least cost method and the actor connected to it, who is the cheapest cost avoider. *See id.* at 151.

<sup>451</sup> Overmars, *supra* note 7, at 22. However, some economic models (e.g. the standard cost model) assume 100% compliance. In such models, the cost of enforcement is not considered. *See, e.g.,* Renda, *supra* note 94, at 132.

<sup>452</sup> Therefore, the actual impact on the environment of an eco-label is hardly ever assessed. *See* Gandara, *supra* note 25, at 266–67. *Cf.* UNFSS Landscape Report, *supra* note 330, at 27.

<sup>453</sup> *Id.* at 28.

<sup>454</sup> *See id.* Eco-labeling entities might not be interested in this type of research, unless coerced to conduct it, because if the research elucidates no actual impact, potential users might not invest in this label. *See id.* at 28, 45. However, eco-labels should assess the actual impact. *Id.* at 28.

<sup>455</sup> *Id.* at 32. The quality of eco-labels is addressed by the ISO-14020 Environmental labels and declarations – General Principles and ISO-14021 and ISO-14025 standards too. *See, e.g., id.* at 16. However, few eco-labels actually meet these standards. *See id.*

industries, products or environmental issues, and (vii) whether they are regularly certified.<sup>456</sup>

Furthermore, a pro-environmental community has to exist in order for eco-labels to perform and the producers need to have possibilities to increase prices and make their environmental performance public (by showing that their environmental performance is higher than prescribed by law).<sup>457</sup> By and large, this possibility does not exist if the eco-label is endorsed by the public regulator because the regulatory nature of it tends to monopolize the market.<sup>458</sup> Therefore, international private regulations are needed in this respect. However, if the impact of a private standard, such as an eco-label, remains unclear and poses high cost to an industry and consumers, the question is whether the unclear contribution to the public good outweighs the cost of participation by an industry and the detriment to consumers.<sup>459</sup> In many instances the answer to this question seems rhetorical. However, even if an eco-label is successful in the aforementioned sense, an over-demand might result in eco-labels emerging on the market with lower standards and being less advantageous to the environment.<sup>460</sup> Furthermore, if too many eco-labels exist the (necessarily higher)<sup>461</sup> prices are not sustainable.<sup>462</sup>

The advantage to the public interest might comprise the prevention of legislation, flexibility, and diminished enforcement effort too.<sup>463</sup> Furthermore, independent supervisory bodies might decrease the use of the government funded judicial systems.<sup>464</sup> Beside this, the industry might have specific knowledge not available to the govern-

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<sup>456</sup> *Id.* at 15-16 (identifying different kinds of voluntary sustainability standards). However, regarding issue (vii) verification instead of certification (especially in business to business environment) is deemed effective too. *See id.* at 51.

<sup>457</sup> Gandara, *supra* note 25, at 160. However, the focus on making the environmental performance public might hamper useful pro-environmental behavior. *See id.* at 170.

<sup>458</sup> *Id.* at 223. In this respect, the eco-label developed by the European Commission might be disadvantageous. *See* THE EU ECOLABEL, <http://www.ecolabel.eu> (last visited Mar. 16, 2014); *see, e.g.*, UNFSS Landscape Report, *supra* note 330, at 32 (providing a legal and economic analysis and showing that the increase of price is not always useful, and other informational tools are necessary).

<sup>459</sup> *Cf.* Gasiorowski-Denis, *supra* note 411, at 33 (analyzing this point in connection with ISO-standards).

<sup>460</sup> *See* Gandara, *supra* note 25, at 125 (discussing the FSC and sustainable wood).

<sup>461</sup> *Id.* at 127-28 (pointing out that eco-labels work best if the environmental legislative standards are not too high).

<sup>462</sup> *See, e.g., id.* at 126.

<sup>463</sup> Overmars, *supra* note 7, at 18.

<sup>464</sup> *Id.* at 21.

ment, and might be able to set standards at lower cost than the government. Private regulation thus benefits to the public good.

From the above, it could be inferred that several indicators might be applied to measure the ex post economic effects of international private regulation at a macro level. Obviously such a measurement is not without hurdles, as has been illustrated hereinabove, and especially if the international private regulation at stake more or less resembles public regulation in terms of the number of regulatees and the content of the rules. The following indicators, mentioned above, might be used to make such an assessment:

- (i) the Standard Cost Model for the measurement and reduction of (administrative) burdens of international private regulation to regulatees;<sup>465</sup>
- (ii) changes in the growth of gross domestic product caused by international private regulation;
- (iii) consumer benefit or detriment;
- (iv) competitiveness and trade;
- (v) impact on the potential for innovation and technological development;
- (iv) improvement of labor conditions and social welfare;
- (iv) benefit or detriment to the public interest.

That said, it should be noted that international private regulation might not have effects on all these indicators. One should only assess these indicators on which the regulation might have an impact. For example, regulation on equal pay among men and women is more likely to have gender effects rather than impact on climate change and the environment.<sup>466</sup>

However, this kind of macro-economic research is rather costly and the outcome is to a certain extent speculative because of the extensive use of assumptions.<sup>467</sup> Beside this, international private regulation often does not resemble public regulation at all.<sup>468</sup> The nature of private regulation might be rather different from public regulation in terms of the number of regulatees and the content of the rules.<sup>469</sup> This is true regarding, for example, codes of conduct, international private regulation entailing principles, and regulation through contractual provisions in supply chains. A macro analysis seems less fit regarding such international private regulation. Furthermore, this research at a

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<sup>465</sup> This model has been elaborated in the ex-ante economic avenue. *See supra* note 176 and accompanying text.

<sup>466</sup> *See, e.g.,* Fritsch et al., *supra* note 146, at 4.

<sup>467</sup> *See* UNFSS Landscape Report, *supra* note 330, at 19.

<sup>468</sup> *See, e.g., id.* at 16.

<sup>469</sup> *See, e.g., id.*

macro level does not provide any grip on the economic effects/benefits of international private regulation on/for individual companies.

To make a proper assessment of these effects a “bottom up” (micro-economic) approach is required. This approach is partially reflected by the policy of the European Commission on CSR, which calls for maximizing the shared value for the owners/shareholders of an enterprise as well as for its other stakeholders and society at large.<sup>470</sup> As enterprises are concerned, research has elucidated that private regulation such as standardization may contribute to the profitability of enterprises. The same is true in connection with sustainable entrepreneurship.<sup>471</sup> An increase of profitability (for example resulting from an increase of market access) is an important indicator to assess the economic effects of international private regulation, as the willingness of industry to establish and/or adhere to private regulation is increased (or even driven) by expected benefit.<sup>472</sup>

However, although continuity and profitability are important (long term) aims, business is increasingly inclined to live up to its responsibility in the CSR field—also if governments are unable to set (national or international) standards—by including other interests (of external stakeholders) into their (CSR) policy and by reporting on those non-financial topics.<sup>473</sup> Furthermore, customers and investors (as well as society<sup>474</sup>) increasingly require a (sound) CSR policy. Therefore, the dissemination of international private CSR regulation is not only driven by an increase in profits caused by this type of regulation, but also entails a delicate process of (enhanced) assured non-financial reporting and of meeting the (CSR) requirements of customers, investors, and society at large.

As to the micro-economic effects of international private regulation, research has been conducted on the economic effects of stand-

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<sup>470</sup> Communication from the Commission, *supra* note 54, at 6.

<sup>471</sup> See, e.g., Robert G. Eccles et al., *The Impact of Corporate Culture of Sustainability on Organizational Processes and Performance* 21 (Harvard Bus. Sch., Working Paper No. 12-035, 2013), available at [www.hbs.edu/research/pdf/12-035.pdf](http://www.hbs.edu/research/pdf/12-035.pdf); see also Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, *Harv. Bus. Rev.*, Jan.-Feb. 2011, at 5, available at [http://www.waterhealth.com/sites/default/files/Harvard\\_Business\\_Review\\_Shared\\_Value.pdf](http://www.waterhealth.com/sites/default/files/Harvard_Business_Review_Shared_Value.pdf) (advertising the concept of “shared value”). Furthermore, this is beneficial to investors too because the return on investment increases as well. See, e.g., *id.* at 9.

<sup>472</sup> Overmars, *supra* note 7, at 20; cf. Alvarez & von Hagen, *supra* note 67, at 11; Casey & Scott, *supra* note 66, at 91; Ogus & Carbonara, *supra* note 10, at 244.

<sup>473</sup> Cf. Ogus & Carbonara, *supra* note 10, at 244. Part of this non-financial reporting is liaising with external stakeholders. *Id.*

<sup>474</sup> Such demands might be expressed through legislation, but also through other means, such as social media, the Internet, or civic voice organizations (e.g. NGO's).

ardization.<sup>475</sup> Standardization is used in the CSR arena too, for example with environmental issues.<sup>476</sup> However, this research entails technical standards only and not relevant (management) standards in the CSR arena. Therefore, the usage of this method to assess the economic impact of standardization or, more generally, of international private regulation in the CSR arena, is not axiomatic.<sup>477</sup> Technical processes within a company are quite distinct and have less external impact as such. In this respect, standardization has to be discerned from CSR.<sup>478</sup>

A company CSR policy (based on private regulation) might be profitable to the company, but might have external consequences for consumers, local communities, or the environment.<sup>479</sup> Besides this, the process from extracting raw materials to the delivery of a certain product to a consumer might take rather long.<sup>480</sup> This process regularly involves a (long) chain of activities of several enterprises.<sup>481</sup> Furthermore, the implementation of certain international private CSR regulations throughout the mentioned supply chain is time consuming, and the economic effects thereof are less clear.<sup>482</sup> This assessment is further complicated because the profit of an enterprise depends on many factors, especially in the long run.<sup>483</sup> Besides this, negative media, because of violations of international private CSR regulation, might be more threatening to a company's profit than non-compliance with international technical standards.<sup>484</sup> However, this depends on the industry.<sup>485</sup> The producer of consumer goods might envisage more severe consequences of negative media attention than a company in the arms industry and might profit more because of positive media if it complies with private CSR regulation.<sup>486</sup> For the company in the arms

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<sup>475</sup> See Gasiorowski-Denis, *supra* note 411, at 11.

<sup>476</sup> See INT'L S. ORG. FOR STANDARDIZATION ser. 14000 (2013) (providing standardization on environmental issues); see also INT'L S. ORG. FOR STANDARDIZATION ser. 26000 (2010) (providing standardization on CSR as a whole).

<sup>477</sup> Cherie Metcalf, *Corporate Social Responsibility As Global Public Law: Third Party Rankings As Regulation by Information*, 28 Pace Env'tl. L. Rev. 145, 160 (2010).

<sup>478</sup> See *id.* at 155.

<sup>479</sup> See *id.* at 158; see, e.g., ADINDA P. INSYIRANI ET AL., THE IMPACT OF CORPORATE SOCIAL RESPONSIBILITY TO INTERNAL EMPLOYEE MOTIVATION 9, 10 (2013), available at [http://www.caal-inteduorg.com/ibsm2/proceedings/FP04-Adinda\\_Putri\\_Insyirani—The\\_Impact\\_of\\_Corporate\\_Social.pdf](http://www.caal-inteduorg.com/ibsm2/proceedings/FP04-Adinda_Putri_Insyirani—The_Impact_of_Corporate_Social.pdf).

<sup>480</sup> Metcalf, *supra* note 477, at 161.

<sup>481</sup> See *id.*

<sup>482</sup> See *id.*

<sup>483</sup> See *id.* at 160.

<sup>484</sup> See *id.* at 169.

<sup>485</sup> See *id.*

<sup>486</sup> See *id.*

industry the expected benefit from compliance with international private regulation in the CSR arena might be lower.<sup>487</sup> Furthermore, the abandonment of child labor, for example, turns on whether the industry in general is child-labor dependent and whether products are sold to consumers and not in a business-to-business market.<sup>488</sup> If both requirements are met, negative media attention is deemed to have adverse effects on a certain company.

Therefore, economic effects of international private CSR regulation on the micro level are not measured easily and depend on the specifics of a certain industry.<sup>489</sup> However, as has been mentioned before, research has shown that CSR might be profitable to companies, consumers, and local communities as well as to the environment.<sup>490</sup> For example, a certified eco-label might lower the cost of reputation-building for a company in the environmental arena because the eco-label might be well known in the market and might be connected to environmental improvement by consumers.<sup>491</sup> The eco-label supports the environmental claim and the (environmental) reputation of the company in such instances. It might even permeate to the other (non-labeled) products of such a company.<sup>492</sup>

How then to find a method to assess the economic effects of international private CSR regulation on the micro level? Many methods exist to measure the economic effects of CSR on companies.<sup>493</sup> The

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<sup>487</sup> *See id.*

<sup>488</sup> *Cf. Kolk & van Tulder, supra note 22, at 7.*

<sup>489</sup> *See id.* at 160.

<sup>490</sup> *See, e.g., Eccles et al., supra note 471, at 4; Porter & Kramer, supra note 471, at 9; Gandara, supra note 25, at 159-60.* However, Gandara notices that a correlation between sustainability and financial performance has been found, but no causal relation. *See id.* at 151.

<sup>491</sup> *See Gandara, supra note 25, at 88.* However, she also addresses the downside because the aforementioned cost reduction is the highest for companies with a rather poor environmental performance. *Id.* at 90. Furthermore, companies with a good environmental performance might incur high cost because of the certification process and might receive marginal benefits. *See id.* at 92.

<sup>492</sup> *Cf. id.* at 100.

<sup>493</sup> It is not possible to review all methods in this contribution. Indicators to measure detriment to local communities by analyzing complaints (e.g. about illness, increased mortality as well as damage to economic and environmental assets) are provided by Renda. Renda, *supra note 94, at 132.* However, these indicators are not considered to be adequate measurement tools. *Id.* The human development indicator might also provide for some insight in the economic advantages of international private regulation to other stakeholders (for example, local communities). However, it is contended an increase of wealth may not constitute a social improvement unless it furthers some other goal such as utility and therefore is not a useful indicator. *Id.* at 104. Furthermore, an aid in the environmental area might be SimaPro software, which uses many of these methods to assess the effects of



Global Reporting Initiative (GRI) might play a role in this.<sup>494</sup> Another useful instrument for the agricultural sector might be the joint ISEAL and FAO initiative Sustainability Assessment of Food and Agriculture systems (SAFA guidelines).<sup>495</sup> GRI provides organizational reporting

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company activities on the environment, climate and health. See SIMAPRO 7, [http://www.pre-sustainability.com/download/Webdemo/SimaPro\\_7\\_Introduction.htm](http://www.pre-sustainability.com/download/Webdemo/SimaPro_7_Introduction.htm). (last visited Mar. 12, 2014); see also *About the Consortium*, THE SUSTAINABILITY CONSORTIUM, <http://www.sustainabilityconsortium.org/what-we-do/> (last visited Mar. 12, 2014) (developing the Sustainability Measurement and Reporting System (SMRS), a global platform which enables research on the effects of company activities on climate, raw materials, health, water use, and the environment at an industry level); *Earthster 2: Semantic Web-based Life Cycle Assessment*, EPIMORPHICS LTD., <http://www.epimorphics.com/web/Earthster> (developing software that assesses the impact of company activities at an industry level); see, e.g., <http://www.sustainabilityconsortium.org/open-io/use-the-model/>.

<sup>494</sup> See GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/Pages/default.aspx> (last visited Mar. 12, 2014); see also Alberto Fonseca, *Barriers to Strengthening the Global Reporting Initiative Framework: Exploring the perceptions of consultants, practitioners and researchers 3–4* (n.d.), available at [http://www.csin-rcid.ca/downloads/csin\\_conf\\_alberto\\_fonseca.pdf](http://www.csin-rcid.ca/downloads/csin_conf_alberto_fonseca.pdf) (discussing the history of the initiative). This type of reporting is required by some certifiable management systems by the Dutch 'MVO prestatieladder' (at application level 5 in which GRI reporting application level B+ is required). See MVO PRESTATIELADDER (CSR PERFORMANCE), <http://www.mvoprestatieladder.nl> (last visited Mar. 12, 2014). However, although the GRI seems an open inclusive organization aiming at public policy goals, its performance in this respect is questioned. FONSECA, *supra* note 494, at 5. Some consider the nature of the indicators rather formalistic and giving rise to a 'box-ticking' mentality as well as difficult to apply (e.g. the human rights indicators). *Id.* A survey amongst stakeholders on the performance of GRI has revealed a lack of integrated indicators, no obligation for external assurance, a lack of guidance on stakeholder engagement and limited participation as well as a lack of real inclusiveness because of the focus on internal organizational performance and losing sight of the physical space surrounding specific facilities or industrial plants. See *id.* at 5-7; cf. Cafaggi & Renda, *supra* note 46, at 18. However, some contend the GRI has succeeded in operationalizing accountability as a virtue. See Curtin & Senden, *supra* note 11, at 178. Besides the GRI, a new organization has been established, the International Integrated Reporting Committee (IIRC), which aims at creating an internationally accepted reporting framework enabling companies to combine financial and non-financial reporting. See INTEGRATED REPORTING, <http://www.theiirc.org> (last visited Mar. 12, 2014).

<sup>495</sup> FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org> (last visited Mar. 12, 2014); see, e.g., Cafaggi & Renda, *supra* note 46, at 23–25. See also *About Us*, TRUE PRICE FOUNDATION, <http://www.trueprice.org> (last visited Oct. 30, 2013) (aiming to establish a methodology to make external social and environmental impact transparent at the price-level of individual products). This might be an interesting tool to assess impact of an initiative which is implemented by a company on the price-level (in terms of improvement of environmental and social impact).

guidance. Its framework enables all companies and organizations to measure and report their sustainability performance.<sup>496</sup> The SAFA guidelines entail a comparable (and comprehensive) framework in the agricultural area. The following research on the GRI therefore *mutatis mutandis* applies to the SAFA guidelines. A sustainability report is an organizational report that gives information about economic, environmental, social, and governance performance.<sup>497</sup> Sustainability reporting is a form of non-financial reporting. It is also an intrinsic element of integrated reporting, a recent development that combines the analysis of financial and non-financial performance. Sustainability reporting involves the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development.<sup>498</sup> In order to produce a regular sustainability report, companies should set up a program of data collection, communication, and responses.

A sustainability report should provide a balanced and reasonable representation of the sustainability performance of the reporting organization, including both positive and negative contributions. The GRI provides that companies, amongst others, provide performance indicators that elicit comparable information on the economic, environmental, and social performance of this company.<sup>499</sup> Furthermore, the

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<sup>496</sup> See ISEAL ALLIANCE, ASSESSING THE IMPACTS OF SOCIAL AND ENVIRONMENTAL STANDARDS SYSTEMS v1.0, at 8 (2010), available at <http://www.isealliance.org/online-community/resources/iseal-impacts-code-of-good-practice> (providing elements the assessment should entail); see, e.g., THE DANISH INST. FOR HUMAN RIGHTS, HUMAN RIGHTS COMPLIANCE ASSESSMENT (HRCA) QUICK CHECK 4, available at [https://hrca2.humanrightsbusiness.org/docs/file/HRCA%20Quick%20Check\\_English.pdf](https://hrca2.humanrightsbusiness.org/docs/file/HRCA%20Quick%20Check_English.pdf) (providing indicators regarding human rights); Shift, From Audit to Innovation: Advancing Human Rights in Global Supply Chains 9 (2013), available at [http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains\\_0.pdf](http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf) (assessing human rights impact in supply chains); see also Cafaggi & Renda, *supra* note 46, at 20-23. Third party rating agencies assess human rights performance of entities on behalf of investors too, but unfortunately their analysis is not public. See, e.g., *About Us*, VIGEO, <http://www.vigeo.com> (last visited Dec. 23, 2013); SUSTAINALYTICS, <http://www.sustainalytics.com> (last visited Dec. 23, 2013). Some public indices such as the Dow Jones Sustainability Index entail human rights indicators as well; however, to date only 6% of the indicators are related to them. See ROBECOSAM, CORPORATE SUSTAINABILITY ASSESSMENT 33 (2013), available at <http://www.robecosam.com/images/sample-questionnaire.pdf> (providing a corporate sustainability questionnaire).

<sup>497</sup> See GLOBAL REPORTING INITIATIVE, *supra* note 494, at 9.

<sup>498</sup> See *id.* at 17.

<sup>499</sup> To date the most advanced performance indicators are entailed in the G4 reporting framework. *G4 Sustainability Reporting Guidelines*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/reporting/g4/Pages/default.aspx> (last

sustainability report has to focus on the organization's key impacts on sustainability and effects on stakeholders, including rights as defined by national laws and relevant internationally agreed standards.<sup>500</sup> In order to meet the GRI requirements, the reporting organization should identify (i) on which topics it has significant economic, environmental, and social impact,<sup>501</sup> (ii) its stakeholders<sup>502</sup> and explain in the report how it has responded to their reasonable expectations and interests, and (iii) should put the performance information in the context of the limits and demands placed on environmental or social resources at the sectorial, local, regional, or global level.<sup>503</sup> For example, this could mean that in addition to reporting on trends in eco-efficiency, an organization might also present its absolute pollution loading in relation to the capacity of the regional ecosystem to absorb the pollutant in a sustainable manner. Furthermore, (iv) coverage of the material topics and indicators and definition of the report boundary should be sufficient to reflect significant economic, environmental, and social impacts<sup>504</sup> (for example along the supply chain<sup>505</sup>) and enable stakeholders to assess the reporting company's performance in the reporting period.<sup>506</sup> Reported information should be presented in a manner that enables stakeholders to analyze changes in the performance of the company over time, and could support analysis relative to other companies.<sup>507</sup> A company should include total numbers (absolute data such as tons of waste) as well as ratios (normalized data such as waste per unit of production) to enable analytical comparisons.<sup>508</sup> GRI has different application levels.<sup>509</sup>

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visited Mar. 12, 2014); *see also* GLOBAL REPORTING INITIATIVE, REPORTING PRINCIPLES AND STANDARD DISCLOSURES 1 (2013).

<sup>500</sup> *See id.* at 17.

<sup>501</sup> *See id.*

<sup>502</sup> Which refers to entities or individuals significantly affected by the activities of the company. Examples of stakeholder groups are civil society, customers, employees (and other workers, and their trade unions), local communities, shareholders, and providers of capital and suppliers. *See* REPORTING PRINCIPLES, *supra* note 499, at 5.

<sup>503</sup> *See id.*

<sup>504</sup> *See id.*

<sup>505</sup> However, this is only if the company has control over the entity in the supply chain or has significant influence on this entity. In the first circumstance, the company has to provide performance indicators and in the latter it has to disclose the management approach of the entity in the supply chain. *See id.* at 20.

<sup>506</sup> *See id.*

<sup>507</sup> *See id.*

<sup>508</sup> *See id.* at 50.

<sup>509</sup> These are A, B and C to which a "+" might be added if external assurance is utilized. *See id.* at 11, 15. Level A is the most elaborate level of reporting and

Because the GRI reporting, especially if the highest (A) application level is implemented, enables stakeholders to analyze changes in the performance of a company over time and could support analysis relative to other companies, it might be a helpful tool to assess the economic impact of the implementation of private regulation in the area of CSR. If a company uses the GRI reporting tool, one could assess its economic, environmental, and social performance indicators before and after the implementation of certain private regulation in the CSR arena. Because the sustainability reports are made public, stakeholders and researchers are able to make this assessment too.<sup>510</sup>

From this analysis, it could be inferred that private regulation in the CSR arena seems to be effective in an economic sense if (i) the profits of the reporting company increase (in the long run) after implementing the private regulation,<sup>511</sup> which could be inferred from the common financial reporting, and (ii) the external (environmental and societal) consequences of the company's operations do not increase (or ideally decrease), which could be inferred from the non-financial performance indicators.<sup>512</sup> However, an increase or decrease of profit might have many causes, especially if measured over a longer period of time.<sup>513</sup> Therefore, increase or decrease of profit might not be attributable to the implementation of certain private CSR regulation.<sup>514</sup> So, the financial statements should be scrutinized to assess whether other factors could have caused changes in profit. As far as possible, these other factors should be left out of the analysis. However, these other factors, such as an increase in production, might also cause an increase in environmental and social consequences. Such an increase might only be left out of the analysis if the increase is consistent with the implemented private CSR initiative. A further complication is that many companies do not adhere to a single private CSR initiative but implement more initiatives. Therefore, it might be difficult to assess which increase of profit could be attributed to the implementation of a certain CSR initiative. This hurdle might be overcome by assessing at which time certain private CSR initiatives are implemented. If these initiatives are not implemented at the same time, one could commence measuring an increase in profits and the change of external consequences after implementation of a first initiative but before the imple-

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entails all indicators of the GRI on economic, environmental, and social impact of a company.

<sup>510</sup> See, e.g., *id.* at 16.

<sup>511</sup> Fully implementing private CSR regulation might be rather time consuming and therefore the moment of measuring profits before and after implementation might be quite remote. See Gandara, *supra* note 25, at 151.

<sup>512</sup> See *id.* at 5.

<sup>513</sup> See Gandara, *supra* note 25, at 151.

<sup>514</sup> *Id.*

mentation of a second. In this regard it is of importance that GRI requires companies to indicate to which initiatives they adhere in their non-financial report.<sup>515</sup> Furthermore, it is conceivable that private CSR initiatives concern different topics, for example water usage and sustainable fishery. In such cases it might be possible to attribute part of the increase of profit and a change in environmental and social consequences to a certain initiative.

Put in a formula: private CSR regulation is efficient (on a micro level) if:

$$PAC_{csr} - PBC_{csr} > 0 \text{ and} \\ \Delta EC + \Delta SC = 0$$

In which formula:

- $PAC_{csr}$  is the company's profit after implementation of a certain private CSR initiative,
- $PBC_{csr}$  is the company's profit before implementation,
- $\Delta EC$  is the change of environmental consequences of the company's operations, and
- $\Delta SC$  is the change of social consequences of the company's operations.<sup>516</sup>

An objection to this way of measuring efficiency through the GRI reporting might be that the figures and statements are provided by the company. Therefore, they might be considered to be less trustworthy, especially by external stakeholders. However, regarding the financial statement, this distrust seems only partially justified be-

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<sup>515</sup> See *id.* at 5.

<sup>516</sup> EC and SC are assumed to be quantifiable in this formula. However, it should be noted that these consequences cannot be monetized regarding all aspects. In the GRI-reports these consequences are considered to be of a non-financial nature. See REPORTING PRINCIPLES, *supra* note 499, at 5 n.1. For example, the impact on human rights in a certain local community or on diversity is not easy to measure in a figure. In such instances, the non-financial report stating the changes in this respect have to be considered without attributing a figure to these changes. Obviously, this may cause problems if the environmental and social consequences are not aligned. For example, if the figures regarding environmental impact show a positive effect and the (non-figurative) social statements a negative, the question arises whether the overall effect (EC + SC) is positive. Furthermore, it might be hard to assess whether the human rights situation has improved if the number of human rights issues has decreased but the severity of the remaining issues has increased. Unfortunately, the answer to these questions cannot be given in a truly objective way, but only more subjectively through assessing which effect seems to be predominant (for example by engaging with the affected community). However, this is still better than refraining from any assessment at all, especially if reports from other companies adhering to certain private regulation are available too.

cause external assurance (by an accountant) is required in most countries.<sup>517</sup> As to the non-financial statements this distrust might be understandable, but in this regard GRI also provides for external assurance.<sup>518</sup> Obviously, if external assurance is applied, the credibility of the reports increases.<sup>519</sup> Furthermore, one might assess the efficiency of certain private CSR regulation by using financial and non-financial GRI reports from multiple companies.<sup>520</sup> If efficiency in the abovementioned sense could be inferred from several GRI-reports, this strengthens the assumption of efficiency of a particular initiative (this entails an assessment at the meso level).<sup>521</sup> Considering the reports of multiple companies also could assist in assessing the efficiency of private CSR initiatives if a certain company has implemented several initiatives at the same time or close to each other. If one compares the reports of multiple companies which, but for one, have implemented different initiatives and assesses efficiency in the abovementioned sense with all these companies, this raises the assumption that the initiative they all have implemented is efficient.

Therefore GRI-reports are helpful to assess the efficiency of private CSR regulation on a micro-economic level, especially if companies have adopted the A+ (the highest externally assured) application level. If so, they have to report on all environmental and social performance indicators with external assurance of this report. From these reports, the efficiency of private CSR regulation can be inferred best in the way described above.

However, not many companies have adopted the GRI A(+) application level.<sup>522</sup> Because companies which have adopted the GRI B or C application level do not have to report on all environmental and social performance indicators, assessing the efficiency of private CSR regulation is more complex, although these reports might still provide some guidance using the indicators which are reported on. Furthermore, GRI-reporting seems to be adopted by companies which have an interest in sustainability.<sup>523</sup> Therefore, assessing the effects of not implementing private CSR regulation by using GRI-reports is less feasible because the companies which have not implemented private CSR

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<sup>517</sup> See Iris H-Y Chiu, *Transparency Regulation in Financial Markets - Moving into the Surveillance Age?*, 2 Eur. J. Risk Reg. 305, 306 (2011).

<sup>518</sup> If external assurance is utilized the company adds a "+" to the application level of GRI. See *id.* at 11, 15; see also Gandara, *supra* note 25, at 151.

<sup>519</sup> See, e.g., Gandara, *supra* note 25, at 151.

<sup>520</sup> See, e.g., *id.*

<sup>521</sup> See, e.g., *id.*

<sup>522</sup> Only 20% of the GRI-based reports published in 2008 declared an A+ level. These reports mainly stem from large transnational corporations based in OECD countries. See FONSECA, *supra* note 494, at 13.

<sup>523</sup> See FONSECA, *supra* note 494, at 1

regulation are not very likely to use the GRI-reporting tool. Thus the assessment of efficiency is mainly undertaken by using reports from companies which implemented private regulation.<sup>524</sup> This might be compensated for, and this method might also be of use, if no GRI-reports are available of companies which have implemented a particular private CSR initiative, by using other assessment tools for example on environmental impact in connection with scrutinizing publicized financial data.<sup>525</sup> However, the current assessment tools do not require companies to make the results of their assessments public. Therefore, these assessments are not fit for external research on the efficiency of private CSR initiatives. In order to enable and improve future research on the effectiveness of international private CSR regulation, the implementation of GRI-reporting (preferably at the A(+) application level) or comparable reporting requirements should be promoted.<sup>526</sup> An even better solution would be to adopt a GRI or comparable reporting requirement in future international private CSR regulation (or elsewhere).<sup>527</sup> Thus, the requirement of GRI-reporting (or comparable kinds of reporting) becomes an indicator of effective-

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<sup>524</sup> See *Regulating for a More Sustainable Future: New Norwegian CSR Regulation Entered Into Force*, GLOBAL REPORTING INITIATIVE (last visited Mar. 12, 2014), <https://www.globalreporting.org/information/news-and-press-center/Pages/Regulating-for-a-more-sustainable-future-New-Norwegian-CSR-regulations-entered-into-force/> (showing how these companies might be intrinsically motivated to make a success of international private CSR regulation, which might cause an increase in profit although the regulation itself is rather ineffective. However, the more companies which have implemented particular private CSR regulation report an increase in profit after implementation, the more likely it becomes that this is (at least partly) attributable to the private regulation. Furthermore, this increase of profit after implementation provides at least an indication of efficiency as opposed to refraining from this assessment at all).

<sup>525</sup> See, e.g., THE CARBON DISCLOSURE PROJECT, <http://www.cdproject.net> (last visited April 29, 2013); THE SUSTAINABILITY MEASUREMENT & REPORTING SYSTEM, SMRS <http://www.sustainabilityconsortium.org/open-io/use-the-model> (last visited April 29, 2013).

<sup>526</sup> Cf. Balleisen & Eisner, *supra* note 62, at 136, 142; see, e.g., *OECD Guidelines for Multinational Enterprises*, OECD, <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>, (last visited Mar. 20, 2013). Furthermore, the SEC requires companies listed at the New York stock exchange to report on sustainability issues such as climate change. See, e.g., *New SEC Guidelines May Cause an Outbreak of Sustainability Reporting*, CA. SUSTAINABILITY ALLIANCE, <http://sustainca.org/blog/climate/sec-guidelines-sustainability-reporting> (last visited Nov. 27, 2013).

<sup>527</sup> Cf. *MSI-evaluation Tool*, *supra* note 97, at 19–20; and Kolk & van Tulder, *supra* note 22, at 10 (arguing that the extent to which a code of conduct entails quantitative standards should be adopted as an effectiveness indicator).

ness of future international private CSR regulation itself because it enables better research on its efficiency.

However, the economic approach by itself is not a reliable indicator that emanates ex post effectiveness of international private regulation. Unlike what classical economic theory assumed, human decision-making is not solely based on economic appraisal of a situation, but also on other assessments and is biased.<sup>528</sup> For example, network effects, herd behavior, and bandwagon effects are typical cases in which the interdependence between individuals and their dynamic interaction makes it impossible to follow a single mathematical aggregation of individual preferences as in the Pareto efficiency (connected to the macro level approach), in which an aggregate increase of wealth agreed upon by all members of society is predominant.<sup>529</sup> As biases emerge, effective international private regulation ought to operate directly on them and attempt to assist people either to reduce or to eliminate them, but this aspect of effectiveness is not covered by the economic avenue.<sup>530</sup> Besides this, acceptance of particular international private regulation by stakeholders is important. Economic efficiency, for example, tends to neglect the division of wealth caused by international private regulation,<sup>531</sup> which is an important factor in the acceptance thereof. The welfare of an individual most often depends on that individual's relative, rather than absolute, well-being.<sup>532</sup> An individual earning €50,000 in a company where everybody receives the same amount might be happier than an individual who earns €60,000 in a company in which everyone else earns €80,000.<sup>533</sup> If the per capita income of a local community increases by \$5 as a result of the implementation of private CSR regulation, it makes a difference whether this community is located in Nigeria or Canada. Such and other distributional issues, which relate to returns on income and the assessment of how much an increase of wealth contributes to the utility for an

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<sup>528</sup> See, e.g., Renda, *supra* note 94, at 110–11.

<sup>529</sup> *Id.* at 117–18, 126. The same is true regarding the Kaldor-Hicks principle, albeit in this principle the possibility that someone is left worse-off after an efficient policy change is explicitly contemplated. This principle is an important feature of the US impact assessment on major legislation issued by agencies. See *id.* at 127–28. Therefore, the aggregate increase of wealth agreed upon by all members of society has lost its predominant position in current law and economics. See, e.g., Faure, *supra* note 134, at 1061.

<sup>530</sup> Christine Jolls, *Behavioural Law and Economics*, in *Behavioral economics and its application* 34–35 (Diamond et al. eds., Princeton Univ. Press 2007).

<sup>531</sup> Cf. Renda, *supra* note 94, at 122.

<sup>532</sup> *Id.* at 118.

<sup>533</sup> *Id.* at 125.



individual (the same increase in wealth has different utility for a poor or a rich individual),<sup>534</sup> are neglected in classical economics.<sup>535</sup>

As discussed above, the economic avenue as a whole is especially fit to measure ex post effects of international private regulation.<sup>536</sup> Only the macro-economic approach is helpful in assessing the economic efficiency of international private regulation ex ante. However, it emanated from the foregoing that a single economic approach does not suffice to assess the ex post effectiveness of international private regulation. Other disciplines are needed to correct the shortcomings of the economic avenue.<sup>537</sup> As to the distributional shortcomings of the economic approach, the acceptance of international private regulation is important. The sociological approach covers this avenue.<sup>538</sup> That said, the economic avenue ought to be one of the main factors in the ex post assessment of the effectiveness of international private regulation, next to the legal approach, in spite of these shortcomings.

### 5.3 Sociological Approach

The sociological approach might be important too in the ex post approach to assessing the effectiveness of existing international private regulation. The better international private regulation is actually accepted, the greater the incentives are to comply with it. This might reduce the costs of enforcement and dispute resolution. Alternatively, if acceptance is rather poor, this might be a contra-indicator.

However, the degree of acceptance is not easily measured. It might, for example, take some time before the implementation of a certain private regulatory regime brings about perceptible effects. Furthermore, private regulation is often intertwined with government

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<sup>534</sup> In technical terms: a diminishing marginal utility of income. See, e.g., Richard A. Easterlin, Diminishing Marginal Utility of Income 2004, <http://ssrn.com/abstract=539262> (last visited March 20th 2013).

<sup>535</sup> Renda, *supra* note 94, at 122 (giving the example of a poor and a rich cousin who have to divide an inheritance on the condition that they agree on how to divide the sum).

<sup>536</sup> See Faure, *supra* note 134, at 1061. (showing that it is possible to assess the economic effects of a particular desirable division of wealth, and that the economic approach also might assist the ex ante appraisal of international private regulation).

<sup>537</sup> Therefore, the importance of human behavior is recognized in current law and economics. See, e.g., Faure, *supra* note 134, at 1061–62; cf. Jonathan Klick, The Empirical Revolution in Law and Economics 23 (Inaugural lecture Rotterdam) (Eleven Publ. 2011).

<sup>538</sup> This approach is, as has been discussed hereinabove, of importance to alternative forms of legitimacy of international private regulation as well. Beside this, insights might be derived from social psychology and political science which also research acceptance of norms.

regulation, and it is therefore rather complicated to isolate the effects of a private regulatory regime.<sup>539</sup> Beside this, acceptance may vary between the different actors subject to the regime. Acceptance then might be assessed by conducting surveys with relevant stakeholders. It should be noted this approach is *ex post*; *ex ante* research of this kind is not conceivable. However, this requires research which is often rather time consuming and costly. Acceptance preferably should be assessed without the necessity of extensive surveys. An indicator of acceptance at the company level might be the commitment of the management of a company as well as financial commitment of that company to a certain initiative.<sup>540</sup> The higher the management and financial commitment of the company is, the higher the degree of assumed acceptance. Obviously, the fact that a company has implemented a certain ISO-standard indicates acceptance thereof. Furthermore, it seems, for example, clear which company has committed itself to the Global Compact (in the CSR area), because of the list of adhering companies. However, this might not be a very reliable indicator. A company could adhere to the Global Compact, but the implementation of the principles might be scant. In such instances, the existence of an effective enforcement framework as well as extensive referral to it in social or other media might be indicators of acceptance.

Some examples might illustrate the importance of actual acceptance of international private regulation. The acceptance/legitimacy of ISO standards was traditionally assessed by reference to the degree of expertise and the extent to which ISO standards rationalized technical standards.<sup>541</sup> The ISO, however, expanded its scope from technical standards to a social responsibility standard with ISO 26000.<sup>542</sup> Expertise and rationalization were insufficient to legitimate the new standard. The ISO recognized that, given the potential users of such a standard, it had to adapt its standard-setting procedure to open it up to wider stakeholders such as NGOs and consumer groups. In order to do this, ISO set up six specific stakeholder categories and created new procedural rules so that it represented all stakeholder views.<sup>543</sup> By doing so, it faced new types of stakeholders who had dif-

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<sup>539</sup> Oude Vrielink, *supra* note 132, at 69.

<sup>540</sup> See Kolk & van Tulder, *supra* note 22, at 10.

<sup>541</sup> Casey & Scott, *supra* note 66, at 92. This however is not an informal process of rule-making, the ISO has created a set of procedures for the creation of standards. See KOPPELL, *supra* note 29, at 148.

<sup>542</sup> ISO 26000 – Social Responsibility, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/iso26000> (last visited Apr. 10, 2014).

<sup>543</sup> Casey & Scott, *supra* note 66, at 92. (Such a multi-stakeholder model was also applied when drafting the model mining development agreement, *supra* note 13, a model agreement drafted for the extracting industry, which model, *inter alia*, contains provisions on CSR (provisions 22-27 including an obligation to adopt a com-

ferent legitimacy demands from those previously dealt with.<sup>544</sup> In particular, NGO and consumer stakeholder groups created a legitimacy dilemma when they demanded that the standard-setting process be more transparent and opened to the media.<sup>545</sup> However, industry stakeholder groups successfully contested this demand for increased transparency.<sup>546</sup>

The acceptance and legitimacy of the Dutch corporate governance code, principle II.1.2.d, which obliges companies listed at the Dutch stock exchange to state the main elements of CSR issues that are relevant to the company,<sup>547</sup> is also questioned. It is purported that the identity of the stakeholders is unclear. Furthermore, no industry organization established this code. Instead, different stakeholders of different disciplines, backgrounds, and interests established the code. A clear picture of the organization is absent, and, stemming from this, it remains unclear whether all stakeholders feel adequately represented.<sup>548</sup> Furthermore it is questionable whether all the information and expertise gathered was needed to solve the societal problem and to support the measures implemented.<sup>549</sup> Despite these objections, section 2:8 of the Dutch Civil Code, which deals with good faith and fair dealing in company law, converts the corporate governance code into norms which are enforceable through national courts.

The social perspective may be used to assess whether a certain initiative is effective *ex post*. One might assess actual acceptance of international private regulation. Obviously acceptance might differ among different groups of stakeholders. Therefore, the level of acceptance has to be assessed within all groups of stakeholders. To assess actual acceptance, the same indicators which have been found in para. 3.3 might be helpful. The *ex post* sociological approach bridges some pitfalls of the economic approach. Effectiveness of international private regulation in a sociological sense might infer that distributional issues (the “fair” division of wealth), return on income, and some aspects of individual happiness, have been covered.<sup>550</sup> If not, this regulation obviously has a high probability of not being effective in a sociological sense. Using the sociological approach to bridge these pit-

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pany based grievance mechanism) and requires the operator to conduct a feasibility study and assess the environmental and social impact of its operations prior to commencing its operations (provision 2.4).

<sup>544</sup> *Id.*

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> See *Corporate Governance Code*, MONITORING COMMISSIE, <http://commissiecorporategovernance.nl/> (last visited Nov. 13, 2013).

<sup>548</sup> Overmars, *supra* note 7, at 25.

<sup>549</sup> *Id.* at 25.

<sup>550</sup> *Cf. Renda, supra* note 94, at 139.

falls of the economic approach is, in my opinion, preferable to trying to adjust economic models, which by their nature have difficulties in dealing with concepts of fairness and distributional issues.<sup>551</sup> Furthermore, acceptance might bridge the lack of legitimacy, in the traditional sense, of existing international private regulation, at least in part.

## 6. INTEGRATED APPROACH

Four avenues have been explored to assess the effectiveness of international private regulation. All of them provide useful insights, either for the rule-setting process (*ex ante* approach) or assessment of existing international private regulation (*ex post* assessment) or for both. However, none of them are sufficient by themselves to make an overarching effectiveness assessment. All approaches have their qualities, but also their pitfalls. Research has also revealed that trust in certain standards results from all these approaches.<sup>552</sup> Therefore, an integrated (*ex ante* and *ex post*) approach is needed to enhance the scientific value of this type of effectiveness research and to bridge the gaps left by the separate approaches. In this contribution, the focus has been on international private regulation in the CSR arena. Hence, the models mentioned hereinafter refer to the effectiveness of international private regulation in that arena.

### 6.1 *Ex Ante Approach*

The *ex ante* approach could, as has been elucidated above, benefit from the legal, macro-economic, sociological, and psychological perspectives to assist private rule makers in instigating effective international private regulation. Therefore, the effectiveness assessment will be more useful and based on actual future impact as more perspectives are taken into consideration.

The relative value of the legal, sociological, and psychological/behavioral avenues as such is equal. One should attempt to meet as many indicators as possible derived from these three perspectives. These indicators require a yes/no (0/1) answer regarding some indica-

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<sup>551</sup> Cf. *id.* at 141–43.

<sup>552</sup> Alvarez and von Hagen refer to a survey of business, government and NGOs commissioned by ISEAL in 2010, *The ISEAL 100: A survey of thought leader views on sustainability standards 2010*. ISEAL Alliance, London, 2011, in which respondents mentioned four main elements that create trust in a standard: credible verification processes, including accreditation and third-party certification (55%); a standard document being science-based, comprehensive, and practical (38%); a credible multi-stakeholder standard-setting process that has the support of all relevant stakeholders (NGOs, local communities/smallholders/producers, enterprises) (35%); a transparent governance model (32%) and an ability to show impacts (11%). See Alvarez & von Hagen, *supra* note 67, at 20.

Elaboration of effectiveness assessment	Perspectives
A	All four perspectives
B	Three perspectives
C	Two perspectives
D	One perspective

tors and a more elaborate answer to others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be higher than on others. This does not necessarily mean that an avenue with a lesser possible highest score is less important, but, in comparison to other initiatives, the overall score is a useful tool to compare effectiveness. Furthermore, the expected impact on a macro level (if applicable) should be assessed in order to strive toward macro-economic efficiency in the design process of international private regulation. This expected impact should be assessed in actual figures. International private regulation is more effective compared to other private regulation if it shows a higher total score on the legal, sociological, and psychological perspectives and a positive future economic impact is expected. It is less effective if positive future economic impact is expected but a lower score on the other three avenues is recorded. It is least effective if negative economic impact (economic avenue) is expected and a lower score on the other three avenues is recorded. The ex ante effectiveness model is as follows:

Effectiveness indicators (ex ante)		Yes (1)- No(0) <sup>553</sup>
Legal approach		
	Articulate specific and assessable objectives	0-3 <sup>554</sup>
	Existing (public or private) regulation does not reach these objectives (if all objectives are met refrain from new regulation)	0-6 <sup>555</sup>

<sup>553</sup> Unless indicated otherwise.

<sup>554</sup> 0: no specific and assessable objectives, 1: specific objectives only, 2: specific objectives and criteria/indicators to assess whether these objectives have been met, 3: as 2 but with verifiers to make this assessment.

<sup>555</sup> 0: verifiers indicate that other regulation meets all the objectives, 1: indicators/criteria indicate that other regulation meets all the objectives, 2: it is not possible to assess whether other regulation meets the objectives, 3: verifiers indicate that other regulation meets part of the objectives, 4: indicators/criteria indicate that other regulation meets part of the objectives, 5: indicators/criteria indicate that no other regulation exists which meets the objectives, 6: verifiers indicate that no other regulation exists which meets the objectives,

	Articulate 'conflict of law' rules	0-6 <sup>556</sup>
	Regular evaluation of the regulation and its functioning and (if necessary) review of the regulation	0-6 <sup>557</sup>
	Enforcement	
	The existence of an supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions	0-3 <sup>558</sup>
	A supervisory body which controls access to scarce resources	
	(A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or (effective) enforcement by states	0-3 <sup>559</sup>

<sup>556</sup> 0: no such rules, 1: only general explanation which rules prevail and why, 2: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for less than 50% of the standards/rules, 3: rules exist which explain which specific standard/rule prevails in connection with public or private regulation and in which circumstances for more than 50% of the standards/rules, 4: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for less than 50% of the standards/rules, 5: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules, 6: rules exist which explain which specific standard/rule prevails in connection with public *and* private regulation and in which circumstances for more than 50% of the standards/rules and other relevant bodies which set international private regulation are informed if rules are set or reviewed.

<sup>557</sup> 0: no evaluation and review, 1: irregular evaluation not involving stakeholders or past grievances and without review, 2: regular evaluation (at least every 5 years) not involving stakeholders or past grievances and without review, 3: irregular evaluation involving stakeholders and past grievances without review, 4: regular evaluation (at least every 5 years) involving stakeholders and past grievances without review, 5: irregular evaluation and review involving stakeholders and past grievances, 6: regular evaluation and review (at least every 5 years) involving stakeholders and past grievances.

<sup>558</sup> 0: no supervisory body, 1: supervisory body exists, but no accountability (possibility to pass judgment) and no sanctions, 2: supervisory body exists and accountability but no sanctions, 3: supervisory body exists, accountability and possibility of imposing sanctions (such as expelling members).

<sup>559</sup> 0: no possibility to enforce, 1: only private enforcement (e.g. through (blocking) entrance to a market, shareholders, media attention etc.), 2: (contractual or other) enforcement through state legislation in some states, 3: (contractual or other) enforcement through state legislation and/or treaties on a global level (e.g. trademarks).

	Specific rules/standards	0-9 <sup>560</sup>
	Sufficient bureaucratic capacity	
	Sufficient (legal) knowledge of the private rule maker	
	An effective complaint and dispute management mechanism	0-9 <sup>561</sup>
	Certification or assessment of compliance by third parties supported by a reporting requirement	0-6 <sup>562</sup>
Sociological approach		
	The degree of knowledge and application of regulation	0-2 <sup>563</sup>

<sup>560</sup> 0: principles only, 1: the norms meets none of the criteria for specificity ((i) entails a clear norm/standard which is interpreted and applied consistently, (ii) states if exceptions to the general rule exist and, if so, under which circumstances they apply, (iii) to whom the rules apply (e.g. only the companies themselves or suppliers and financing entities too), (iv) refers to applicable (international) norms and treaties (e.g. in the area of human rights or environment)), 2: as one but less than 50% of the norms meet one criterion, 3: as one but less than 50% of the norms meet two criteria, 4: as one but less than 50% of the norms meet three criteria, 5: as one but less than 50% of the norms meet all criteria, 6: as one but more than 50% of the norms meet one criterion, 7: as one but more than 50% of the norms meet two criteria, 8: as one but more than 50% of the norms meet three criteria, 9: as one but more than 50% of the norms meet all criteria.

<sup>561</sup> 0: dispute management mechanism meets none of the criteria of Guiding Principle 31 of the Ruggie framework en entails no evaluation of outcomes, 1: dispute management mechanism meets at least one of the criteria of Guiding Principle 31, 2: dispute management mechanism meets at least two of the criteria of Guiding Principle 31 (etc.), 9: dispute management mechanism meets all criteria of Guiding Principle 31 and entails an evaluation of the outcomes of the mechanism.

<sup>562</sup> 0: no certification or assessment by third parties, 1: entails assessment by independent third parties, 2: entails certification for less than 50% of the operations of members, 3: entails certification for more than 50% of the operations of members, 4: entails assessment by independent third parties and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 5: entails certification for less than 50% of the operations of members and a reporting requirement (which either obliges the regulatee to make the results of the assessment by the third party public or allows the third party to share the information retrieved with the overarching body the regulatee is accountable to), 6: entails certification for more than 50% of the operations of members and a reporting requirement.

<sup>563</sup> 0: no training and education on norms and no explanation on background and objectives, 1: explanation on background and objectives but no training and education on norms, 2: explanation on background and objectives and training and education on norms.

Acceptance [has to be assessed per (group of) stakeholder(s)]	A stable group of stakeholders	
	Willingness to collaborate and to address relevant issues	0-2 <sup>564</sup>
	Shared vision on relevant issues	0-2 <sup>565</sup>
	The degree to which the actions of a governing body are aligned with this shared vision	0-2 <sup>566</sup>
	Tradition of and experience with private rulemaking	
	The way the regulation fits within the strategic choices and dilemmas faced by the regulatees	0-2 <sup>567</sup>
	Own interest in the regulation	0-2 <sup>568</sup>
	A slowly changing environment	
	Support from governments	0-2 <sup>569</sup>
	Effective mode of transmission	0-3 <sup>570</sup>
	Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement	0-7 <sup>571</sup>

<sup>564</sup> 0: no willingness to collaborate, 1: minority of stakeholders wants to collaborate, 2: majority of stakeholders wants to collaborate.

<sup>565</sup> 0: no shared vision, 1: minority of stakeholders has a shared vision, 2: majority of stakeholders has a shared vision.

<sup>566</sup> 0: actions are not aligned, 1: minority of actions is aligned, 2: majority of actions is aligned.

<sup>567</sup> 0: does not fit, 1: only fits within the strategic choices of a minority of the regulatees, 2: fits within the strategic choices of the majority of the regulatees.

<sup>568</sup> 0: no own interest, 1: only in the own interest of a minority of the stakeholders, 2: in the own interest of the majority of the stakeholders.

<sup>569</sup> 0: no support, 1: support from (western) government(s), 2: global support from governments.

<sup>570</sup> 0: no transmission through market mechanisms or contracts, 1: transmission through market mechanisms, 2: transmission through contracts, 3: transmission through market mechanisms and contracts.

<sup>571</sup> 0: no stakeholder engagement, 1: one of four criteria ((i) a proper procedure in which the relevant stakeholders are identified and engaged in the rule setting process, preferably through (with administrative procedures comparable)



Psychological approach			
	Takes into account that human decision making is not flawless and expects failures	0-2 <sup>572</sup>	
	Structures complex choices	Restricts the number of choices	0-4 <sup>573</sup>
		Provides information which assists people in making proper decisions	0-4 <sup>574</sup>
	Demands	0-4 <sup>575</sup>	

engagement rules, (ii) an assessment of their interests, (iii) a procedure in which adequate and timely information (on the rule setting process and its substantive norms) is provided in such a manner that the relevant stakeholders are able to access and understand it and (iv) sufficient documentation of the process and reporting to the stakeholders) on stakeholder engagement is met, 2: two of four criteria are met (etc.), 4: all criteria are met, 5: all criteria are met and affected stakeholders make up a meaningful segment of the participants, 6: all criteria are met, affected stakeholders make up a meaningful segment of the participants and necessary funding is provided for stakeholder engagement; 7: all criteria are met, affected stakeholders make up a meaningful segment of the participants, necessary funding is provided for stakeholder engagement and diversity of stakeholders (e.g. geographical spread, gender, constituency) is maintained.

<sup>572</sup> 0: no account of behavioral effects, 1: takes into account the behavioral effects on regulatees, 2: takes into account the behavioral effects on all stakeholders.

<sup>573</sup> 0: no restriction, 1: less than 50% of the norms that entail an element of choice restrict the choices of regulatees, 2: more than 50% of the norms that entail an element of choice restrict the choices of regulatees, 3: less than 50% of the norms that entail an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation, 4: more than 50% of the norms that entail an element of choice restrict the choices of regulatees and takes into account the choices to be made by other stakeholders which originate from the regulation.

<sup>574</sup> 0: no information, 1: less than 50% of the norms that entail an element of choice provide information to the regulatees, 2: more than 50% of the norms that entail an element of choice provide information to the regulatees, 3: less than 50% of the norms that entail an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that entail an element of choice provide information to the regulatees and provide information to other stakeholders on choices which originate from the regulation.

<sup>575</sup> 0: no transparency, 1: less than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees, 2: more than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees, 3: less than 50% of the norms that entail an element of choice provide transparency on the consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation, 4: more than 50% of the norms that entail an element of choice provide transparency on the

	transparency as to the consequences of a choice	
	Entails a default option which is beneficial to the majority of regulatees	0-2 <sup>576</sup>
	If business is involved, takes into account the organizational model of the regulatees	0-2 <sup>577</sup>
	Enhances crystallization as to govern behavior	0-2 <sup>578</sup>
Total score		

Macro-economic approach (figures of expected impact)(if effects occur at the macro level)		
	(Administrative) burdens by international private regulation according to the Standard Cost Model	
	Changes in the growth of gross domestic product caused by international private regulation	
	Additional consumer detriment	
	Impact on competitiveness and trade	
	Impact on the potential for innovation and technological development	
	Impact on labor conditions and social welfare	
	Additional detriment to the public interest	

## 6.2 *Ex Post Approach*

The ex post approach might especially benefit from the legal and economic avenues. In addition, the sociological avenue might bridge some of the gaps that the economic avenue leaves. The lower the sociological score, the higher the non-acceptance of international private regulation and thus the risk of less effectiveness thereof. In such circumstances, positive impact has to be scrutinized because, for example, distributive effects might have been neglected. Hence, the more these perspectives are taken into account, the more significant the effectiveness assessment will be.

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consequences of a choice to the regulatees and provide transparency on the consequences of a choice to other stakeholders on choices which originate from the regulation.

<sup>576</sup> 0: no default option, 1: less than 50% of the norms that entail an element of choice provide a default option, 2: more than 50% of the norms that entail an element of choice provide a default option.

<sup>577</sup> 0: does not take the organizational model into account, 1: takes into account the organizational model of the minority of the regulatees, 2: takes into account the organizational model of the majority of the regulatees.

<sup>578</sup> 0: no crystallization, 1: crystallization with the minority of regulatees, 2: crystallization with the majority of regulatees.

Elaboration of effectiveness assessment	Perspectives
A	All three perspectives
B+	Legal and economic perspective
B-	Legal or economic perspective combined with sociological perspective
C+	Legal or economic perspective only
C-	Sociological perspective only

The following indicators require a yes/no (0/1) answer regarding some indicators and are more elaborated score regarding others. As some of the avenues have more indicators than others and a possibility of higher scores, the highest possible score on a certain avenue might be higher than on others. This does not necessarily mean that the avenue with the lesser possible highest score is less important, but, in comparison to other initiatives, the overall score is a useful tool to compare effectiveness. Furthermore, the actual impact on a macro level (if applicable) and micro level (both in figures) should be assessed in order to assess macro and micro-economic efficiency of existing international private regulation. Existing international private regulation is more effective compared to other private regulation if it has a higher score on the legal and sociological perspectives and shows positive economic impact. It is less effective if it shows positive economic impact but a lower score on the other two avenues and least effective if it shows negative economic impact as well as a lower score on the other two avenues. Furthermore, the effectiveness comparison reflects effectiveness at a certain moment in time. It might well be that a certain initiative gains effectiveness later on. The ex post model might be defined as follows:

Effectiveness indicators (ex post)		Yes(1) or no (0) <sup>579</sup>
Legal approach		
	Articulate specific and assessable objectives	0-3
	Objectives are effectively achieved	0-3 <sup>580</sup>

<sup>579</sup> Unless indicated otherwise (see for the explanation of the elaborated indicators lacking a footnote the footnotes in the ex ante model).

<sup>580</sup> 0: objectives are not met, 1: it is not possible to assess whether objectives are met, 2: criteria/indicators indicate that the objectives are met, 3: verifiers indicate that the objectives are met.

Existing (public or private) regulation does not reach these objectives		0-6
Entails "conflict of law" rules		0-6
Regular evaluation of the regulation and its functioning (and if necessary) review of the regulation		0-4
Enforcement		
	The existence of an supervisory body to which parties are accountable and the power of supervisory body to pass judgment and impose sanctions	0-3
	A supervisory body which controls access to scarce resources	
	(A) serious (threat of) contractual enforcement or other means of enforcement or endorsement if necessary through state legislation and/or enforcement by states	0-3
	Specific rules/standards	0-9
	Sufficient bureaucratic capacity	
	Sufficient (legal) knowledge of the private rule maker	
	An effective complaint and dispute management mechanism	0-9
	Certification or assessment of compliance by third parties supported by a reporting requirement	0-6
	Susceptibility of a certain industry to negative (social) media attention and active NGOs or other organizations monitoring	0-2 <sup>581</sup>
Sociological approach		
	The degree of knowledge and application of regulation	0-2
Acceptance [has to be assessed per (group of) stakeholder(s)]	A stable group of stakeholders	
	Willingness to collaborate and to address relevant issues	0-2
	Shared vision on relevant issues	0-2
	The degree to which the actions of a governing body are	0-2

<sup>581</sup> 0: no susceptibility, 1: susceptibility of less than 50% of a certain industry, 2: susceptibility of more than 50% of a certain industry.

	aligned with this shared vision	
	Tradition of and experience with private rulemaking	
	The way the regulation fits within the strategic choices and dilemmas faced by the regulatees	0-2
	Own interest in the regulation	0-2
	A slowly changing environment	
	Support from governments	0-2
	Effective mode of transmission	0-3
	Inclusiveness vis-à-vis stakeholders and effective stakeholder engagement	0-7
Total score		

Economic approach		
Macro level (if applicable)	(Administrative) burdens by international private regulation according to the Standard Cost Model	
	Changes in the growth of gross domestic product caused by international private regulation	
	Additional consumer detriment	
	Impact on competitiveness and trade	
	Impact on the potential for innovation and technological development	
	Impact on labor conditions and social welfare	
	Additional detriment to the public interest	
Micro level [(private) regulation lacking macro impact or with macro impact but at level of individual enterprise] <sup>582</sup>	$PAC_{csr} - PBC_{csr} > 0$ and $\Delta EC + \Delta SC = 0$ <sup>583</sup> (measuring through e.g. GRI)	

<sup>582</sup> If international private regulation has impact on more than one regulatee, this impact should preferably be assessed by aggregating the impact on individual regulatees.

<sup>583</sup> In which formula  $PAC_{csr}$  is the company's profit after implementation of a certain private CSR initiative,  $PBC_{csr}$  is the company's profit before

### 6.3 *Conclusion*

To conclude, the outline of a methodology has been developed to assess the effectiveness of international private regulation in the CSR arena. This methodology is useful to evaluate and perhaps, where necessary, to abandon the plethora of existing international private regulation in the CSR arena and to design new private CSR regulation. To perform this function, public data needs to be collected to enable external assessment of the effectiveness of international private regulation in the CSR arena. However, it seems substantial work remains ahead. The outline of the methodology has been described, but the details still need elaboration.<sup>584</sup> Furthermore, for example, the effectiveness of complaint and conflict resolution mechanisms requires further research. I expect to elaborate these topics in future research.

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implementation,  $\Delta$ EC is the change of environmental consequences of the company's operations, and  $\Delta$ SC is the change of social consequences of the company's operations.

<sup>584</sup> *E.g.*, how to assess the macro-economic factors and sociological indicators mentioned properly.