

Enforcing Sustainability Clauses in Global Supply Chains with a Focus on Proactive and Relational Contract Theory: Case of SDG 12

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Abstract

Globalisation allows corporate organisations to rise above the national and regional regulatory constraints through global value chains. This is especially due to the fact

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that national boundaries do not limit the flow of investment capital, labour, goods, or the environmental consequences of such activities. In parallel, the evolution of sustainable development has brought with it social, environmental, and economic activities for the benefit of future generations. The 2030 Agenda reflects the notion of sustainable development with 17 individual goals and 169 targets. While many welcomed such development, enforceability of sustainable development goals (SDGs) remains a challenge, primarily as voluntarism is central to the system of SDGs. In theory, consumers and end-user companies opt for sustainably produced goods to contribute towards sustainable development in their own countries and other countries in global value chains. In the absence of a national or international binding regulatory framework, contract emerged as the most effective solution for enforcing the SDGs in global value chains. This article explores the current challenges in the enforceability of sustainability clauses in global value chains through the lens of sustainable consumption and production patterns and SDG 12. It contributes to the ongoing academic debates and practical considerations through the lens of proactive law theory.

Keywords: 2030 Agenda, SDGs, Sustainable Consumption and Production, Global Value Chains, Proactive Law Theory

A. Introduction

Sustainable Consumption and Production (SCP) emerged as a sustainable development goal (SDG) after a long evolutionary process in 2015.¹ SCP is integral to the 2030 Agenda's framework.² After three decades of defining the SCP framework, its introduction as a standalone SDG in the 2030 Agenda is a significant milestone. This is even more so as SDG 12: Sustainable Consumption and Production (SDG 12) is closely interlinked with several other SDGs, making it central to the overall system of the 2030 Agenda. While it is challenging to identify a single, uniform definition of SCP, most commentators in the field agree that it captures social, environmental, and economic aspects of the production and consumption lifecycle.³ Specifically, it encompasses the process from procurement of raw materials, to production and manufacturing, supply and distribution, and consumption on the side of end consumers/customers. Each of the stages in the product lifecycle should comply with social and environmental standards to identify, prevent, or mitigate adverse social and environmental impacts. Such compliance should balance the short-term and long-term economic gains that companies strive to achieve. As almost 80% of modern production and consumption occurs in GVCs, achieving SCP is challenging for

1 UNEP, *Global Outlook on Sustainable Consumption and Production Policies Taking action together*, 2012, p. 18; *Saumier*, in: Michaels et al. (eds.).

2 UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/Res/70/1, 2015 [2030 Agenda].

3 See e.g., *Blankenbach*, in: Negi et al. (eds.), *Bauer et al.*, p. 11.

chain leaders and their suppliers. Moreover, discrepancies in the relevant regulatory framework between the global North and the global South enabled the chain leaders to take advantage of the low-cost production environment in the global South without being accountable for such processes' adverse social and environmental impact.

Enforceability of SCP and SDG 12 requires a shift in the conceptual framework of contractual relationships in GVCs and the role that international instruments can play. The following sections will outline the scope of SCP and SDG 12 (B.), describe GVCs as a model of modern production through contractual chains, outline attempts to regulate commercial activities in GVCs (C.), and elaborate on the proactive law theory as a possible solution in changing the conceptual understanding of GVCs concerning SCP (D.).

B. Sustainable Consumption and Production in the 2030 Agenda

The SCP practice shifted from an end-of-pipe approach in the 1970s to a cleaner production approach.⁴ In the absence of a single definition, the UN Environment Program (UNEP) identified its main tenants. Specifically, SCP refers to “[i]mproving the quality of life without increasing environmental degradation and without compromising the resource needs of future generations”, “[d]ecoupling economic growth from environmental degradation”, and “applying lifecycle thinking”.⁵ The SCP, as understood today, has three dimensions of the lifecycle approach: the total use of resources and the resulting emissions, minimisation of adverse environmental impacts, and promotion of inclusive well-being.⁶ Moreover, the lifecycle approach in its three dimensions covers the entire value chain from a social and environmental perspective in the pre-production (design), production, and post-production (distribution) stages.⁷ The SCP aims to, among other elements, improve the environmental performance of goods and their production process by reducing ecological footprint (water and carbon intensities) while considering the social impact of production.⁸ Such a holistic approach is essential as it helps deal with common misconceptions about SCP, especially from the perspective of the non-western developing countries to SCP.⁹ Most welcome such development, especially as it will bring more attention and focus towards breaking unsustainable patterns and achieving SCP.¹⁰

4 UNEP, p. 18.

5 Ibid.

6 Ibid., p. 19.

7 Ibid., pp. 19–20. In more detail, the stages include: the design and production of a product; selection, procurement, and supply of raw materials; manufacturing, packaging, and distribution; impacts throughout retails, purchases, usages, and services; and impacts of products when recycled, reused, or disposed of.

8 Ibid., 20; see also Akenji et al., p. 27.

9 Akenji et al., p. 26.

10 Arcuri/Partiti, in: Ebbeson/Hay (eds.), available at: <https://ssrn.com/abstract=3814765> (10/3/2022), p. 2; Le Blanc, DESA Working Paper 2015, p. 18.

The 2030 Agenda took a holistic approach to SCP through SDG 12 as a standalone goal and through its connections with other SDGs. One of the main failures in the approaches to sustainable development pre-2030 Agenda was a lack of integrated strategies, policies, and implementation.¹¹ Le Blanc's mapping of SDGs suggests that the 2030 Agenda remedies the previous failures by integrating SDGs as a network of multiple goals and targets.¹² This especially concerns integrating SCP as a vital element of sustainable development. While SCP may have emerged as a political approach to achieve human well-being,¹³ the integration of SDG 12 with other SDGs resulted in the concept of SCP in the 2030 Agenda taking on a holistic function, encapsulating social, environmental, and human rights elements.¹⁴ It would be artificial to observe SCP as an element of purely technical production processes without considering the adverse social, environmental, and human rights impact of those processes. Thus, SDG 12 operates as an integrative framework for the various dimensions of sustainability and sustainable development.¹⁵ Simultaneously, the wording and the structure of SDG 12 raise concerns due to vagueness and ineffective indicators.

The structure and wording of SDG 12 also raise concerns about its effectiveness in tackling the root causes of unsustainable SCP patterns.¹⁶ The language of SDG 12 sets out to "encourage sustainable practices", "promote sustainable public procurement", or provide "people with relevant information and awareness", demonstrating the vague and voluntary nature of SDG 12 as such. Criticisms encompass a lack of reference to binding and soft law international instruments addressing adverse social and environmental impacts of global production patterns. For example, SDG 12 refers only to international treaties dealing with chemicals and hazardous waste.¹⁷ The indicators of achieving SDG 12 specific targets are vague and focused on voluntary activities, consequently failing to lead to radical transformative changes necessary to address the inherent inequality and contrasts of global production patterns.¹⁸ For example, target 12.6 calls for the encouragement of "companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle". The performance indicator is the number of such companies that publish their sustainability reports.¹⁹ Another example is target 12.7, focused on the public sector to transform the pro-

11 *Le Blanc*, p. 2–3.

12 *Ibid.*, p. 3.

13 *Akenji et al.*, p. 17.

14 For example, SDG 12 links with SDG 6 on water, SDG 8 on growth and employment, and energy and industrialization. See further, *Le Blanc*, p. 8–9.

15 *Ibid.*

16 *Arcuri/Partiti*, p. 2.

17 Target 12.4.1 includes "number of parties to international environmental agreements on hazardous waste".

18 *Mardirossian*, p. 13.

19 See UNGA, Resolution Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, A/RES/71/313, 6 July 2017, p. 12–13.

curement guidelines, selection criteria, and appropriate tender documents to reflect SDG 12. A performance indicator is the number of countries implementing sustainable public procurement policies and action plans.²⁰

An even more significant problem is that SDG 12 focuses on the efficiency approach and consequently distracts from considering a system approach “overall volumes of consumption, distributional issues, and related social and institutional challenges”.²¹ The underpinning policy reasons lie in the human-centric economic development without a complete account of the social and environmental components.²² Consequently, while SDG 12 aims to tackle and revert environmental breakdowns and social injustice, it remains rooted in the same foundations of a system that enables such environmental degradation and social injustice.²³ As critics of SDG 12 point out, the environmental and human rights instruments are bleak compared to the international economic framework that protects the flow of capital, capitalist societies that thrive on extractivism and inequalities.²⁴

The allocation of responsibilities and costs between the market economies of the global North and the emerging economies of the global South was the main feature in the development of SCP in the work of the UN.²⁵ While market economies adopted a regulation to curb unsustainable SCP patterns, they soon realised that SCP practices occur in private transactions where regulatory responses are “often slow, belated, and politically challenging”.²⁶ The result is a business-centred understanding of sustainable consumption focused on voluntary and indirect policy approaches.²⁷

20 Evidence that governments in North America, Europe, and APAC region have begun to reform their procurement policies precisely to include sustainable development goals. See e.g., Committee on Trade and Investment (CTI), *Green Public Procurement in the Asia Pacific Region: Challenges and Opportunities for Green Growth and Trade*, 2013; *Green Procurement Policies in European Union*, available at: https://ec.europa.eu/info/policies/public-procurement/tools-public-buyers/green-procurement_en (10/3/2022); *Outline of the North American Green Purchasing Initiative*, available at: <http://www5.cec.org/more/outline-north-american-green-purchasing-initiative> (10/3/2022). For further discussions on SDGs in these regions, see e.g., *Servaes* (ed.); Shinn, *Journal for European Environmental & Planning Law* 3/2009; Statistical Office of the European Communities (ed.), *Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals*, 2016.

21 *Bengtsson et al.*, *Sustainability Science* 2018/13/, p. 1543–1544.

22 See *Kotzé*, in: French/Kotzé (eds.), p. 41–65; *Gordon*, in: Alam et al. (eds.), p. 50, 68; *Washington*, p. 36.

23 *Arcuri/Partiti*, *SDG 12: Ensure Sustainable Consumption and Production Patterns*, TILEC Discussion Paper, DP2021-007/2021, available at: <https://ssrn.com/abstract=3814765> (10/3/2022), p. 5.

24 *Ibid.*, p. 3. The disbalance between the framework of human rights and environment protection and the economic and investment protection exists in WTO and ISDS system.

25 See Statements by Australia-Netherlands-UK, Poland-Romania, Japan and Portugal (all in OWG Session 9), as quoted by *Gasper et al.*, p. 82–83; *Handke*.

26 *Gasper et al.*, p. 84.

27 On the involvement of businesses in shaping environmental and sustainable development standards, see e.g., *Falkner*, *Global Environmental Politics*, 2003/2, p. 81.

Commentators, such as Gasper, criticise SDG 12 for adhering closely to ideas of business-oriented norm entrepreneurs since the 90s, whose main audiences were, first, government officials with the message to downplay regulation as a tool for promoting sustainability and, second, corporate leaders with the message that sustainability should be embraced as a profitable way of thinking about their business.²⁸

[...] given the pressures to reach an agreement despite strongly conflicting interests and technical and practical challenges, the SDG 12 targets and indicators have emerged with, as yet, few numbers and too little power to be truly transformative in regard to global sustainability.²⁹

There is a need to balance government regulation and self-regulation. A key concern is ensuring SCP practices in GVCs, as an essential element of GVCs operations, as increased recognition of adverse environmental impacts supports broader accountability and liability of GVCs leaders.³⁰ To fully grasp the interplay between the two, it is necessary first to examine the nature of GVCs and identify ways of enforcing SDG obligations in GVCs.

C. Global Supply Chains: Production Through Contractual Chains

80% of global trade is connected with the international production networks of transnational corporations (TNC).³¹ These GVCs include: “the full range of activities that are required to bring a product or service from conception, through the intermediary phases of production (involving a combination of physical transformation and the input of various producer services), delivery to final consumers, and

28 Gasper et al., p. 86. See further, *Amos/Lydgate*, *Sustainability Science*, 2020/15.

29 Gasper et al., p. 93. A growing legal, technical, and policy-oriented literature address topics surrounding innovation and practices necessary to achieve SCP patterns in line with SDG 12 specific targets. From the vast literature, see e.g., *Junior et al.* (eds.); *Goldsmith; Testa et al.*, *Journal of Cleaner Production* 2016/112; *Yakovleva et al.* (eds.); *Zielinski et al.* (eds.); *Alayon et al.*, *Journal of Cleaner Production* 2016/141; *Jarman/Luna-Reyes* (eds.); *Bengtsson et al.*, *Sustainability Science*, 2018/6; *Heldeweg*, *Journal of Cleaner Production* 2016/169; *Kaltenborn/Krajewski/Kuhn* (eds.); *Dubey et al.*, *Resources, Conservation and Recycling* 2015/106; *Clay et al.*, *Journal of Cleaner Production* 2007/9; *Idowu et al.* (eds.); *Blok et al.*, *Journal of Cleaner Production* 2015/108.

30 *Delera*, PEGNet Policy Studies 2020/4, p. 1; *Mardirossian et al.*, available at: <https://ccsi.columbia.edu/content/documents-library> (10/3/2022). For similar handbooks and guidelines for SDG alignment, see e.g., Just Transition Centre, *Just Transition: A Report for the OECD*, 2017; International Labor Organization, *Guidelines for a just transition towards environmentally sustainable economies and societies for all*, 2015.

31 *Cafaggi*, in: *Saidov* (ed.). Terms transnational companies (TNC), multinational corporations (MNC), or multinational enterprises (MNE) are often used interchangeably.

final disposal after use”.³² GVCs are the face of the world economy,³³ existing in national, regional, and transnational legal regimes, including soft law and other private mechanisms.³⁴ In general, four features are relevant in understanding the structure, power dynamics and imbalance in GVC contractual chains.

First, on top of GVCs are companies, usually TNCs, that regulate the entire supply chain. In buyer-driven GVCs, the chain leaders are usually buyers located in the global North or the global West. They aim to regulate the behaviour of their suppliers, contractors, and sub-contractors, who are usually medium and small enterprises located in the global South. Generally, chain leaders aim to push down their production costs by sourcing the necessary labour in jurisdictions of the global South.³⁵ The GVC structures orient towards the vertical integration of production,³⁶ and organisation of such vertical production structures through corporate or contractual mechanisms.³⁷ The latter encompasses a disintegrated supply chain management system through a service of commercial contracts with suppliers, contractors, or sub-contractors.³⁸

Second, the chain leaders rely extensively on transnational codes and standards of industry bodies, associations, or inter-governmental or non-governmental organisations. The control over the participants in the supply chain stems from commercial contracts with TNCs exercising higher bargaining power and subjecting suppliers, contractors, and subcontractors to their will.³⁹ The power of the decision-making is in the chain leader’s hands.

Third, the production process comprises interdependent, embedded sales contracts covering production and distribution. Consequently, parties need to coordinate and cooperate in the contract performance and handling of the change in circumstances or contract breaches.⁴⁰ The production process encompasses both the multitude of contractual relations in the chain and the totality of the social and legal environment in which they occur. A unique feature of the production process is information and knowledge sharing and distribution through the interdependent contract chains. The commercial decisions driving such supply-chain structures consider legal implications insofar as it is necessary to realise the relevant commercial goals. A chain leader assesses multiple laws, different stakeholders, and actors with the goal of finding the most favorable place for the business activity “based on the

32 Kaplinsky, Problems of Economic Transition 2004/2. Global supply chains further refer to the transformation of the global political economy in which they operate. For a discussion concerning the factors that led to development of global supply chains, see e.g. *Salminen; Sobel-Read* et al., Tulane Law Review 2018/93, p. 5, 7.

33 The IGLP Law and Global Production Working Group, London Review of International Law, 2016/1, p. 79.

34 The IGLP Law and Global Production Working Group, p. 57; *Delera*, p. 1.

35 *Cabrelli*, Journal of European Tort Law 2019/2, p. 110; *Geistfeld*, Journal of European Tort Law 2019/2, p. 131.

36 *Cabrelli*, p. 110.

37 *Ibid.*, p. 111.

38 *Ibid.*: see further *Cafaggi*, p. 336.

39 *Cabrelli*, p. 111; *Geistfeld*, p. 131–132; see also *Sobel-Read* et al., p. 7.

40 *Sobel-Read* et al., p. 5.

legal and economic terrain with which a multinational company seeks to engage and the distributive effects they seek to achieve”.⁴¹ Such decisions equally concern contractual methods to mitigate or avoid types of liability and the degree of enforcement and economic productivity.⁴² The result does not necessarily favour all the participants in the supply chain or, more importantly, all other participants affected by the supply-chain activities.⁴³

Fourth, the GVC structures enable TNC to reduce their costs and increase competitiveness on the market, but they also enable the GVC leaders to avoid liability for the total social cost of their production processes.⁴⁴ The social cost – the adverse impact of production processes – is not limited to human rights and worker protection but also encompasses environmental protection.⁴⁵ As *Geistfeld* explains, “these costs impose negative externalities on others and created identifiable inefficiencies – in this instance, the GVC would produce more pollution than is socially efficient”.⁴⁶ Problems of social, economic, and environmental responsibility represent costs of globalisation, often referred to as governance gaps.⁴⁷ The negative consequences go beyond the supply chain structures, as they also lead to incentives for the emerging economies to maintain the status quo to attract TNCs.⁴⁸ The tension between adverse social and environmental impact and sustainable development requires a careful balance in meeting the interests of the business while achieving sustainable development goals.

While policy considerations favour holding TNCs accountable for adverse human, social, and environmental impacts throughout the GVC, the existing corporate and contract doctrines do not reflect these policies.⁴⁹ Contract law theory struggles to overcome two vital obstacles that GVCs pose. First is the business efficiency focused on production, not on sale, accompanied with contextual elements of human rights, labour rights, and environmental protection.⁵⁰ While the enforceability of the contract clause is undisputed (hence their potential to reduce governance gaps), it is questionable whether they can incentivise a shift in supplier behaviour.⁵¹ Second, as *Lipson* argues, is the public character of the human rights and environmental pro-

41 The IGLP Law and Global Production Working Group, p. 65.

42 Ibid.

43 *Snyder/Maslow*, 2020/2, p. 9.

44 *Geistfeld*, p. 131.

45 *Horváthová*, in: *Heidemann/Lee* (eds.), p. 286.

46 *Geistfeld*, p. 131.

47 *Lipson*, *American University Law Review* 2019/68, p. 1576. See further *Falkner*, p. 77, *Berger-Walliser/Shrivastava*, p. 428.

48 *Mitkidis*, *Nordic Journal of Commercial Law* 2014/1, p. 3. However, contrast with *Falkner*, p. 78.

49 *Cabrelli*, p. 109, 128; *Geistfeld*, p. 133; *Mitkidis*, p. 3.

50 *Sobel-Read et al.*, p. 2.

51 *Mitkidis*, p. 24, contrast with *Weber/Meyer*, *Using Psychological Theories to Shape Partner Relationships through Contracting*, available at: <https://ssrn.com/abstract=1094985> (10/3/2022); *Weber/Meyer*, *Unpacking Contract Capabilities: Shaping Behaviour by Implementing Appropriate Contract Framing*, available at: <https://ssrn.com/abstract=1349247> (10/3/2022). *Mardirossian et al.*, p. 13–14.

tection, breach of which affects the parties who are not parties to the contracts in the supply chain structures.⁵² Aware of the problem of privity concerning enforcement of human rights and environmental protection in GVC, scholars have argued for innovative remedial solutions,⁵³ broadening the theory of privity,⁵⁴ or have suggested new concepts, such as the concept of “network liability” or the “concept of production liability”.⁵⁵

However, a far simpler solution lies in recognising the potential of a proactive law approach in contracting practices. Proactive contracting methods focus on managing the risks and shifting parties’ behaviours by fostering collaborative relationships between buyers and suppliers. Most of the GVCs’ power stems from their private ordering: they themselves need to see a benefit in changing and shaping the supply-chain structures through collaborative contracting processes. Especially in the context of interdependence between GVCs and human rights, there needs to be a system of accountability that can be shaped either through a regulatory framework or through judicial conduct. The following sections will outline the proactive law theory and its current application in the contractual structures of GVCs.

D. Proactive Law Theory: A Pathway to Achieve SDG 12

The relationship between law and society is always in search of balance.⁵⁶ Some believe that law is a “neutral autonomous system that interprets legal rules according to legal logic” and a “coherent conceptual system that creates legal cause and effect relationships”, without considering the social reality that such neutral interpretation promotes and creates.⁵⁷ Proactive law theory challenges such a strict separation of law from society and social goals, placing law as an active instrument in the overall societal dynamics.⁵⁸

Proactive law theory observes society as a community or a social construct with defined values and goals.⁵⁹ Instead of focusing on the law as a barrier or a constraint on commercial activities or purely as an instrument to protect oneself from the harmful and self-interest driven actions of others, proactive law theory focuses on

52 Lipson, p. 1771.

53 See e.g., Sobel-Read et al., p. 2–3.

54 See e.g. Cabrelli, p. 213; Salminen, fn. 89. On extending the privacy of contract to allow third parties to seek remedies for harmful consequences of commercial activities, see e.g. Bagchi, Yale Journal of Regulation 2015/2; Smits, Stellenbosch Law Review; Caruso, Harvard International Law Journal 2018/2.

55 For a discussion on “network liability” see e.g. Cabrelli, p. 125. For further discussion, see e.g., Amstutz/Teubner. For a discussion on production liability, see e.g. Ulfbeck, Journal of European Tort Law 2018/3. For a discussion on tort law and protection of human rights in supply chains, see e.g. Conway, Queen’s Law Journal 2015/40; Salminen, p. 163–203, 219–222.

56 Pohjonen, Scandinavian Studies in Law 2006/49, p. 55–56.

57 Ibid., p. 56.

58 Ibid., p. 57.

59 Berger-Walliser/Shrivastava, Georgetown Journal of International Law 2015/46, p. 417–474, 435.

the law as an enabling instrument whose active use and practical, proactive application can foster collaborative relationships for the sake of achieving broader societal goals in the interest of individuals and businesses.⁶⁰ Some authors emphasise proactive law as a paradigm shift finding justification in the changing economic and social realities: society changed from a nationalistic, vertical structure towards a globalised, horizontal, networked social and economic system.⁶¹

Proactive law has its origins in the concept of preventive law found in the US legal literature.⁶² In the European context, proactive law originated in Scandinavian legal realism, where the law has an active social role, i.e., it pursues socially beneficial goals and considers the economic and social consequences of judicial decisions.⁶³ The theory spread through the Nordics and most of Western Europe until the European Social and Economic Committee adopted an Opinion in 2009 advocating for the use of proactive law in the design and implementation of laws in the European Union.⁶⁴ Proactive law initially focused on contracting practices and has evolved to encompass proactive judicial making and proactive interpretation and design of laws.

Proactivity is central to sustainable development, thus making proactive law theory a vital conceptual framework in achieving SDGs. The 2030 Agenda specifically calls for all stakeholders involved in a proactive and collaborative effort to identify and implement appropriate solutions. Proactive law theory considers the social reality outside of the law, e.g., the goals of achieving SDGs, and places the law as an active instrument to achieve the goals of that reality. Both the 2030 Agenda and the proactive law theory consider economic, legal, social, and ethical aspects when assessing the appropriate measures and steps to take.

It may be counterintuitive to consider the central role of businesses in achieving SDGs, since most environmental degradation, interlinked with social injustice, stems from business activity.⁶⁵ However, the private sector is increasingly realising the need and feeling the pressure to account for and address the economic cost of

60 Pohjonen, p. 54–55.

61 Berger-Walliser, in: Berger-Walliser/Østergaard (eds.), p. 21–22.

62 See e.g. Siedel/Haapio, *American Journal of Business and Law* 2010/47. For further discussions on preventive law, see e.g. Barton; Bird, *Connecticut. Law Review* 2011/44; DiMatteo, *American Business Law Journal*, 2010/4.

63 Berger-Walliser et al., *Michigan Journal of Environmental & Administrative Law* 2016/1, p. 10; Hondius, *Scandinavian Studies in Law* 2007/50. Professor Helena Haapio is a pioneer of proactive law theory and has long advocated for proactive contracting techniques. From her rich contributions on the topic, see e.g. Haapio (ed.), *A Proactive Approach*; Haapio, in: Barton (ed.); Haapio, in: Wahlgren (ed.); Haapio, in: DiMatteo (ed.), p. 704–724.

64 See Opinion of the European Economic and Social Committee on “The proactive law approach: a further step towards better regulation at EU level” (2009/C 175/05) [further cited as *EESC Opinion*]. Proactive contracting also has links to relational contract, a theory primarily developed by Professor Ian MacNeil. On relational theory, see e.g. McLaughlin/Elaydi, *Journal of Management History* 2014/1, p. 44–61; Macneil et al. (eds.); Berger-Walliser et al., *Michigan Journal of Environmental & Administrative Law* 2016/1, p. 11.

65 Berger-Walliser/Shrivastava, p. 420, 427. On the link between corporate activities and environmental degradation, see further, Younis et al., *Environmental Science and Pollution*

environmental degradation.⁶⁶ Thus, proactive law theory can balance business activities, especially in GVCs, with the policies and standards behind sustainable development.

Proactive law theory does not advocate a managerial approach to achieving sustainable development, but it recognises the business' involvement as the reality of global business structures. Simultaneously, it recognises the adverse social and environmental impact of such business activities on individuals and societies worldwide, especially in the emerging economies of the global South. In addressing these issues, it further recognises the reality of the governance gap and the need to find a balance to incentivise business operations aligned with SDGs through proactive contracting, interpretation, and application of the existing framework through proactive judicial interpretation, and proactive design of laws in the creation of new instruments. The following sections will outline proactive contracting and proactive design of contract terms in GVCs.

I. Proactive Contracting: Enforceability of SDG 12 in Global Supply Chains

Proactive contracting is an element of the proactive law approach focused on reconciling commercial interests through contract terms aiming to foster “win-win” solutions for all parties involved. As proactivity is central to sustainable development, and contracts are instrumental in addressing governance gaps in securing environmental responsibility and SCP, proactive contracting is the most appropriate. The UN Guiding Principles on Business and Human Rights (UN Guiding Principles) and OECD Guidelines for Multinational Companies (OECD Guidelines) recognise this potential and incorporate methods which parties can apply in their commercial practices; the American Bar Association (ABA) Model Contract Clauses and the Chancery Lane Project (TCLP) Model Clauses further specify these elements through specific contract terms. Such an approach is in line with the central role of party autonomy and is informative in the interpretation of party intent to reflect the interests of both buyers and suppliers in the totality of their region-specific cultural and factual circumstances.

1. Proactive Contract Design and Supply Management in GVC

GVC are focused on economic growth, i.e., improving profit and reducing loss. However, introduction of the “triple bottom-line” approach strives to balance profit and loss on one side, while maintaining social and environmental values in

Research 2021/28; *Paramati et al.*, *Emerging Markets Review* 2018/35; *Ali*, *Environmental Science and Pollution Research* 2020/27.

⁶⁶ For example, the pressure comes not only from consumers, but also from the climate justice litigation and increased regulation. From recent decisions on these issues, see the decision of District Court in the Hague ordering Royal Dutch Shell to cut its CO₂ emissions by 45% by 2030 from 2019 levels. See *Rechtbank Den Haag*, 26-05-2021 / C/09/571932.

GVC.⁶⁷ Consequently, the focus is increasingly on sustainable supply chain management with sustainable raw materials selection or purchasing as its most significant aspect.⁶⁸ Sustainable supply chain management has been shown to boost operating efficiency, ensure efficient resource utilisation, enhance consumer satisfaction, unlock new revenue opportunities, and improve brand loyalty.⁶⁹ Incorporating elements of CSR into codes of conduct and socially responsible business practices adopted throughout the chain is a way to demonstrate sustainable supply chain management to the broader public and end-consumers.⁷⁰ Elements of this process include proactive supply chain management, proactive SCP due diligence encompassing human rights and environmental elements, and proactive reporting.

2. Proactive SCP Due Diligence in GVC

Apart from developing internal policies and corresponding internal business operation shifts, the OECD Guidelines recognise the role of contract as a tool to incorporate responsible business conduct (RBC) expectations and manage supplier and client relationships in line with other international instruments, such as the UN Guiding Principles.

At the outset, practical actions to incorporate responsible business conduct expectations and policies into engagement with suppliers and other business relationships encompass including conditions and expectations on RBC issues in supplier or business relationship contracts or another form of written agreements.⁷¹

TNCs should identify and assess actual and potential adverse impacts of their operations, products, or services. To do this, TNCs need to scope their business operations, including operations and relationships in their supply chains. This will enable TNCs to prioritise and address identified risks accordingly. Part of the scoping exercises include information gathering to understand risks related to the sector, including products and their supply chains and associated contracts, geography, which includes governance and the rule of law, or enterprise-specific risk factors.⁷² TNCs should map out their operations, suppliers, and other business relationships following the information-gathering stage.⁷³

Following mapping out the process, risk assessment, and identification of appropriate steps, TNCs should prioritise addressing all potential and actual adverse impacts immediately by, among other steps, updating contract terms with suppliers and amending audit protocols.⁷⁴ Proactive contracting elements in this context in-

67 Ghosh et al., *Modern Supply Chain Research and Applications* 2020/2, p. 124.

68 Ibid., 126.

69 Lee et al., *Businesses* 2020/1, p. 169.

70 Ibid., p. 169, 176.

71 OECD Due Diligence Guidance for Responsible Business Conduct, Section 1.3, lit.b, p. 24.

72 Ibid., Section 2.1, lit. b, p. 25.

73 Ibid., Section 2.2, lit. a, p. 26.

74 Ibid., Section 2.4, lit. a, p. 28.

clude consultation with the suppliers and other business relationships and assessing the relationships to determine the extent to which they have appropriate policies and processes in place to identify, prevent, and mitigate RBC risks themselves.⁷⁵ The relational and collaborative elements further come to light in preventive and mitigating plans. Appropriate responses range from continuing the relationship while simultaneously engaging in risk mitigation efforts, suspension of the relationship to pursue ongoing risk mitigation efforts, or disengagement after failed mitigation attempts, considering the social and economic adverse impacts and legal implications.⁷⁶

To incentivise desired behavioural outcome, TNCs can use leverage to prompt business relationships to prevent or mitigate adverse impacts, build additional leverage with the business relationship through, for example, commercial incentives, and build leverage into new and existing business relationships through policies or codes of conduct, contracts, written agreement or use of market power.⁷⁷ Proactive collaborative elements include supporting suppliers and other business relationships to prevent or mitigate adverse impacts of risk through training, upgrading facilities, or strengthening their management system.⁷⁸ Scaling and scoping examples of these issues include the extent of the impact on human health, changes in species composition, water use intensity, and degree of waste and chemical generation; including geographic reach of the impact and the number of species impacted.⁷⁹

3. Proactive Reporting in GVC

Reporting is an essential element of proactive contracting, as it can be a powerful tool to collect, assess and monitor data on direct and indirect, current and future, corporate and product emissions.⁸⁰ In addition, in relation to GVCs, the reporting and disclosure requirements should be such to prevent companies from “outsourcing” their carbon emission or carbon intense aspects of their production to other suppliers and jurisdictions.

A recent report analysed net-zero pledges of 35 companies across seven industries accounting for 64% of the global GHG emissions on a direct emissions basis.⁸¹ The report captured companies from oil and gas, mining, chemicals, utilities, cement, steel, and food processing. The results of the analysis are staggering. Relevant for the discussion on effectiveness of reporting and disclosure, it is essential that a company’s reporting encompasses all three scopes of GHG emissions; otherwise, the results of their corporate sustainability reporting may be misleading. For example, the

⁷⁵ Ibid., lit. c, p. 28.

⁷⁶ Ibid., lit. h, p. 31.

⁷⁷ Ibid., lit. c–e, p. 30.

⁷⁸ Ibid., lit. g, p. 31.

⁷⁹ OECD Due Diligence Guidance for Responsible Business Conduct, p. 43.

⁸⁰ OECD Guidelines, p. 29; Lee et al., p. 170.

⁸¹ Arnold/Toledano, Corporate Net-Zero Pledges: The Bad and the Ugly, available at: <https://ccsi.columbia.edu/news/corporate-net-zero-pledges-bad-and-ugly> (10/3/2022).

Report showed that for Shell, Rio Tinto, and McDonald's, for instance, over 90% of their emissions occur upstream or downstream in the GVC (scope 3). For companies in the oil and gas sector, and food processing sector, more than 90% of life cycle GHG emissions do not lie with the company's direct emissions (scope 1) or purchased electricity (scope 2) but elsewhere in the value chain, upstream or downstream (scope 3). Thus, the report indicates that omission of scope 3 GHG emissions from reporting is concerning, since companies effectively fail to monitor and target the reduction of the majority of their contributions to climate change.

To address the imbalance between long-term and short-term sustainability goals in terms of corporate governance, a notable increase of due diligence and reporting legislation emerged. Examples include EU,⁸² Germany,⁸³ France,⁸⁴ UK,⁸⁵ Australia,⁸⁶ and California.⁸⁷ Such laws aim to regulate the behaviour of TNCs with places of business in their respective jurisdictions. Irrespective of considering the responsible business conduct standards in UN Guiding Principles and OECD Guidelines, or the national due diligence legislation, the TNCs need to translate those standards into enforceable contract terms. Thus, an important element in the proactive design of the contractual chain in GVCs includes a consideration of model clauses, further outlined in the next section.

II. Proactive Design of Contract Terms: Model Contract Clauses

ABA issued model clauses with a vision of using contracts to achieve social, environmental, and human rights protections. Additionally, private initiatives, such as TCLP, produce model clauses focused on, among other aspects, greening the supply chains. The expectation is that these emerging contracting patterns will influence parties' negotiation and drafting processes.

82 EU recently published a Proposal for a Directive on Corporate Sustainability Due Diligence, available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en (10/3/2022). EU Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 and Commission Delegated Regulation (EU) 2019/429 of 11 January 2019 supplementing Regulation (EU) 2017/821. Both texts are available at: <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/> (10/3/2022). Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Full text is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> (10/3/2022).

83 German Supply Chain Act, available at: <https://www.bundesregierung.de/breg-en/federal-government/supply-chain-act-1872076> (10/3/2022).

84 French Duty of Vigilance Law 2017.

85 UK Modern Slavery Act 2015, full text available at: <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (10/3/2022).

86 Australia Modern Slavery Act 2018, full text available at: <https://www.legislation.gov.au/Details/C2018A00153> (10/3/2022).

87 California Transparency in Supply Chains Act, Kamala D. Harris, Attorney General California Department of Justice, "The California Transparency in Supply Chains Act: A Resource Guide", 2015, available at: <https://oag.ca.gov/> (10/3/2022).

1. American Bar Association Model Clauses for Human Rights

In 2021, the ABA Working Group published an updated version of their Model Contract Clauses for Human Rights (MCCs 2.0).⁸⁸ MCCs integrate UN Guiding Principles and OECD Guidelines into contractual terms, providing buyers and suppliers in international supply chains practical tools to ensure workers' human rights protection. MCCs in general received significant scholarly praise as innovative tools to address the governance gap and transform contracts into tools that achieve outcomes beyond purely allocating risks and maximising joint gains of the parties.⁸⁹

MCCs 2.0 further recognise the power asymmetry between buyers and suppliers, recognising that buyers, through their practices, often contribute to the violations of workers' human rights.⁹⁰ As part of the revision of MCCs, the Working Group conducted consultations in 2020 with representatives of Western buyers, multilateral organisations, union and labour advocates, industry associations, and suppliers from several countries in East and South Asia.⁹¹ After the consultations "the Working Group has no doubt that buyer demands, typically related to production times, price requirements, or change orders, can often cause or contribute to human rights violations. It has become clear that improving buyers' purchasing practices is central to protecting workers from human rights abuses".⁹² It is instrumental to recognise the difference in bargaining power between suppliers and buyers in the totality of the relevant circumstances, such as industry and parties' leverage within that industry.⁹³

Recognising this shortcoming, a significant change introduced in the MCC 2.0 was a shift from warranties and representations to due diligence as an effective mechanism to share responsibility between buyers and suppliers.⁹⁴ A shared responsibility between buyers and suppliers encourages the buyers to create communicative and collaborative relationships with their suppliers, while simultaneously incentivising them to police their supply chains more effectively.⁹⁵ MCC 2.0 recognises the power asymmetry between buyers and suppliers through the treatment of the right to exit the relationship. Therefore, MCC 2.0 included a solution allowing the parties to adequately address the risks and balance the positions of both the buyers and the suppliers.⁹⁶

88 For details see Contractual Clauses Project, available at: https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/ (10/3/2022).

89 For discussions on the first version of the MCCs, see *Sherman*, Working Paper 73/2020; *Dadush*, American University Law Review 2019/5, p. 1523–1524, 1526; *Lipson*, p. 1752–1753.

90 *Dadush*, p. 1521.

91 *Snyder et al.*, Business Lawyer (ABA) 2021–2022, p. 9.

92 *Ibid.*

93 *Dadush*, p. 1523.

94 *Snyder et al.*, p. 10–12.

95 *Dadush*, p. 1521.

96 *Snyder et al.*, p. 14.

As an example, MCC 2.0 designed specific clauses to ensure a responsible exit in case of “[...] any ‘reasonably unforeseeable, industry-wide or geographically specific, material change’ regardless of whether the change constitutes a force majeure”.⁹⁷ While the suppliers can do so without default if it would otherwise lead to a breach of their obligations, the buyers, irrespective of the reason for exit, have a duty to “consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them”.⁹⁸ Although it does not solve all problems concerning the liability for adverse environmental and social impact, MCC 2.0 nonetheless represent a powerful shift in contract negotiation and drafting since they bring human rights to the table in designing, managing, and performing the contract.

2. The Chancery Lane Project

TCLP is a collaborative effort of lawyers and legal professionals to create new, practical contract clauses that deliver climate solutions.⁹⁹ A unique approach to climate-conscious contracting in harmony with law and business underpins their vision: every contract and law enables solutions to climate change.¹⁰⁰ The work focuses on model clauses and model laws; each clause is developed through five stages: a collaborative drafting event and a rigorous peer review.¹⁰¹ Thus far, the use cases show the inclusion of TCLP clauses into organisations’ standard forms, with a potential further replication as a standard throughout the organisation’s agreements.¹⁰² TCLP model contract clauses published in the Climate Contract Playbook encompass a broad range of subjects, covering banking and finance, investment projects, the energy and construction industry, and dispute resolution.¹⁰³ TCLP clauses are particularly relevant as they lay out a design of specific contract terms to incorporate RBC standards of conduct set out in the UN Guiding Principles, OECD Guidelines, and the national due diligence requirements. To illustrate the latter point, TCLP’s clauses encompass elements of seeking assurances from suppliers, and contractual cascading, both of which are set out in the EU Proposal for Corporate Due Diligence.¹⁰⁴ The following section will illustrate examples of general and specific TCLP model clauses that encompass various aspects of proactive contracting discussed here.

97 Ibid.

98 Ibid.

99 The information about The Chancery Lane Project is available at: <https://chancerylaneproject.org/about/> (10/3/2022).

100 See <https://chancerylaneproject.org/about/> (10/3/2022).

101 See <https://chancerylaneproject.org/about/> (10/3/2022).

102 See <https://chancerylaneproject.org/comms-resources/> (10/3/2022).

103 All clauses are available <https://chancerylaneproject.org/model-clauses/> (10/3/2022).

104 Art. 7, para. 2(b), Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

a) General Model Clauses

General model clauses address the overall structure of GVC, instead of specific contract terms. The aim is to provide parties with tools to design and more effectively manage their commercial relationships throughout the chain. The relevant clauses include green supply agreement clauses, sustainability clauses, net zero target supply chain cascade, and supply chain emissions scorecard clauses.

(1) Green Supply Agreement Clauses

The Green Supply Agreement targets green procurement clauses, providing a checklist to make standard supplier agreements focus on emissions across the value chain. In doing so, the model Green Supply Agreement targets companies that are pledging or have pledged to be carbon negative by 2030; to achieve this, they will need to adjust their value with the supply chain to achieve the target. The model clause focuses on changing supplier behaviour to “encourage existing suppliers to “up their climate change game” and thus accelerate a greater number of businesses in their transition to net zero”.¹⁰⁵

(2) Sustainability Clauses in Supply Chain Contracts

The clause focuses on using supply chain contracts to extend positive climate change measures adopted in one country to contracting parties in other countries with a less legislative focus on climate.¹⁰⁶ The model clause is intended for multinational companies contracting in multiple jurisdictions, including those with fewer environmental laws.¹⁰⁷ The clause reflects that adopting a bottom-up approach by way of supply chain requirements addresses the imbalance in regulatory activity between regions.

(3) Net Zero Target Supply Chain Cascade

The Net Zero Target Supply Chain Cascade model clause is aimed at businesses and organisations committed to achieving net-zero targets not just upstream in their supply chains but also downstream in their distribution networks.¹⁰⁸ Since their supply chains and business partners contribute to their emissions, they need to align the net-zero target to achieve their net-zero target goal.¹⁰⁹

¹⁰⁵ Climate Contract Playbook, p. 33.

¹⁰⁶ Ibid., p. 55-56.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid., p. 29; for a list of companies that have recently announced their net-zero targets at <https://carbon.ci/insights/companies-with-net-zero-targets/> (10/3/2022) including, among others, Shell, Microsoft, British Telecom, Japan Airlines, American Airlines, IKEA.

¹⁰⁹ Ibid., p. 29.

(4) Supply Chain Emissions Scorecard

The Supply Chain Emissions Scorecard model clause aims to address the issue that 90% of companies' impacts on the environment come from supply chains, with carbon emissions from a company's supply chain typically averaging between 65% and 95% of the total emissions triggered by whatever it is a company does.¹¹⁰ Nonetheless, there is a lack of long-term sustainability strategies due to the pressure to achieve short-term profits.¹¹¹

b) Specific Model Clauses

Specific model clauses target specific contract terms, such as production and manufacturing, risk allocation, and remedies and termination. While risk allocation clauses and remedies and termination clauses are essential in the proactive design of sustainable contract terms, only production and manufacturing clauses are relevant for the present analysis as they closely relate to SDG 12. These clauses include a carbon performance clause, supplier environmental threshold obligations, and circular economy product design obligations.

(1) Carbon Performance Clause

Like other model clauses, the carbon performance clause recognises that, although business customers treat environmental impact from goods and services, their supply agreements do not adequately capture that.¹¹² At the moment, the carbon costs of producing goods are not specified in contracts, leaving the parties without an incentive to reduce carbon emissions.¹¹³ The clause encompasses a solution to include climate considerations in contract drafting, climate metrics for performance in all contracts, and provide a mechanism akin to liquidated damages for breaches with negative climate impact in the form of a mandatory donation to an appropriate non-profit organisation.¹¹⁴ Moreover, parties may consider other incentives, such as rights of first refusal or "climate option", where the buyer can pay the seller to enact carbon-reducing changes in the systems at the supplier's costs.¹¹⁵

Under the model clause, the parties can agree to acknowledge that the performance of their agreement will result in specific climate and ecological impacts, including GHG emissions.¹¹⁶ The parties agree to use all reasonable endeavours and cooperate in good faith (including their respective contractors) to minimise as far as

110 Ibid., p. 61.

111 Ibid.

112 Ibid., p. 24.

113 Ibid.

114 Ibid.

115 Ibid., p. 25.

116 Ibid., Section 1.1, 2.

reasonably practicable the quantity of GHG emissions. In case of a climate breach of warranty, the breaching party will pay a Climate Remediation Fee.¹¹⁷

(2) Supplier Environmental Threshold Obligations

In this model clause's background, the carbon costs of producing goods or delivering services are not internalised to the contract, leading to no incentive to reduce carbon emissions.¹¹⁸ The clause sets out contract terms, conditions, and remedies for contracts to become vehicles for setting environmental performance.¹¹⁹ As a preliminary step for parties to include the model clause in their agreement, they need to assess their respective carbon emissions, with the supplier assessing the product's carbon footprint to be supplied under a contract.¹²⁰ A condition of the model clause is the supplier's obligation to warrant an assessment of the relevant carbon footprint, and (as far as it is aware), the carbon footprint is true and accurate as of the date of the agreement.¹²¹ Contract terms setting out supplier obligations include development and implementation of a plan of continuous improvement to reduce the carbon footprint through the contract term. This is achieved by setting targets, and per contract terms, as the parties define,¹²² re-assessment of the carbon footprint every one to three years.¹²³ Furthermore, the parties provide the buyer a written confirmation of the results of each of the assessments.¹²⁴

(3) Circular Economy Product Design Obligation

The Circular Economy Product Design Obligation model clause explicitly refers to SDG 12.¹²⁵ The model clause aims to tackle SCP concerning the lack of reuse or recycling of products in various industries.¹²⁶ In terms of the definitions, the model clause, among other terms, introduces the concepts of circular design requirements and circular manufacturing requirements, both of which set out detailed guidelines for suppliers in the use of materials in the production lifecycle of the product. The final design of the product should either satisfy the circular design requirements entirely or partially upon approval of the buyer.¹²⁷ Circular design requirements include an obligation to maximise the volume of materials derived from recycled sources and vice versa minimise the resources that are not derived.¹²⁸ Moreover, the requirements include a prohibition against coating or embedding, or otherwise

117 Ibid., p. 26–27.

118 Ibid., p. 22.

119 Ibid.

120 Ibid., p. 23.

121 Ibid., Sections 1.1 and 1.2, p. 23.

122 Ibid., Section 2.1, p. 23.

123 Ibid., Section 2.2, p. 23.

124 Ibid., Section 2.3, p. 23.

125 Ibid., p. 43.

126 Ibid.

127 Ibid., Section 1.4, p. 45.

128 Ibid., Section 1.2.1–1.2.2, p. 44.

treating the product with chemicals or treatments that prevent the product from being recycled, and against using harmful/banned materials such as micro-plastics and glitter.¹²⁹ Although not related to components and materials used, the manufacturer obligations also include a prohibition against affixing the branding on the product or other labels to prevent repair, refurbishment, reuse, or recycling of the product.¹³⁰ On the other hand, the manufacturer needs to ensure that the product contains minimum percentage components or constituent parts that can be efficiently and economically viable, disassembled, removed, refurbished, replaced, or repaired.¹³¹

E. Conclusion

The overall passivity of both the individual states and the community in taking meaningful action to reprimand violation of ethical value shifted the power balance over to the sphere of private regulation. In addressing this governance gap, international commercial contracts play an instrumental role. The role of the law as a resource used by corporate actors to configure their GVCs encompasses the totality of the GVCs to all private sector activities. It is not surprising that the 2030 Agenda recognised the private sector's importance, especially its ability to innovate when finding appropriate solutions to global challenges.

In their business dealings, the private sector has sufficient incentive to address ethical values, human rights, and environmental protection, as they are associated with corporate reputation, financial performance, and human resources management from a business perspective. On the side of the private sector's activities, these methods require reconciliation of their commercial strategies with the governance of their supply chains and proactive contracting elements. Contracts within GVCs are the primary tool to monitor and manage adverse environmental impact throughout supply chains effectively and take appropriate measures. With the increasing trend of national mandatory due diligence legislation, one can expect that corporate due diligence standards will continue to probe commercial activities in GVCs, requiring adjustments of the contracting process and the design of contract terms.

In that context, the UN Guiding Principles and OECD Guidelines provide guidance on the effective contract design to implement policies and drive RBC-consistent behaviour (both through incentive and preventative methods). They also shed light on the business and societal expectations of the TNCs in the broadest sense when engaged in international business operations. SCP due diligence is vital in the structure of OECD Guidelines and UN Guiding Principles. Elements of due diligence are designed with relationship and collaboration in mind and have roots in relational contract theory, while proactive contracting represents a practical way of achieving the desired results through a contractual relationship.

129 Ibid., Sections 1.2.3–1.2.4, p. 44–45.

130 Ibid., Sections 1.2.5, p. 45.

131 Ibid., Sections 1.2.6, p. 45.

Concerning the latter, ABA Model Clauses 2.0 and the TCLP Model Clauses are essential as they provide specific templates that parties can further tailor to their needs. Last but not least, the enforceability of SDGs in GVC will likely incentivise interdisciplinary research on the intersection between technology, psychology, business management, economics, and contract law considerations.

Bibliography

- AKENJI, L. et al., *Sustainable Consumption and Production in Asia — Aligning Human Development and Environmental Protection in International Development Cooperation*, in: Schroeder, P. et al. (eds), *Sustainable Asia: Supporting the Transition to Sustainable Consumption and Production in Asian Developing Countries*, World Scientific, 2017
- ALAYON, CLAUDIA, et al., *Conceptual Sustainable Production Principles in Practice: Do They Reflect What Companies Do?*, *Journal of Cleaner Production*, 2016, Vol. 141, p. 693–701.
- ALI, MUHAMMAD et al, *Environmental degradation, economic growth, and energy innovation: evidence from European countries*, *Environmental Science and Pollution Research*, 2020, Vol. 27, p. 28306–28315
- AMOS, ROB.; LYDGATE, EMILY, *Trade, transboundary impacts and the implementation of SDG 12*, *Sustainability Science*, 2020, Vol. 15, p. 1699–1710
- ARCURI, ALESSANDRA; PARTITI, ENRICO, *SDG 12: Ensure Sustainable Consumption and Production Patterns*, in: Ebbeson, J.; Hay, E. (eds.), *The Cambridge Handbook on SDGs and international law*, Cambridge: Cambridge University Press, 2022 (forthcoming)
- BAGCHI, ADITI, *Other People's Contract*, *Yale Journal of Regulation*, 2015, Vol. 32(2), p. 211 ff.
- BARTON, THOMAS D., *Preventive Law and Problem Solving: Lawyering for the Future*, Lake Mary, 2000
- BAUER, BJOERN, et al., *Sustainable Consumption and Production: An analysis of Nordic progress towards SDG12, and the way ahead*, Nordics Council of Ministers, 2018
- BENGTTSSON, MAGNUS et al., *Transforming systems of consumption and production for achieving the sustainable development goals: moving beyond efficiency*, *Sustainability Science*, 2018, Vol. 13:6, p. 1533–1547
- BERGER-WALLISER, GERLINDE et al., *Using Proactive Legal Strategies for Corporate Environmental Sustainability*, *Michigan Journal of Environmental & Administrative Law*, 2016, Vol. 6(1), p. 1 ff.
- BERGER-WALLISER, GERLINDE; SHRIVASTAVA, PAUL, *Beyond compliance: Sustainable development, business, and proactive law*, *Georgetown Journal of International Law*, 2015, Vol. 46, p. 417 ff.

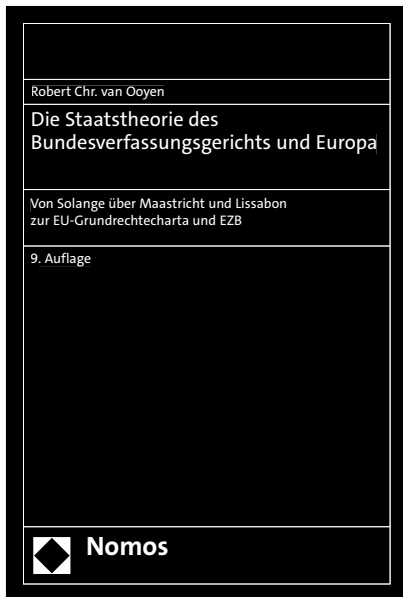
- BIRD, ROBERT, *Law, Strategy and Competitive Advantage*, Connecticut Law Review, 2011, Vol. 44(1), p. 61 ff.
- BLANKENBACH, JOHANNES, *Voluntary Sustainability Standards and the Sustainable Development Goals*, in: NEGI, A. et al. (eds.), *Sustainability Standards and Global Governance – Experiences of Emerging Economies*, Singapore, 2020, p. 19–38
- BLOK, V. et al., *From Best Practices to Bridges for a More Sustainable Future: Advances and Challenges in the Transition to Global Sustainable Production and Consumption*, Journal of Cleaner Production, 2015, Vol. 108, p. 19–30
- CABRELLI, DAVID, *Liability for the Violation of Human Rights and Labor Standards in Global Supply Chains: A Common Law Perspective*, Journal of European Tort Law, 2019, Vol. 10(2), p. 108–129
- CAFAGGI, FABRIZIO, *Sales in global supply chains: a new architecture of the international sales law*, in: Saidov, D. (ed.), *Research Handbook on International and Comparative Sale of Goods Law*, Cheltenham, 2019, p. 334–365
- CARUSO, DANIELA, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, Harvard International Law Journal, 2018, Vol. 59(2), p. 389 ff.
- CLAY, SIMON et al., *Sustainability Victoria: Influencing Resource Use, towards Zero Waste and Sustainable Production and Consumption*, Journal of Cleaner Production, 2007, Vol. 8(9), p. 782–786
- DADUSH, SARAH, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, American University Law Review, 2019, Vol. 68(5), p. 1519
- DELERA, MICHELE, *Is production in global value chains (GVCs) sustainable? A review of the empirical evidence on social and environmental sustainability in GVCs*, PEGNet Policy Studies, 2020/4
- DIMATTEO, LARRY A., *Strategic contracting: contract law as a source of competitive advantage*, American Business Law Journal, 2010, Vol. 47(4), p. 727–794
- DUBEY, RAMESHAW et al., *Towards a Theory of Sustainable Consumption and Production: Constructs and Measurement*, Resources Conservation and Recycling, 2015, Vol. 106, p. 78–89
- FALKNER, ROBERT, *Private Environmental Governance and International Relations: Exploring the Links*, Global Environmental Politics, 2003, Vol. 3(2), p. 72–87
- GASPER, DES et al., *The Framing of Sustainable Consumption and Production in SDG 12*, Global Policy, 2019, Vol. 10, p. 83–95
- GEISTFELD, MARK A., *The Law and Economics of Tort Liability for Human Rights Violations in Global Supply Chains*, Journal of European Tort Law, 2019, Vol. 10(2), p. 130–165

- GHOSH, PIYA et al., *Managing carbon footprint for a sustainable supply chain: a systematic literature review*, Modern Supply Chain Research and Applications, 2020, Vol. 3(2), p. 123–141
- GOLDSMITH, ELIZABETH B., *Social Influence and Sustainable Consumption*, Tallahassee, 2015
- GORDON, RUTH, *Unsustainable Development*, in: ALAM, S. et al. (eds.), International Environmental Law and the Global South, New York, 2015, p. 58–63
- HAAPIO, HELENA (ed.), *A Proactive Approach to Contracting and Law*, Turku University of Applied Sciences, 2008
- HAAPIO, HELENA, *Introduction to Proactive Law: A Business Lawyer's View*, in: Wahlgren, P. (ed.), Scandinavian Studies in Law: A Proactive Approach, 2010, Vol. 49, p. 21–34
- HAAPIO, HELENA, *Proactive Law: Cross-Border Contracting*, in: Barton, T. D. (ed.), Preventive Law and Problem Solving: Lawyering for the Future, 2008/2009
- HAAPIO, HELENA *Using the CISG Proactively*, in: DiMatteo, L., (ed.), International Sales Law: A Global Challenge, Cambridge, 2014
- HANDKE, SUSANN, *The UN Climate Regime's Journey: Contesting Legality and Constructing Substance*, Erasmus University Rotterdam, 2020
- HELDEWEG, MICHIEL, *Legal Regimes for Experimenting with Cleaner Production – Especially in Sustainable Energy*, Journal of Cleaner Production, 2016, Vol. 169, p. 48–60.
- HONDIUS, EWOUT, *Pro-Active Comparative Law: The Case of Nordic Law*, Scandinavian Studies in Law, 2007, Vol. 50, p. 143–155
- HORVATHOVA, ALEXANDRA, *Commercial Contracts and Corporate Social Responsibility Values: A European Perspective and an Attempt of a Normative Approach*, in: Heidemann, M., Lee, J. (eds.), The Future of the Commercial Contract in Scholarship and Law Reform, Cham, 2018, p. 283–308
- JARMAN, HOLLY; LUNA-REYES, LUIS (eds.), *Private Data and Public Value: Governance, Green Consumption, and Sustainable Supply Chains*, New York, 2016
- JUNIOR, AMARAL et al. (eds.), *Sustainable Consumption: The Right to a Healthy Environment*, Cham, 2020
- KALTENBORN, MARKUS et al. (eds.), *Sustainable Development Goals and Human Rights*, Cham, 2020
- KAPLINSKY, RAPHAEL, *Spreading the Gains from Globalization: What Can be Learned from Value-Chain Analysis?*, Problems of Economic Transition, 2004, Vol. 47(2), p. 74–115

- KOTZÉ, LOUIS J., *The Sustainable Development Goals: An existential critique alongside three new millennial analytical paradigms*, in: French, Duncan; Kotzé, Louis J. (eds.), *Sustainable Development Goals Law, Theory and Implementation*, Cheltenham, 2018, p. 41–65
- LE BLANC, DAVID, *Towards integration at last? The sustainable development goals as a network of targets*, *Sustainable Development*, 2015, Vol. 23(3), p. 176–187
- LEE, VERONIKA et al., *Comparative Study of Key Supply Chain Management Elements in Sustainability Reports*, *Businesses*, 2020, Vol. 1(3), p. 168–195
- LIPSON, JONATHAN, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, *American University Law Review*, 2019, Vol. 68, p. 1751 ff.
- MACNEIL, IAN et al. (eds.), *The Relational Theory of Contract: Selected Works of Ian Macneil*, London, 2001
- MARDIROSSIAN, NORA et al., *Handbook for SDG-Aligned Food Companies: Four Pillar Framework Standards*, Columbia Center on Sustainable Investment and UN Sustainable Development Solutions Network, 2001
- MCLAUGHLIN, JOSETTA; ELAYDI, RAED, *Ian Macneil and relational contract theory: evidence of impact*, *Journal of Management History*, 2014, Vol. 20(1), p. 44–66
- MITKIDIS, KATERINA P., *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements*, *Nordic Journal of Commercial Law*, 2014, No. 1, p. 1–30
- PARAMATI, SUDHARSHAN R. et al., *The role of stock markets on environmental degradation: A comparative study of developed and emerging market economies across the globe*, *Emerging Markets Review*, 2018, Vol. 35, p. 19–30
- POHJONEN, SOLIE, *Proactive Law in the Field of Law*, *Scandinavian Studies in Law*, 2006, Vol. 49, p. 53–70
- SALMINEN, JAAKKO, *From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains*, University of Turku, 2017
- SAUMIER, GENEVIEVE, *SDG 12: Sustainable Consumption and Production*, in: Michaels, Ralf et al. (eds.), *The Private Side of Transforming Our World*, Intersentia, 2021
- SERVAES, JAN (ed.), *Sustainable Development Goals in the Asian Context*, Singapore, 2017
- SCHMIDPETER, RENE et al. (eds.), *The Future of the UN Sustainable Development Goals: Business Perspectives for Global Development in 2030*, Cham, 2020, p. 1–11

- SHERMAN, JOHN, *The Contractual Balance Between “Can I” and “Should I?” Mapping the ABA’s Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights*, Corporate Social Responsibility Initiative, Harvard Kennedy School, Working Paper No. 73, 2020
- SHINN, MELISSA, *No Wheels, No Driver, Can’t Travel. The EU Sustainable Consumption and Production Action Plan, a Framework of Policies towards Eco-Design of Products for Material Efficiency?*, Journal for European Environmental & Planning Law, 2009, Vol. 3(6), p. 301–318
- SIEDEL, GEORGE; HAPPIO, HELENA, *Using Proactive Law for Competitive Advantage*, American Journal of Business and Law, 2010, Vol. 47, p. 641–686
- SMITS, JAN, *The Expanding Circle of Contract law*, Stellenbosch Law Review, 2016, Vol. 27(2), pp. 227–237
- SNYDER, DAVID et al., *Balancing Buyer and Suppliers Responsibilities, Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, Business Lawyer (ABA), 2021–2022, Vol. 77, p. 115–182
- SOBEL-READ, KEVIN et al., *Recalibrating Contract Law: Choses in Action, Global Value Chains and Enforcement of Obligations Outside of Privity*, Tulane Law Review, 2018, Vol. 93, p. 1–46
- TESTA, FRANCESCO et al., *Drawbacks and Opportunities of Green Public Procurement: An Effective Tool for Sustainable Production*, Journal of Cleaner Production, 2016, Vol. 112, p. 1893–1900
- IGLP Law and Global Production Working Group, *The role of law in global value chains: a research manifesto*, London Review of International Law, 2016, Vol. 4(1), p. 57–79
- WASHINGTON, HAYDN, *Demystifying Sustainability: Towards real solutions*, New York, 2015
- YAKOVLEVA, NATALIA et al. (eds.), *Sustainable Development Goals and Sustainable Supply Chains in the Post-Global Economy*, Cham, 2019
- YOUNIS, LIAZ et al., *Impact of stock market, renewable energy consumption and urbanization on environmental degradation: new evidence from BRICS countries*, Environmental Science and Pollution Research, 2021, Vol. 28, p. 31549–31565
- ZIELINSKI, TYMON et al. (eds.), *Interdisciplinary Approaches for Sustainable Development Goals*, Cham, 2018

Die Entstehung des Bundesverfassungsgerichts zu Europ



Die Staatstheorie des Bundesverfassungsgerichts und Europa

Von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta und EZB

Von Prof. Dr. Robert Chr. van Ooyen

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Der Zweite Senat hat mit „Lissabon“ seine Eurorechtsprechung verschärft und betont in den neueren Entscheidungen zu „Euro-Rettung“ und „Perrklauseln Europawahl“ seine seit „Maastricht“ vertretene etatistische „Trinitätslehre“ der staatsrechtlich-souverän-national verfassten Demokratie. Mit „Vergessen I und II“ hat nun auch der Erste Senat auf den EuGH reagiert, indem er sich plötzlich zum „Hüter“ der Europäischen Grundrechte einstellt und sogar hinter die alte, „europafreundliche“ lange II-Entscheidung zurückzufallen droht.

Es zeigt sich insgesamt, so die zentrale These des Buchs, die „Europafeindlichkeit“ der Staatstheorie des Bundesverfassungsgerichts. Diese resultiert aus überholten Traditionslinien der deutschen Staatsrechtslehre und einem Demokratietheorie-Defizit.

Neu in der 9. Auflage hinzugekommen sind u.a. die aktuellen Entscheidungen zum Staatsanleihekaufprogramm (PSPP) der EZB vom Mai 2020.