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ARTICLES

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**INTEGRATING THE RUGGIE GUIDING PRINCIPLES INTO THE
INTERNATIONAL ECONOMIC COMMUNITY**

*Laurie E. Abbott**

Abstract

The United Nation's Guiding Principles on Business and Human Rights (Guiding Principles) signify an important stride in the effort to make corporations more accountable for their human rights obligations. The Guiding Principles have received substantial support from members of business, government, and civil society, and they appear to be gaining a reputation as one of the most important human rights instruments for business. Despite their impressive reception in the international business community, the Guiding Principles have also been continuously criticized for their lack of binding authority. Indeed, many human rights organizations consider the Guiding Principles a mere affirmation of the status quo, which relies mostly on voluntary corporate social responsibility codes that do little more than encourage corporations to respect human rights.

This Article evaluates whether the United Nations, with its weak enforcement mechanisms and lack of influence over transnational corporations (TNCs), is the proper source of a global social responsibility code like the Guiding Principles. It further investigates whether economically oriented intergovernmental organizations (IOs) such as the Organization for Economic Co-operation and Development, the International Labor Organization, the World Bank, the World Trade Organization, and the International Chamber of Commerce may be the more appropriate source for creating and implementing such guidelines. These economically oriented IOs are perhaps better positioned to incentivize TNCs to comply with CSR codes, to provide remedies when TNCs do not comply, and most importantly to use their built-in enforcement mechanisms to create binding obligations on TNCs. Thus this Article will look at five of the most powerful economically oriented IOs to determine (1) what efforts they have made to promote corporate social responsibility, (2) whether and to what extent these IOs have promoted the UN Guiding Principles, and (3) what more these IOs can do to create a uniformly accepted corporate social responsibility code that has some binding authority.

I. INTRODUCTION

The past decade has witnessed a dramatic shift in opinions on the societal duties of business. Indeed, not so long ago, most members of the business community adamantly believed that the greatest contribution businesses could make to the world was to be profitable, thereby stimulating economic growth and creating jobs.¹ Though profitability remains the primary goal of business, members of the private sector, public sector, and civil society have come to agree that corporations can and should do more than look out for the interests of their shareholders.² The greatest contributor to this shift in perspectives has been the growth of the corporate social responsibility (CSR) movement.³

CSR is generally considered a voluntary means whereby corporations initiate self-regulating codes to ensure they behave responsibly⁴ and that they take into consideration the impact of their work on not only their shareholders, but on other “stakeholders” like employees, consumers, suppliers, and the communities where they do business.⁵ Though voluntarism is at the heart of CSR, countless international organizations have done their best to prod corporations into joining the CSR movement by creating model codes, guidelines, and other tools intended to guide corporations down the path of responsibility.⁶ With so many model

* © 2014 Laurie E. Abbott. J.D. 2013, S.J. Quinney College of Law, University of Utah. Law Clerk for Justice Jill N. Parrish of the Utah Supreme Court, 2013–2014. Law Clerk for Judge Carolyn B. McHugh of the U.S. Court of Appeals for the Tenth Circuit, 2014–2016. The ideas and opinions of this article are solely the author’s. The author wishes to thank Erika George for her thoughtful comments and suggestions and for inspiring the author’s interest in issues related to human rights and corporations.

¹ See *The Good Company*, THE ECONOMIST (Jan. 20, 2005), <http://www.economist.com/node/3555212>; Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES (Sept. 13, 1970), <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

² See *Just Good Business*, THE ECONOMIST (Jan. 19, 2008), http://www.economist.com/blogs/theinbox/2008/02/just_good_business_january_19t_3.

³ Aaron K. Chatterji & Barak D. Richman, *Understanding the “Corporate” in Corporate Social Responsibility*, 2 HARV. L. & POL’Y REV. 33, 33 (2008).

⁴ See Andrew Crane, *The Oxford Handbook of Corporate Social Responsibility* 27–28 (2008).

⁵ Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1411 (1993).

⁶ Some of the most prominent model CSR codes and certification initiatives include the Global Reporting Initiative (GRI) (<https://www.globalreporting.org/Pages/default.aspx>), the UN Global Compact (<http://www.unglobalcompact.org/>), Social Accountability International’s SA8000 Certification Standard (<http://www.sa-intl.org/index.cfm?>), and AA1000 Standard (<http://www.accountability.org/standards/index.html>), to name just a few. In addition to these general CSR codes and certification programs, there are several industry specific CSR initiatives. These include the Extractive Industry Transparency Initiative (<http://eiti.org/>), the

codes to choose from, corporations are likely overwhelmed by ever growing CSR movement. Adding to the many model codes, the most recent and perhaps most well received CSR initiative is the United Nation's *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework"* (Guiding Principles). Created principally by United Nations Special Representative on the Issue of Human Rights and Transnational Corporations, John Ruggie,⁷ the Guiding Principles, like most CSR initiatives, create no legal obligations for transnational corporations (TNCs); however, they do provide TNCs with guidelines for how to better respect human rights. So far, the Guiding Principles have received substantial support from members of business, government, and civil society and appear to be gaining a reputation as one of the most important human rights instruments for business.

Though the Guiding Principles mark an important step toward greater global uniformity in the realm of CSR, this Article intends to evaluate if such principles should originate from a different source. Specifically, though the UN is perhaps the most influential promoter of human rights, it has little authority over the international economy and the actions of TNCs. Other intergovernmental organizations (IGOs) like the Organization for Economic Co-operation and Development (OECD), International Labor Organization (ILO),⁸ World Bank, World Trade Organization (WTO), and the International Chamber of Commerce (ICC)⁹—which are inherently economically or financially focused—may be the more appropriate source for creating and implementing such guidelines because they are better positioned to incentivize TNCs to comply with CSR codes and to provide remedies when TNCs do not comply. Additionally, some IGOs such as the WTO have built-in enforcement mechanisms and could therefore give more teeth to the Guiding Principles.

Electronic Industry Citizenship Coalition (<http://www.eicc.info/index.shtml>), and the Global Network Initiative (<http://www.globalnetworkinitiative.org/>).

⁷ See generally Human Rights Council Res. 17/4, Rep. of the Hum. Rts. Council, 17th Sess., June 16, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011); Special Rep. of the Sec'y-Gen., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

⁸ Though arguably the ILO is more of a socially-oriented than economically oriented IGO, because labor is such an integral part of business, I include it among the IGOs that have an important influence on corporate behavior.

⁹ The ICC is technically not an IGO, since its delegates are business leaders, not government leaders. Despite this technical difference, the ICC behaves like an IGO, and due to its obvious influence over TNCs, it is included in this Article as one of the organizations that could assist in legitimizing and promoting the Guiding Principles.

Thus, this Article will evaluate what, if anything, these economically oriented IGOs are doing to support the Guiding Principles or to create their own human rights guidelines for corporations. This Article will also provide suggestions for how these IGOs can be better promoters of corporate social responsibility and how they can cooperate and work in conjunction with the UN to promote the Guiding Principles and create a uniform international standard of corporate respect for human rights. This Article will proceed as follows: Part II will provide a history and analysis of the Guiding Principles. It will discuss both the praise and criticism that the Guiding Principles have received and will introduce the ways in which other IGOs might help the Guiding Principles overcome their principal criticism of lack of enforceability. Part III will introduce the key economically oriented IGOs, explaining their relationship with TNCs and evaluating what, if any CSR initiatives they are promoting. It will also discuss how those IGOs can work with the United Nations to support and perhaps improve upon the Guiding Principles. This section will principally show that the economically oriented IGOs have significant potential to put in place strong incentives for TNCs to fulfill their human rights responsibilities, and in some instances to provide remedial processes when TNCs fail to fulfill their duties. This section will also show that, while many of the powerful economically oriented IGOs have made significant strides to support the Guiding Principles, the most powerful of these IGOs—the World Trade Organization—has been conspicuously silent. Part IV concludes by explaining that though IGOs have made important efforts to endorse the Guiding Principles, more can be done to create a uniform and authoritative global CSR system that puts in place effective incentives, proper remedies, and stronger enforcement mechanisms.

II. THE UN FRAMEWORK AND GUIDING PRINCIPLES

a. *History and Overview*

i. *The Rise and Fall of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*

To better understand the global human rights breakthrough embodied in the UN Guiding Principles, it is important to understand the United Nations' prior CSR attempts and how their failures forged the path for the Guiding Principles' success. Indeed, the United Nations' pursuit of bringing corporations into the human rights dialogue had a rocky beginning. In 1998, the Sub-Commission on the Promotion and Protection of Human Rights established a three-year study to “identify and examine the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social and cultural rights and the right to

development, as well as civil and political rights.”¹⁰ The outcome of this research project was a document titled *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the Norms).¹¹ The Norms were filled with mandatory language, consisting of eighteen paragraphs that laid out TNC’s specific human rights obligation.¹² In their explanation of TNCs general human rights obligations, the Norms proclaimed, “transnational corporations and other business enterprises have the *obligation* to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law.”¹³ The Norms were even accompanied by an enforcement mechanism that included monitoring by NGOs as well as self-monitoring provisions.¹⁴

Initially the Norms were lauded for finally providing a strong mandate against corporate human rights violations. As one scholar expressed, “the Norms present the most promising human rights norms for TNCs to date.”¹⁵ The Norms received praise for several revolutionary components, including their creation of a “comprehensive list of human rights obligations,” their reference to several international treaties and mandates for TNCs to abide by those treaties, and their imposition of both positive and negative obligations.¹⁶ Despite, or perhaps because of, such positive reception by human rights advocates and scholars, most states and corporations were deeply concerned with the Norms’ strong language and their departure from traditional international law, which focused on the obligations of states, and not non-state actors like corporations.¹⁷ After their cool reception by member-states at the UN Commission on Human Rights

¹⁰ The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1998/8, U.N. ESCOR, 50th Sess., 26th mtg., U.N. Doc. E/CN.4/Sub.2/Res/1998/8 (1998), ¶ 4(a).

¹¹ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 2003/12, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹² *Id.* ¶¶ 1–18.

¹³ *Id.* ¶ 1 (emphasis added).

¹⁴ Pini Pavel Miretski & Sascha-Dominik Bachman, Global Business and Human Rights – The UN “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”: A Requiem, 17 DEAKIN L. REV. 5, 8 (2012), available at <http://ssrn.com/abstract=1958537>.

¹⁵ Surya Deva, UN’s Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?, 10 ILSA J. INT’L & COMP. L. 493, 497 (2004).

¹⁶ *Id.* at 497–500.

¹⁷ Miretski & Bachman, *supra* note 14, at 5.

2004 session, the Norms were put on hold, and by 2006 they were abandoned entirely.¹⁸

ii. *The Creation of the UN Framework*

It was after the Norms were sent to their grave that Kofi Annan, by means of a UN resolution, appointed John Ruggie as the Special Representative on the issue of Human Rights and Transnational Corporations (SRSG).¹⁹ Mr. Ruggie came into the position of SRSG with a strong human rights background and extensive experience at the United Nations.²⁰ As a respected member of the human rights community who had been an early supporter of the CSR movement, Mr. Ruggie made an ideal candidate to resurrect the United Nations' CSR efforts and gain the corporate support that the UN Norms failed to achieve.

In the same resolution that appointed Mr. Ruggie as the SRSG, the UN High Commissioner for Human Rights laid out five central mandates for the SRSG:

(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including international cooperation;

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

¹⁸ Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 331–32 (2006).

¹⁹ *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. OFFICE OF HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx> (last visited July 20, 2014).

²⁰ Larry Catá Backer, *On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT'L LAW 37, 47 (2011).

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises.²¹

Interestingly for the purposes of this Article, the resolution also explicitly requested that the SRSG, while working to fulfill the five mandates, work closely not only with other UN human rights institutions like the Global Compact, but also with other IGOs like the ILO and the OECD.²²

Mr. Ruggie immediately got to work to put together a “policy framework for better managing business and human rights challenges.”²³ Between 2005 and 2008 Mr. Ruggie held several consultation periods on four continents, during which he met with representatives from governments, businesses, NGOs and other members of civil society, and IGOs.²⁴ Among the participants of the stakeholder consultations were representatives from the OECD, ILO, and the International Finance Corporation of the World Bank Group (IFC), each of which sent representatives to at least one consultation period and submitted recommendations at various stages of the consultation process.²⁵ The SRSG also allowed stakeholders to submit recommendations and reviews of his work during that period.²⁶ The SRSG received hundreds of responses to his call for commentary from business associations, law firms, NGOs, academics, and IGOs.²⁷ Incorporating the ideas and recommendations he received, the SRSG submitted two interim reports²⁸ to the Commission on Human Rights²⁹ between 2005 and 2007.

²¹ Comm’n on Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, 61st Sess., U.N. Doc. E/CN.4/RES/2005/69 (2005), ¶ 1 (2005).

²² *Id.* ¶ 3.

²³ Introduction by John Ruggie, Special Representative, Business and Human Rights, 1 (July 2000), available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Introduction>.

²⁴ *Id.*

²⁵ See *List of documents prepared by and submitted to SRSG on Business and Human Rights As of 10 August 2010*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, 9–15, available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Introduction> Introduction [hereinafter SRSG DOCUMENTS] (for a complete list of the SRSG’s sessions and participants of those sessions); *UN Secretary-General’s Special Representative on Business & Human Rights: Consultations, Meetings & Workshops*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops> (last visited July 10, 2014).

²⁶ List of SRSG Documents, *supra* note 25, at 16–33.

²⁷ *Id.*

²⁸ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc.

In June 2008, the SRSG presented his final product to the Human Rights Council: *The “Protect, Respect and Remedy” Framework* (UN Framework).³⁰ The UN Framework has been described as “an authoritative focal point around which actors’ expectations [can] converge—a framework that clarified the relevant actors’ responsibilities, and provide[s] the foundation on which thinking and action [can] build over time.”³¹ The UN Framework’s primary accomplishment was the establishment of three separate pillars - a foundation upon which business and human rights could be reconciled. The first pillar, the State’s duty to protect, addresses the “governance gap,” which the Framework describes as the “root cause of the business and human rights predicament today.”³² To address this governance gap, the Framework outlines four main areas where States can work to fulfill their responsibility to protect human rights. First, by “fostering corporate cultures in which respecting rights is an integral part of doing business”³³ through market pressure criminal liability for businesses,³⁴ second, by aligning domestic corporate policies of both home and host states to bring business and investment interests in line with States’ responsibility to respect human rights;³⁵ third, by collaborating with States to achieve greater policy coherence at the international level;³⁶ and fourth, by putting particular focus on conflict zones where many of “the most egregious human rights abuses, including those related to corporations” occur.³⁷

E/CN.4/2006/97 (Feb. 22, 2006); Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/035 (Feb. 9 2007).

²⁹ Ruggie, *supra* note 23, at 1.

³⁰ Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights* U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter UN Framework].

³¹ *Introductory Description of the Special Representative’s Mandate and the UN “Protect, Respect, and Remedy” Framework*, UNITED NATIONS, 1, <http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf> [hereinafter United Nations, *Introductory description*].

³² UN Framework, *supra* note 30, ¶ 3.

³³ *Id.* ¶ 29.

³⁴ *Id.* ¶¶ 30–31.

³⁵ *Id.* ¶¶ 33–42.

³⁶ *Id.* ¶¶ 43–46.

³⁷ *Id.* ¶¶ 47–49.

The second pillar is the corporate responsibility to respect human rights.³⁸ This pillar begins with a critique of the Norms, explaining that the Norms focus on creating a limited list of human rights that companies may affect was the wrong approach.³⁹ Instead, companies should be conscious of all rights and should focus their energy on determining “what precise *responsibilities* companies have in relation to rights.”⁴⁰ Though a company’s primary responsibility according to the Framework is to “do no harm,” the Framework explains that doing no harm is an active, rather than passive responsibility because it requires companies to take positive steps to ensure they are not inadvertently abusing human rights.⁴¹ The Framework continues by dividing the responsibility to respect human rights into three positive actions: first, due diligence, which includes creating a company human rights policy, conducting impact assessments, integrating human rights policies through the entire company, and tracking company performance on human rights policies;⁴² second, “sphere of influence,” which asks corporations to think about “their human rights impact beyond the workplace and . . . identify[] opportunities to support human rights;⁴³ and third, avoid complicity, including both criminal complicity like aiding and abetting and social complicity like “deriving a benefit from a human rights abuse.”⁴⁴ The Framework provided an illustration of abuse by complicity through an opinion from the International Criminal Tribunal for the Former Yugoslavia, which found the defendant guilty of human rights abuses for merely providing “verbal encouragement,” for being present while abuses took place, and for having knowledge of abuses without attempting to stop them.⁴⁵ The Framework expressed that corporations likewise should not complicity abuse human rights.

The third and final pillar of the UN Framework is access to remedies.⁴⁶ Though the Framework accedes that States have the primary responsibility to provide a judicial system where human rights grievances against corporations may be brought, the Framework also provides recommendations for remedy mechanisms outside the traditional judicial process.⁴⁷ These alternative grievance mechanisms include those created by human rights institutions, mediation services, specialized agencies,

³⁸ UN Framework, *supra* note 30, ¶¶ 51–81.

³⁹ *Id.* ¶¶ 51–52.

⁴⁰ *Id.* ¶ 53 (emphasis added).

⁴¹ *Id.* ¶ 55.

⁴² *Id.* ¶¶ 56–64.

⁴³ *Id.* ¶¶ 65–72.

⁴⁴ UN Framework, *supra* note 30, ¶¶ 73–81.

⁴⁵ *Id.* ¶ 77, n. 48 (citing to International Criminal Tribunal for the former Yugoslavia, Trial Chamber Judgment *Kvočka et al* (IT-98-30/1-T), Nov. 2, 2001, paras. 257-261).

⁴⁶ *Id.* ¶¶ 82–103.

⁴⁷ *Id.*

“industry based or multi-industry organizations,” multi-stakeholder initiatives, as well as “company level grievance mechanisms.”⁴⁸ The Framework also provides a set of principles representing the qualities that non-judicial mechanisms should have at a minimum: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency.⁴⁹ Finally, the Framework, in its discussion of remedies for human rights abuses, addresses the gap in access to such remedies and calls on human rights institutions, NGOs, academics, states, and other actors to improve the flow of information about these remedies.⁵⁰

Important for the purposes of this Article is the fact that the Framework explicitly mentions three of the economically oriented IGOs at various points within its text: the OECD, the ILO, and the World Bank. Beginning in the overview section, the Framework refers to the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises (ILO MNE Declaration) and Social Policy⁵¹ and the OECD Guidelines for Multinational Enterprise (OECD MNE Guidelines)⁵² as two important soft law instruments that recognize the corporate responsibility to respect human rights.⁵³ The Framework again mentions the OECD Guidelines in its discussion of the State’s duty to protect, and finds that though the Guidelines are “currently the most widely applicable set of government endorsed standards related to corporate responsibility and human rights,” it criticizes the OECD Guidelines for lacking specificity and recommends they be revised.⁵⁴ The Framework further discusses the OECD Guidelines within the Access to Remedies section, finding that while the Guidelines have some mechanism for handling grievances against corporations, those mechanisms should be strengthened.⁵⁵ In terms of the ILO and its Tripartite Declaration, the Framework, under its discussion of corporations’ due diligence obligations, tells companies to look to ILO core conventions to better understand their due diligence requirements.⁵⁶

The World Bank makes a more opaque appearance in the Framework. First, under the policy alignment subsection of the State’s Duty to Protect section, the Framework refers to a study that was created jointly between the SRSB and the IFC developing countries and regulatory

⁴⁸ *Id.* ¶¶ 84–86, 88–95.

⁴⁹ *Id.* ¶ 92.

⁵⁰ *Id.* ¶ 102.

⁵¹ See *infra* notes 129–38 and accompanying text for a further discussion of the Tripartite Declaration.

⁵² See *infra* notes 97–111 and accompanying text for a further discussion of the OECD MNE Guidelines.

⁵³ UN Framework, *supra* note 30, ¶ 23.

⁵⁴ *Id.* ¶ 46.

⁵⁵ *Id.* ¶ 98.

⁵⁶ *Id.* ¶ 58.

mechanisms.⁵⁷ This discussion of a joint project between the UN and a member organization of the World Bank Group shows some effort to coordinate global efforts on human rights and corporations. A second Framework reference related to the World Bank is its mentioning of the Equator Principles.⁵⁸ As will be discussed in more detail below,⁵⁹ the Equator Principles were created by the IFC and nine international banks and are “a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions.”⁶⁰ The UN Framework calls on the Equator Principles to “develop a grievance process,” so as to provide greater access to remedies against human rights abuses by corporations.⁶¹ These UN Framework references to CSR initiatives from the OECD, ILO, and the World Bank demonstrate an initial effort by the SRSB to collaborate at least on some level with economically oriented IGOs so as to create stronger international support for and enforcement of the Framework.

Initial response to the UN Framework by members of the business, human rights, and government communities was overwhelmingly positive.⁶² As one *Economist* article put it, the Framework symbolized a “new consensus” between human rights activists and business leaders, and the Framework “lack[ed] serious opposition.”⁶³ Though support for the Framework was generally unanimous, human rights activists received the Framework with some caution, stressing that the Framework alone was not enough. In the Joint NGO Statement to the Eighth Session of the Human Rights Council,⁶⁴ activists lead by Human Rights Watch praised the Framework, but asserted that the SRSB should create a “follow-on

⁵⁷ *Id.* ¶ 36.

⁵⁸ *Id.* ¶ 100.

⁵⁹ See *infra* notes 174–81 and accompanying text for further discussion of the Equator Principles.

⁶⁰ *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/all-news-media/adoption-news> (last visited July 10, 2014).

⁶¹ UN Framework, *supra* note 30, ¶ 100.

⁶² See Frances Williams, *Human Rights Duty for Business*, FINANCIAL TIMES (June 6, 2008, 3:09 AM), <http://www.ft.com/intl/cms/s/0/30fee3aa-3312-11dd-8a25-0000779fd2ac.html#axzz1qjtcU03J> (“The broad welcome given to Prof Ruggie’s report by governments, business and human rights groups is in sharp contrast to the polarised views that greeted an earlier attempt to define the human rights responsibilities of business known as the ‘draft UN norms.’”).

⁶³ *Business and Human Rights: Beyond the “Genocide Olympics”*, THE ECONOMIST (Apr. 24, 2008), http://www.economist.com/node/11090045/print?story_id=11090045.

⁶⁴ Joint NGO Statement to the Eighth Session of the Human Rights Council: Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Businesses, HUMAN RIGHTS WATCH (May 20, 2008), <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>.

mandate” to not only elaborate on the “protect, respect, and remedy” framework, but also to “include an explicit capacity to examine situations of corporate abuses.”⁶⁵ Clearly the human rights community wanted the Framework to grow some teeth.

Commentary from the IGO community following the release of the UN Framework was limited. Indeed, the only formal submission to the Human Rights Council by IGOs in 2008 was a joint commentary from an OECD affiliate organization, the International Chamber of Commerce (ICC), and the International Organization of Employers (IOE).⁶⁶ Though generally supportive of the Framework, this joint commentary provided several important recommendations. To assure the success of the state’s duty to protect pillar, the joint commentary urged “implementation and effective enforcement of existing laws.”⁶⁷ It also advised that not only TNCs, but also local and national companies, including the suppliers of larger TNCs, be included in the Framework.⁶⁸ The joint commentary also put particular emphasis on recognizing that though business should comply with the law, their duties are distinct from those of the State.⁶⁹ Finally, in its discussion of the access to remedies pillar, the joint commentary expressed “serious reservations about the idea of establishing a global ombudsman function as part of the business and human rights mandate.”⁷⁰ Absent from this joint commentary was any recommendation that the Framework obtain support or endorsement from other economically oriented IGOs that could improve the enforceability of the Framework.

iii. The Guiding Principles

Given the overwhelmingly positive feedback to the UN Framework, the Human Rights Council unanimously welcomed the UN Framework.⁷¹ But given the repeated recommendation to elaborate upon and operationalize the mandate, the Human Rights Council “extended the Special Representative’s mandate until 2011 with the task of ‘operationalizing’ and ‘promoting’ the framework.”⁷² Thus between 2008

⁶⁵ *Id.*

⁶⁶ INT’L CHAMBER OF COMMERCE, Joint Initial Views of the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on Business and Human Rights (May 2008), available at <http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ United Nations, *Introductory Description*, *supra* note 31, at 1.

⁷² *Id.*

and 2011, further consultations took place to assist the SRSG in turning the Framework into a set of operationalized guidelines for governments and businesses. Once again, some economically oriented IGOs participated in the consultation period, including the OECD, IFC, ILO, IOE, and the ICC.⁷³ However, far more participants came from the business sector and civil society, as well as member-states of the UN. The result of the three additional years of consultation and operationalization was the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy' Framework*,⁷⁴ which the SRSG issued in March of 2011 and Human Rights Council endorsed on June 16, 2011.⁷⁵ Divided between the three pillars of the UN Framework, the Guiding Principles spell out thirty-one specific principles to assist governments and businesses in fulfilling the responsibilities that the UN Framework established. Within each pillar, the principles are split into two categories: foundational principles, which provide a brief elaboration of the goal of each pillar; and operational principles, which describe specific steps that either governments or business should take toward either protecting human rights, respecting human rights, or providing effective remedies. Additionally, the Guiding Principles provide commentary after each of the thirty-one principles to give further explanation as to how governments and businesses might satisfy the commitments of each principle.

The Guiding Principles make only two references to efforts by other IGOs in the realm of business and human rights. First, in its discussion of the progress of the UN Framework, the introduction explains that the Framework “has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain.”⁷⁶ This significant collaboration between the SRSG and the OECD will be discussed further below.⁷⁷ The Guiding Principles’ second reference to an IGO is within principle twelve, which is one of the foundational principles for the

⁷³ For access to the reports and lists of participants at the various consultation periods, see *UN Secretary-General’s Special Representative on Business & Human Rights: Consultations, Meetings & Workshops*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops> (last visited June 30, 2014).

⁷⁴ UN Guiding Principles, *supra* note 7.

⁷⁵ Secretary-General’s Special Representative on Business & Human Rights: UN “Protect, Respect and Remedy” Framework – Guiding Principles, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> (last visited June 30, 2014).

⁷⁶ UN Guiding Principles, *supra* note 7, ¶ 7.

⁷⁷ *Infra* notes 97–111 & accompanying text.

corporate responsibility to respect human rights.⁷⁸ That principle explains that the ILO's Declaration on Fundamental Principles and Rights at Work is one of the international instruments to which businesses should look to understand what human rights they have the responsibility to protect.⁷⁹ From these two references it is clear that the SRSG, when creating the Guiding Principles, made at least a minimal conscious effort to promote cooperation and collaboration with other important IGOs that have an inherent influence on TNCs. Indeed, in an interview shortly after the release of the Guiding Principles, Mr. Ruggie, specifically mentioning the OECD and the IFC, said that he had been "been working with a number of other international institutions to make sure that their policies become aligned with the UN Framework and Guiding Principles."⁸⁰

b. *The Strengths and Weaknesses of the Guiding Principles*

While the UN Framework received near universal praise, by the time the Framework was translated into the Guiding Principles, some stakeholders—in particular human rights advocates—had become more critical. Specifically, human rights advocates found the Guiding Principles to be a weak mechanism that created no real obligations for corporations. As one Human Rights Watch article expressed, "[i]n effect, the [Human Rights Council] endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights Guidance isn't enough—we need a mechanism to scrutinize how companies and governments apply these principles."⁸¹ In a Joint Civil Society Statement made to the Human Rights Council in June, 2011, human rights activists expressed similar concerns that the Guiding Principles suffer from significant shortcomings and "will require more work on key issues such as accountability, the extraterritorial reach of laws and jurisdiction, and remedies for victims."⁸² These statements make it clear that members of

⁷⁸ UN Guiding Principles, *supra* note 7, ¶ 12 (principle twelve establishes that TNCs' responsibility to respect human rights requires that, at a minimum, TNCs comply with international instruments like the International Bill of Human Rights and "the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work").

⁷⁹ *Id.*

⁸⁰ John Ruggie, *Business and Human Rights: Together at Last? A Conversation with John Ruggie*, 35 FLETCHER F. WORLD AFF., 117, 121 (2011).

⁸¹ *UN Human Rights Council: Weak Stance on Business Standards*, HUMAN RIGHTS WATCH (June 16, 2011), <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.

⁸² *Human Rights Council: Resolution on International Business Needs Strengthening -- Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council* (June 15, 2011), HUMAN RIGHTS WATCH,

civil society were concerned that the Guiding Principles do not go far enough in obliging states and corporations to fulfill their human rights responsibilities. Such critics would like to see some type of enforcement mechanism or clearer means whereby corporations could be held accountable for human rights abuses.

Though the Guiding Principles are indeed voluntary guidelines and are in no way enforceable, they did succeed, unlike the failed Norms, in gaining support from both member-states of the United Nations and members of the business community. Therefore, perhaps the Guiding Principles' greatest weakness—their lack of enforceability—is also their greatest strength, for were they more demanding on businesses they likely would have met the same fate as the Norms.

As it stands, the United Nations lacks the ability to incentivize corporations and hold them accountable to the responsibilities outlined in the Framework and the Guiding Principles. It is possible, however, that the Guiding Principles could overcome this lack of incentives and enforceability and through their integration into other IGOs that have a stronger influence over TNCs and better accountability mechanisms. Therefore, though the UN Human Right Council is perhaps the most influential member of the human rights community, it could benefit from cooperation with other IGOs that can make up for the shortcomings of the Guiding Principles. Thus the following section describes five of the most influential economically oriented IGOs to determine what they have done to strengthen the impact of the Guiding Principles. As the following section explains, some IGOs have worked closely with the SRSG to promote the Guiding Principles and integrate them into their business and human rights endeavors. In some cases, these IGOs have successfully used their business influence to incentivize TNCs to live up to their Guiding Principle responsibilities and to create remedial systems when TNCs do not behave responsibly. However, more can be done by these IGOs to transform the Guiding Principles into a uniformly accepted system that benefits from the built-in incentive and enforceability mechanisms of some of the most influential IGOs.

III. ECONOMICALLY FOCUSED IGOs: WHAT, IF ANYTHING, IS HAPPENING IN THE REALM OF CORPORATE SOCIAL RESPONSIBILITY?

Though the interplay between business and human rights has been a topic of interest since at least the 1980s, it was not until the first decade of the twenty-first century that serious discussions about human rights abuses at the hands of corporations emerged. During that time when the CSR movement started to truly take form, scholars began discussing options for how corporations might become integrated into the international legal system and who should hold them accountable for their human rights responsibilities. In a widely cited article published in 2001, Steven Ratner proposes that at least four IGOs—the ILO, the OECD, the United Nations, and the World Bank—were “promising candidates for prescribing soft law” to regulate the human rights responsibilities of corporations.⁸³ Ratner also suggests that the WTO, with its “near-universal membership,” its status as the “leading global institution concerning international commerce,” and its recognition as an organization “capable of creating and overseeing a regime with enforcement mechanisms,” could prescribe and apply hard law for human rights obligations of corporations.⁸⁴

David Kinley and Junko Tadaka published a similar article in 2004, which discusses how various international institutions might adapt their roles to better regulate human rights responsibilities of TNCs.⁸⁵ The article compares the potential of the IMF, UN human rights bodies, World Bank, WTO, and ILO as “vehicles for the enforcement of the human rights responsibilities of corporations.”⁸⁶ After discussing the potential and limitations of each of these IGOs, Kinley and Tadaka conclude, “no single body can provide a comprehensive enforcement mechanism. Rather, the pursuit of enforcement must be targeted at the collective efforts of all institutions across their constituent fields, with each contributing their particular technical expertise and resources.”⁸⁷ This article provides evidence that early scholars envisioned a cooperative approach to solving the business-human rights dilemma—not an approach where the United Nations addressed the problem alone.

⁸³ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 536–37 (2001).

⁸⁴ *Id.* at 538.

⁸⁵ David Kinley & Junko Tadaka, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 995–1020 (2004).

⁸⁶ *Id.* at 1019.

⁸⁷ *Id.*

Surya Deva also wrote an article in the same time period, which argues more specifically that “the proposed international mechanism [for dealing with human rights violations of TNCs] should be based upon a partnership between the United Nations (U.N.) and the World Trade Organization (WTO) for the promotion of human rights in the new economic order.”⁸⁸ Deva’s article makes clear the advantage of the United Nations’ collaboration with an IGO that has a stronger enforcement mechanism and more direct ties to TNCs. These articles demonstrate that, at the time when corporate responsibility was at its inception, scholars believed that the United Nations should not pursue human rights guidelines for corporations on its own. Instead, the United Nations should collaborate with other IGOs—particularly those with greater participation in and influence over the global economic system.

Before moving on to a discussion of the economically oriented IGOs that could improve the effectiveness of the Guiding Principles and incorporate them into their human rights initiatives, it is important to briefly touch on the weaknesses of the United Nations as the leader of corporate social responsibility and why other IGOs may be able to overcome those weaknesses. First, though the United Nations leads the international community in the realm of human rights, it has little authority or influence over corporations. Thus when the United Nations’ Human Rights Council attempted to create a binding corporate social responsibility instrument—the UN Norms—TNCs and member-states would not accept its legitimacy as having authoritative power over corporate behavior. Second, as a result of their lack of direct influence over TNCs, the effectiveness of any United Nations instrument “significantly depends on state cooperation.”⁸⁹ Thus, being at least one step removed from TNCs, a United Nations instrument may struggle to be viewed as legitimate in the eyes of corporate leaders. Finally, the United Nations past attempts to intervene in the international economic system may come back to haunt it, since some scholars believe that “the UN’s authority in this area [has been] significantly tarnished in the eyes of [TNCs] and some Western states, particularly the United States, as a result of the debates of the 1970s and 1980s over the New International Economic Order and the planned UN Code of Conduct.”⁹⁰

⁸⁸ Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT’L L. 1, 2-3 (2003).

⁸⁹ Kinley & Tadaki, *supra* note 85, at 998.

⁹⁰ Ratner, *supra* note 83, at 536–37.

As a result of these weaknesses, the United Nations cannot work alone to create the ideal system of corporate responsibility or the incentive structure to motivate TNCs to comply with that system. It is apparent from the SRSGs efforts to collaborate with institutions like the OECD, ILO, and IFC that the SRSG is aware of the need for support from other IGOs. However, more can be done to involve IGOs in the efforts to establish the legitimacy of the Guiding Principles. Thus, what follows is an analysis of five economically oriented IGOs—the OECD, ILO, World Bank, ICC, and WTO⁹¹—to evaluate the measures that some of these IGOs have already taken to promote the Guiding Principles and what can be further done to ensure that the Guiding Principles become an authoritative mechanism for incorporating TNCs into the international human rights system.

a. OECD

The OECD, like the World Bank and the IMF, was a product of the post World War II international collaboration intended to help reconstruct Europe and prevent future economically motivated wars.⁹² Though initially

⁹¹ Conspicuously missing from this analysis is the International Monetary Fund (IMF). See Kinley & Tadaki, *supra* note 85, at 996 (because of the IMF's state-level macroeconomic and fiscal reform, it has little interaction with or influence over TNCs; thus, it is unlikely that the IMF will be instrumental in promoting corporate respect for human rights or that it will integrate the Guiding Principles into its policies); David Kinley, *Corporate Social Responsibility and International Human Rights Law*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 231, 236 (Ramon Mullerat, ed., 2011).

Despite the IMF's intransigent stance on human rights, some have argued that, at a minimum, the IMF could incorporate human rights considerations into its policy of "good governance." Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 766 (1999). Pursuant to its good governance policy, the IMF promotes good governance "when providing policy advice, financial support, and technical assistance to its member countries." *The IMF and Good Governance*, IMF, <http://www.imf.org/external/np/exr/facts/gov.htm> (last visited July 10, 2014). The IMF's approach to good governance "is to concentrate on those aspects of good governance that are most closely related to [its] surveillance over macroeconomic policies—namely, the transparency of government accounts, the effectiveness of public resource management, and the stability and transparency of the economic and regulatory environment for private sector activity." Michel Camdessus, Managing Director of the International Monetary Fund, *Fostering an Enabling Environment for Development*, Address at the High-Level Meeting of the UN Economic and Social Council, Geneva, Switzerland (July 2, 1997), available at <https://www.imf.org/external/np/speeches/1997/mds9710.htm>.

Thus, with its focus on state-level governance policies, the IMF's greatest potential for assisting the dissemination and implementation of the UN Guiding Principles is through pillar one—the state's duty to protect human rights. The IMF could promote the implementation of pillar one by requiring that its members states comply with their responsibilities under the Guiding Principles before receiving IMF funding or counseling. Because the remainder of the Article focuses on IGOs that could have a potential impact on the implementation of pillars two and three of the Guiding Principles, this will be the extent of the discussion on the IMF.

⁹² *History*, OECD, <http://www.oecd.org/about/history> (last visited June 30, 2014) (last visited June 30, 2014).

the OECD restricted its membership to European countries, it has expanded its membership to a total of thirty-four states committed to the ideals of democracy and market economy. These additional members include the United States, Canada, Japan, Mexico, Australia, South Korea, and Chile.⁹³ The OECD also has an “enhanced engagement program” with Russia, China, India, Brazil, Indonesia, and South Africa.⁹⁴ Collectively, these forty countries make up 80 percent of world trade and investment.⁹⁵

The OECD’s primary objective is to stimulate the global economic growth through the creation of agreements, standards, and recommendations, as well as through peer-review and economic monitoring programs.⁹⁶ As an organization focused on improving the global economy and enhancing foreign investment, the OECD’s policies have strong implications for TNCs—especially considering that its member-states make up the vast majority of TNC home states. Three of the OECDs standards have a particularly focused impact on TNCs: the OECD Principles of Corporate Governance, the Guidelines on Corporate Governance of State-Owned Enterprises, and the OECD Guidelines for Multinational Enterprise (OECD MNE Guidelines).⁹⁷ The OECD MNE Guidelines have been viewed as a particularly influential instrument for the CSR movement. Indeed, as former Secretary of State Hillary Clinton recently described, the OECD MNE Guidelines “have occupied a unique space within the world of corporate social responsibility . . . [bringing] together labor, civil society, and business to create the broadest possible consensus behind them.”⁹⁸ The OECD MNE Guidelines originated as part of the OECD’s 1976 Declaration on International Investment and Multinational Enterprise.⁹⁹ Though the OECD MNE Guidelines have evolved considerably since 1976, at their inception they were a novel concept in that they created “voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards.”¹⁰⁰

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *What We Do and How*, OECD, <http://www.oecd.org/about/whatwedoandhow/> (last visited June 30, 2014).

⁹⁷ For access to each of these sets of principles, see *Corporate Governance*, OECD, <http://www.oecd.org/daf/ca/oecdprinciplesofcorporategovernance.htm> (last visited June 30, 2014).

⁹⁸ Hillary Rodham Clinton, Secretary of State, Remarks: Commemoration of the 50th Anniversary of the OECD (May 25, 2011).

⁹⁹ OECD, *The OECD Declaration and Decisions on International Investment and Multinational Enterprise: Basic Texts 2* (2000), available at <http://www.oecd.org/daf/inv/investment-policy/ConsolidatedDeclarationTexts.pdf> (last visited June 30, 2014).

¹⁰⁰ *Id.* at 7.

The OECD MNE Guidelines have been periodically updated since 1976, and the 2000 version was the first to explicitly encourage TNCs to respect human rights.¹⁰¹ Though the 2000 version symbolized an important first step toward acknowledging the human rights responsibilities of TNCs, it was not until 2011 that the OECD published a version of the OECD MNE Guidelines¹⁰² that included an entire chapter on human rights aspects of business.¹⁰³ This significant progress was not solely the work of the OECD. Instead, as the UN SRSG noted in his April 2010 interim report to the UN Human Rights Council, he had “consulted with the [OECD] . . . [and as a result] [t]he OECD is currently revising its Guidelines for Multinational Enterprises.”¹⁰⁴ Indeed, the human rights section of the 2011 OECD MNE Guidelines states that its framework “draws upon the United Nations Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and is in line with the Guiding Principles for its Implementation.”¹⁰⁵

The OECD MNE Guidelines’ human rights chapter reiterates the UN Framework’s language of the state’s duty to protect human rights and business’s responsibility to respect human rights.¹⁰⁶ Also like the UN Framework, the OECD MNE Guidelines recommend that businesses implement policy commitments to respect all human rights and carry out appropriate due diligence to determine human rights impact at various points along their supply chains.¹⁰⁷ Finally, the OECD MNE Guidelines recommend that businesses cooperate with remediation processes when human rights abuses take place.¹⁰⁸ While in line with the UN Framework’s third pillar of providing effective remedies, the OECD MNE Guidelines provide little elaboration on what remediation processes should be available for victims of human rights abuses at the hands of corporations. The commentary does call for “cooperation with judicial or State-based non-judicial mechanisms,” as well as for operational-level grievance mechanisms.¹⁰⁹ The commentary also specifically refers to the OECD’s

¹⁰¹ Ashley L. Santner, *A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future*, 43 GEO. WASH. INT’L L. REV. 375, 382 (2011).

¹⁰² OECD, *OECD Guidelines for Multinational Enterprises* (2011 ed.), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf> [hereinafter 2011 OECD MNE Guidelines].

¹⁰³ Santner, *supra* note 101, at 382.

¹⁰⁴ Sarah A. Altschuller, Amy K. Lehr & Andrew J. Orsmond, *Corporate Social Responsibility*, 45 INT’L LAW. 179, 180 (2011), available at http://www.americanbar.org/content/dam/aba/publications/international_lawyer/til_45_1/corporate_social_responsibility_authcheckdam.pdf.

¹⁰⁵ 2011 OECD MNE Guidelines, *supra* note 102, at 31.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ *Id.* at 34.

National Contact Points¹¹⁰ as a potential non-judicial grievance mechanism.¹¹¹

In addition to recognizing business's duty to respect human rights, the OECD MNE Guidelines also recognize the state's duty to protect human rights.¹¹² Like the UN Framework, the OECD MNE Guidelines assert the independent nature of the state's duty to protect and the corporation's duty to respect, such that a state's failure to fulfill its duty "does not diminish the expectation that enterprises respect human rights."¹¹³ These and other statements make it clear that the human rights chapter of the OECD MNE Guidelines is wholly in line with the UN Framework and Guiding Principles.

Beyond the human rights chapter, the OECD MNE Guidelines provide extensive recommendations to TNCs in areas such as employment and industrial relations, the environment, bribery, science and technology, competition, and taxation.¹¹⁴ Thus the OECD MNE Guidelines go beyond the Guiding Principles to provide specific guidance for how corporations can behave more responsibly in a variety of contexts. Additionally, though the OECD MNE Guidelines are entirely voluntary, they are "supported by a unique implementation mechanism" known as National Contact Points (NCPs), which enhance the effectiveness of the OECD MNE Guidelines by "assist[ing] enterprises and their stakeholders to take appropriate measures to further the objectives of the Guidelines."¹¹⁵ The OECD maintains at least one NCP in forty-two countries, which are generally run by a government agency like the State Department.¹¹⁶ The NCPs create a quasi-judicial mechanism that "provide[s] a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines."¹¹⁷ Civil society groups or individuals can bring their grievances against corporations to an NCP, and the NCP will facilitate a voluntary conciliation process. One positive example of the NCPs' ability to resolve conflict occurred in Chile in 2002. Certain NGOs submitted a complaint to the Chilean NCP alleging that a Chilean TNC violated certain labor and environmental recommendations. Two years later, the conflict was resolved by means of a dialogue process, which concluded with the

¹¹⁰ See *infra*, notes 115–121 and accompanying text.

¹¹¹ 2011 OECD MNE Guidelines, *supra* note 102, at 34.

¹¹² *Id.* at 31-32.

¹¹³ *Id.* at 32.

¹¹⁴ See *id.* at 5 for the OECD MNE Guidelines' Table of Contents [hereinafter OECD National Contact Points].

¹¹⁵ *Id.* at 3.

¹¹⁶ OECD Guidelines for Multinational Enterprise: National Contact Points, OECD (Mar. 2012), available at <http://www.oecd.org/daf/inv/mne/NCPCcontactDetails.pdf>.

¹¹⁷ OECD National Contact Points, *supra* note 114.

parties “accept[ing] the procedure adopted by the NCP as well as most of the recommendations contained in the report of the NCP.”¹¹⁸

Similarly in 2008, the NCP for the United Kingdom resolved a complaint brought by Global Witness against a British mining company working in the Democratic Republic of Congo (DRC), Afrimex.¹¹⁹ Global Witness alleged that Afrimex “paid taxes to rebel forces in the [DRC] and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour, who work under unacceptable health and safety practices.”¹²⁰ After leading mediation sessions between Global Witness and Afrimex, the NCP submitted its final statement, which explicitly recommended that Afrimex implement the UN Framework’s due diligence policies.¹²¹ This illustrations shows that not only are the NCPs an effective non-judicial remedial system, but also that in recent years the OECD has promoted the UN Guiding Principles through the NCPs.

Not only does the OECD interact with TNCs through its NCPs, but it also supports a variety of other programs that impact TNCs through its Directorate for Financial and Enterprise Affairs.¹²² The Directorate works with member-states to implement policies in the areas of competition, corporate governance, anti-corruption, international investment, and financial markets.¹²³ Within these focus areas, the Directorate often consults with representatives of the business and financial sectors, and the ultimate policies that the Directorate implements are often binding on OECD member-states. Such policies are therefore binding on the TNCs whose home-states are members of the OECD.

In addition to the Directorate, the OECD officially recognizes the Business and Industry Advisory Committee to the OECD (BIAC) “as the representative body of the OECD.”¹²⁴ The BIAC promotes business interests to the OECD and is lead by industry leaders from OECD member-states. Through its executive board and various policy groups, the BIAC brings an additional level of direct contact between the OECD and leaders

¹¹⁸ OECD Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points, OECD (Nov. 22, 2011), *available at* <http://www.oecd.org/dataoecd/15/43/33914891.pdf>

¹¹⁹ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd (2008), *available at* <http://www.oecd.org/investment/mne/43750590.pdf>.

¹²⁰ *Id.* at 1.

¹²¹ *Id.* at 14.

¹²² OECD, *Secretary General’s Report to Ministers 2014*, <http://www.oecd.org/directorate-for-financial-and-enterprise-affairs>, <http://www.oecd.org/about/> (last visited June 29, 2014).

¹²³ *Id.*

¹²⁴ BIAC, ANNUAL REPORT 2011 at 3, *available at* http://www.biac.org/pubs/annual_reports/BIAC2011US.pdf (last visited July 9, 2014).

of TNCs. Thus it is evident that between the mediation system of the NCP, the policy work of the Directorate for Financial and Enterprise Affairs, and the business influence of the BIAC, the OECD has significant direct and indirect contact with TNCs. As a result, the OECD's support of the UN Guiding Principles has and will continue to make a meaningful contribution to the dissemination and implementation of the Guiding Principles. As a respected member of the international economic community, the OECD's support of the Guiding Principles makes them more legitimate in the eyes of TNCs and other economic actors.

This explanation of the OECD's efforts to collaborate with the UN SRSG show that the OECD is a strong example of an economically oriented IGO that has embedded the Guiding Principles into its already existing CSR framework. Additionally, because the OECD's involvement in the international business community is not limited to human rights issues, its MNE Guidelines provide an even more comprehensive standard than the Guiding Principles. Finally, through continued use and strengthening of the NCPs, the OECD may be able to provide a mechanism through which the Guiding Principles can achieve the third pillar goal of creating effective remedies.

b. ILO

Though it originally began as an independent entity in 1919, the ILO eventually became an agency of the United Nations.¹²⁵ As a labor agency closely tied to the United Nations, the ILO may not seem like the best fit for an Article discussing how the United Nations can collaborate with economically oriented IGOs. However, due to labor's obvious ties to business, the ILO's unique tripartite structure, and the many years that the ILO had dedicated to encouraging the responsible labor practices of TNCs, it is included in this Article. As a tripartite agency, the ILO brings together representatives of governments, employers, and workers for a distinctive approach to membership.¹²⁶ Each member State is represented by a delegation that consists of four members with equal rights: two governmental, one employer, and one worker representative. These delegations represent their member-states in the International Labour Conference—comparable to the UN General Assembly—and each individual member of a delegation votes independently at the annual

¹²⁵ *Origins and History*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited July 23, 2014).

¹²⁶ *Who We Are*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/who-we-are/lang--en/index.htm> (last visited July 20, 2014).

meetings.¹²⁷ With a distinct structure that facilitates cooperation between governments, labor, and business, the ILO stands uniquely positioned among United Nations affiliated agencies to influence the decisions of TNCs.

The ILO's most important instrument "for promoting labour standards and principles in the corporate world"¹²⁸ is its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration).¹²⁹ During the 1960s and 1970s, the ILO became concerned with the growth of TNCs and their influence on international labor activities. Thus in 1977, the ILO first promulgated the ILO MNE Declaration with the goal of creating international guidelines for TNC's labor policies.¹³⁰ Not only are the labor and social obligations of TNCs outlined in the ILO MNE Declaration, but those obligations of workers' groups, employers' organizations, and governments are also presented in the Declaration. The ILO MNE Declaration aims to "encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve" the potential negative consequences that may result from their activities.¹³¹ In an effort to encourage TNCs to acknowledge the human rights implications of their activities, the ILO MNE Declaration provides that TNCs, labor groups, employer organizations, and governments should respect key human rights instruments like the Universal Declaration on Human Rights.¹³²

After presenting these general principles, the ILO MNE Declaration is divided into four main sections: Employment, which encourages TNCs to actively promote employment opportunities so as to stimulate economic growth in both home and host countries;¹³³ Training, which motivates governments to work with TNCs to provide vocational training and guidance for employees;¹³⁴ Conditions of Work and Life, which urges governments to create and TNCs to support standards relating

¹²⁷ *International Labour Conference*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang--en/index.htm> (last visited July 20, 2014).

¹²⁸ *Multinational Enterprises (EMP/MULTI)*, INT'L LABOUR ORG., <http://www.ilo.org/empent/units/multinational-enterprises/lang--en/index.htm> (last visited July 20, 2014).

¹²⁹ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, INT'L LABOUR ORG. (2006), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [hereinafter ILO MNE Declaration].

¹³⁰ *Id.*

¹³¹ ILO MNE Declaration, *supra* note 129, ¶ 2.

¹³² *Id.* ¶ 8.

¹³³ *Id.* ¶¶ 13–28.

¹³⁴ *Id.* ¶¶ 29–32.

to wage, benefits, work conditions, minimum work ages, and health and safety;¹³⁵ and Industrial Relations; which encourages TNCs to provide consultations, grievance mechanisms, and dispute settlement, and to allow workers to freely associate and organize and to participate in collective bargaining.¹³⁶

The ILO MNE Declaration played an influential role in the creation of the UN Framework. As the SRSG stated in a 2010 speech before the International Labour Conference, “on matters of workers rights [contained in the UN Framework] I have simply referenced the ILO from the start.”¹³⁷ Indeed, the UN Framework twice references the ILO and the ILO MNE Declaration and urges states and corporations to look to the ILO’s core principles for labor standard guidance.¹³⁸ Clearly the SRSG collaborated with or at least sought guidance from the ILO when creating the UN Framework.

In addition to the SRSG’s effort to incorporate ILO principles into the UN Framework, the ILO has reciprocated that collaborative effort by promoting the Guiding Principles through the ILO MNE Declaration. Though the ILO MNE Declaration has not been updated since 2006—before either the UN Framework or Guiding Principles were published—the ILO’s Subcommittee on Multinational Enterprises meets regularly and reports to the Governing Body on efforts to promote and enhance the ILO MNE Declaration. In a November 2011 report to the Governing Body, the Subcommittee on MNE described its recent efforts to collaborate with IGOs and other international organizations as a means of promoting the ILO MNE Declaration.¹³⁹ Among a variety of other international standards, this report provided a detailed analysis of the UN Framework and Guiding Principles. The report discussed the ILO’s involvement in the consultation and commentary processes, and explained the implications of the Guiding Principles for the ILO.¹⁴⁰ Though the report praised the Guiding Principles for the “significant visibility [they give] to the fundamental principles and

¹³⁵ *Id.* ¶¶ 33–40.

¹³⁶ *Id.* ¶¶ 41–59.

¹³⁷ Remarks by John Ruggie, Special Representative of the Secretary-General on Business and Human Rights, Remarks at the International Labour Conference: The “Protect, Respect and Remedy” Framework: Implications for the ILO (June 3, 2010), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/genericdocument/wcms_142560.pdf.

¹³⁸ UN Framework, *supra* note 130, ¶¶ 23, 58.

¹³⁹ Int’l Labour Org., Policy Development Section, Multinational Enterprise Segment, 312th Sess., Nov. 2011 GB.312/POL/13 (Nov. 2011) *Update on Strategic Priorities 2010–11, Including Promotion of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in Collaboration With Intergovernmental and Other International Organizations*.

¹⁴⁰ *Id.* ¶¶ 4–9.

rights at work,”¹⁴¹ the report also cautioned about a lack of coordination, stating:

the Guiding Principles do not establish a mechanism for coordination with the ILO in this regard nor do they refer to the ILO MNE Declaration. At an operational level, the Framework and Guiding Principles thus risk causing confusion about what is within the mandate of the UN Human Rights Council and within the ILO. In this regard, the Office has informally agreed with the Office of the High Commissioner for Human Rights to pursue cooperation and coordination to ensure that technical issues are addressed within each agency’s respective mandate.¹⁴²

Since the Subcommittee on MNE released this report, the SRSG has taken at least one step toward greater coordination with the ILO. As explained in a March 5, 2012 concept note, the ILO described its plans to work with the SRSG’s working group and members of civil society to create a Child Labour Guidance Tool.¹⁴³ This project is intended to “provide guidance on how companies can avoid child labour and contribute to child labour remediation, whether in their own operations or in their supply chains, through appropriate policies, due diligence and remediation processes.”¹⁴⁴ The UN Framework and Guiding Principles will serve as the guide for this project, “particularly as it pertains to companies’ responsibilities in contributing to the elimination of child labour.”¹⁴⁵

Though the ILO MNE Declaration is the ILO’s most relevant instrument for creating international standards for TNCs, a second ILO Declaration, the Declaration on Fundamental Principles and Rights at Work (the Rights at Work Declaration),¹⁴⁶ also deserves some consideration. As previously mentioned,¹⁴⁷ the SRSG referred to the Rights at Work Declaration as an international instrument that TNCs should turn to in order to understand their human rights obligations.¹⁴⁸ Like the Universal

¹⁴¹ *Id.* ¶ 9.

¹⁴² *Id.*

¹⁴³ *The UN “Protect, Respect and Remedy” Framework and Child Labour Guidance Tool*, INT’L LABOUR ORG. (Mar. 5, 2012), http://www.ilo.org/ipec/Action/CSR/WCMS_174981/lang--en/index.htm.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁴⁷ *Supra* notes 78–79 and accompanying text.

¹⁴⁸ UN Guiding Principles, *supra* note 7, ¶ 12.

Declaration on Human Rights,¹⁴⁹ the Rights at Work Declaration presents a set of basic human rights and broadly declares that member-states have an obligation to promote certain rights. The Declaration limits its reach to four rights of workers: “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”¹⁵⁰ Unlike the Guiding Principles or the ILO MNE Declaration, the Rights at Work Declaration does not develop any details on the steps governments or corporations can take toward accomplishing the goals of this Declaration. Thus, while it is a useful tool for understanding the rights that the ILO strives to promote, it is not as useful as the ILO MNE Declaration for understanding how IGOs like the ILO have incorporated the ideas of the Guiding Principles into their CSR endeavors.

The ILO has evidently played a meaningful role in the creation of the UN Framework and Guiding Principles, and has continued to collaborate with the SRSG’s efforts to promote the Guiding Principles. This is perhaps not surprising since the ILO is technically a specialized agency of the United Nations. Despite the ILO’s relatively strong presence at the various stages of the Guiding Principles’ development, the ILO has made calls for greater coordination between the two agencies. Indeed, though the 2008 UN Framework explicitly mentioned the ILO MNE Declaration, the 2011 Guiding Principles do not. This omission could lead to confusion about where the ILO MNE Declaration fits within the Guiding Principles’ goals. Therefore, it appears that even an IGO with the closest of ties to the United Nations and its Human Rights Council sees the need for even greater uniformity among the relevant actors in their efforts to promote international corporate responsibility.

c. *World Bank Group*

The World Bank Group, a conglomerate of five financial institutions,¹⁵¹ is an IGO with the goal of “reduc[ing] poverty and support[ing] development.”¹⁵² This economic priority, while seemingly

¹⁴⁹ *ILO Declaration on Fundamental Principles and Rights at Work*, INT’L LABOUR ORG. June 1998, 37 I.L.M. 1237 (1998), available at <http://www.ilo.org/public/english/standards/decl/declaration/index.htm>.

¹⁵⁰ *Id.*

¹⁵¹ The International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID) are the five institutions that make up the World Bank Group. See *About Us: The World Bank Group*, THE WORLD BANK, <http://www.worldbank.org/en/about> (last visited June 29, 2014).

¹⁵² *Id.*

unrelated to human rights, actually has a direct tie to such internationally accepted human rights like the right to development and the right to an adequate standard of living.¹⁵³ The Bank strives to achieve its illusive goal by implementing development projects in the world's least developed countries, and each of the Bank's five separate sub-institutions tackles economic development through different approaches. The International Financial Corporation (IFC), one of those five sub-institutions, approaches the problem of global poverty by providing financial resources for private enterprise development.¹⁵⁴ In FY2011 the IFC invested over \$12 billion USD in hundreds of private sector projects throughout the developing world.¹⁵⁵ To receive IFC funding, a project must "[b]e located in a developing country that is a member of IFC; [b]e in the private sector; [b]e technically sound; [h]ave good prospects of being profitable; [b]enefit the local economy; and [b]e environmentally and socially sound, satisfying IFC environmental and social standards as well as those of the host country."¹⁵⁶ With small businesses as the direct recipients of its aid programs, the IFC is the World Bank Group's obvious entity for implementing a CSR initiative.

The IFC has made considerable strides toward encouraging the social responsibilities of its aid recipients. As noted above, one of the criteria for a business seeking IFC funding is that it is "environmentally and socially sound."¹⁵⁷ The IFC measures compliance with this criterion through its Performance Standards on Environmental and Social Sustainability (Performance Standards).¹⁵⁸ Initially adopted in 2006, the Performance Standards "define clients' roles and responsibilities for managing their projects and the requirements for receiving and retaining IFC support."¹⁵⁹

¹⁵³ See ROGER NORMAND AND SARAH ZAIDA, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 312 (2008); G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, art. 25 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter Universal Declaration].

¹⁵⁴ *IFC's Vision, Values, & Purpose*, INT'L FINANCIAL CORP., http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc/vision (last visited July 10, 2014).

¹⁵⁵ *IFC Investment Services*, INT'L FINANCIAL CORP., http://www1.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/What+We+Do/Investment+Services/ (last visited July 10, 2014).

¹⁵⁶ *How to Apply for Financing*, INT'L FINANCIAL CORP., http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/what+we+do/about_ifc_financing (last visited July 23, 2014).

¹⁵⁷ *Id.*

¹⁵⁸ *Performance Standards on Environmental and Social Sustainability*, INT'L FINANCE CORP. (2nd ed. Jan. 1, 2012), available at http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES [hereinafter Performance Standards].

¹⁵⁹ *IFC Sustainability: Performance Standards and Guidance Notes*, INT'L FINANCE CORP. (2006 ed.),

Within the instrument are eight specific standards for: (1) social and environmental assessment and management systems; (2) labor and working conditions; (3) pollution prevention and abatement; (4) community health, safety and security; (5) land acquisition and involuntary resettlement; (6) biodiversity conservation and sustainable natural resource management; (7) indigenous peoples; and (8) cultural heritage.¹⁶⁰

Though the Performance Standards have generally been well received, human rights groups criticized the 2006 edition for its “lack of due diligence and oversight and an over reliance on self-monitoring,” uneven implementation, and other human rights gaps.¹⁶¹ Thus, in 2010 the IFC began revising the Performance Standards and consulted with the UN SRSG to incorporate the ideas of the UN Guiding Principles into the Performance Standards.¹⁶² In 2012 the IFC adopted a new edition of the Performance Standards that aims to overcome the shortcomings of the earlier edition.

Though the 2012 Performance Standards do not explicitly mention the SRSG, the UN Framework, or the Guiding Principles, the ideas of the UN Framework are embedded into the standards. For example, though the term “human rights” was never mentioned in the 2006 edition, the 2012 Performance Standards reference human rights throughout the document, and the introduction explicitly states that “[b]usiness should respect human rights.”¹⁶³ The introduction goes on to explain that this obligation “means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to.” Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations.¹⁶⁴ Additionally, like the Guiding Principles, the Performance Standards require that companies exercise due diligence to ensure they are not involved in any human rights abuses.¹⁶⁵ The Performance Standards require companies receiving IFC

http://www.ifc.org/wps/wcm/connect/corp_ext_content/tobedeleted/projectglossary/projectglossary (last visited July 20, 2014).

¹⁶⁰ *IFC Policy on Environmental and Social Sustainability*, INT’L FINANCE CORP. (Jan. 1, 2012),

http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

¹⁶¹ Adrienne Margolis, *Equator Principles*, 6 IN-HOUSE PERSP. 13, 14–15 (2010).

¹⁶² U.N. Secretary-General, On the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, ¶ 13, U.N. Doc. A/HCR/14/27 (Apr. 9, 2010).

¹⁶³ *Performance Standards*, *supra* note 158, ¶ 3.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

funding to submit risk and impact assessments of their projects, as well as establish a social and environmental policy intended to “guide the project to achieve sound environmental and social performance.”¹⁶⁶ Beyond the due diligence, assessment and management of environmental risk, social risk and impact requirements, the other seven performance standards elaborate on specific obligations of corporations to ensure their IFC projects do not overly burden the environment or negatively impact the human rights of those impacted by the projects.

Because corporations seeking funding from the IFC must comply with the Performance Standards, the IFC stands in a powerful position to influence corporate behavior. This influence may be limited, however, because IFC beneficiaries are generally underfunded corporations from developing countries. This means the IFC and its Performance Standards will likely have a negligible impact on large TNCs based in wealthy nations. However, because the business community in the developing world is often either overlooked or hard to monitor, the IFC’s Performance Standards make an important contribution to the CSR movement by providing incentives for responsible behavior to an otherwise hard-to-reach group. Additionally, many of the recipients of IFC funding likely partner or interact with larger TNCs on some level, and therefore, their compliance with the IFC performance standards may “trickle up” and influence the behavior of the broader global business community. Therefore, by integrating the ideas of the UN Framework and Guiding Principles into the Performance Standards, the IFC has been a positive factor in the efforts to create uniform acceptance of the SRSG’s work and to ensure that the Guiding Principles reach businesses of all sizes within countries of all levels of development.

Beyond the Performance Standards, additional collaboration between the SRSG and the IFC is evidenced through a 2009 joint paper titled *Stabilization Clauses and Human Rights*.¹⁶⁷ As part of his mandate, the SRSG conducted research on a variety of corporate topics to determine their impact on human rights. In this joint research project with the IFC, the SRSG evaluated the human rights impact of a common provision of investment contracts between TNCs and host countries known as stabilization clauses. These clauses allow TNCs to reduce the risk of investing in a host country by protecting the TNC from any future changes in the host country’s laws. Mostly used to protect TNCs from risks like

¹⁶⁶ *Id.* ¶¶ 6–12.

¹⁶⁷ U.N. Secretary-General, *Stabilization Clauses and Human Rights* (May 27, 2009), available at [http://ifcext.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://ifcext.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf).

“nationalization, expropriation, or the obsolescence bargain,”¹⁶⁸ stabilization clauses may also shield TNCs from adapting to new social and human rights policies. The joint study concluded that “[e]vidence supports the hypothesis that some stabilization clauses can be used to limit a state’s action to implement new social and environmental legislation to long-term investments.”¹⁶⁹ The report also presented three ideas for addressing this problem: first, creating “guidelines on contracting and human rights,” second, creating “incentives to enable human rights compliant” Host Government Agreements, and third addressing “the apparent capacity gap among host states, particularly from developing states.”¹⁷⁰ Finally, the report discussed the SRSG’s plans to further evaluate this issue and incorporate it into his work with the UN Framework.¹⁷¹

It is clear that the IFC has not only promoted its own corporate social responsibility initiatives, but has also been involved in the creation of the Guiding Principles and has used the UN Framework to update and improve its CSR instruments. With its direct relationship with corporations in developing countries, the IFC has the potential to incentivize such companies, which have normally slipped through the cracks of the CSR movement, to improve their human rights policies, and to implement the Guiding Principles. Now, as the SRSG has turned his attention toward the implementation and dissemination of the Guiding Principles, the IFC should participate in that process by explicitly endorsing the Guiding Principles and requiring the businesses that receive its funding to implement the business standards contained in the Guiding Principles.

Like the OECD through its NCPs, the World Bank has established a grievance mechanism, the Office of Compliance Advisor/Ombudsman (CAO), whereby communities negatively affected by IFC and other World Bank projects can submit complaints.¹⁷² When the CAO receives a complaint from an affected community, it performs a conflict assessment and oversees dispute resolution meetings and, if necessary, performs compliance audits.¹⁷³ Unlike the OECD’s NCPs, the CAO has not begun using the UN Guiding Principles directly in any of its dispute resolution endeavors; however, it does look to the IFC’s Performance Standards when assessing a complaint, and since the 2011 version of the Performance Standards integrated many of the standards of the UN Guiding Principles, in

¹⁶⁸ *Id.* at vii.

¹⁶⁹ *Id.* at x.

¹⁷⁰ *Id.* at xi.

¹⁷¹ *Id.*

¹⁷² *About CAO*, CAO, <http://www.cao-ombudsman.org/about/> (last visited July 20, 2014).

¹⁷³ *How We Work*, CAO, <http://www.cao-ombudsman.org/howwework/> (last visited July 20, 2014).

an indirect way the CAO is promoting the implementation of the Guiding Principles.

Beyond the IFC's Performance Standards and the CAO's assessment of IFC projects, the World Bank has demonstrated additional alignment with the UN Guiding Principles through its Equator Principles. The Equator Principles were created by the IFC and nine international banks as a "a credit risk management framework for determining, assessing and managing environmental and social risk in Project Finance"¹⁷⁴ transactions."¹⁷⁵ The Equator Principles primarily provide "a minimum standard for due diligence to support responsible risk decision making."¹⁷⁶ Seventy-nine private banks and investment intuitions have adopted the Equator Principles,¹⁷⁷ and as a result the Equator Principles are succeeding at bringing the financial sector into the CSR movement.

As previously mentioned,¹⁷⁸ in the 2008 UN Framework the SRSF explicitly mentioned the Equator Principles, and called on them to "develop a grievance process," so as to provide greater access to remedies against human rights abuses by corporations.¹⁷⁹ In 2013, a new version of the Equator Principles was released that makes explicit reference to the UN Guiding Principles. As explained in the Preamble, the Equator Principle Financial Institutions recognized "that [their] role as financiers affords [them] opportunities to promote responsible environmental stewardship and socially responsible development, including fulfilling [their] responsibility to respect human rights by undertaking due diligence."¹⁸⁰ By acknowledging and striving to fulfill their human rights obligations through the Equator Principles, members of the global financial sector have demonstrated their commitment to supporting the UN Guiding Principles.

¹⁷⁴ *What is Project Finance*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/frequently-asked-questions/42-about/frequently-asked-questions/18> (last visited July 20, 2014) (The Equator Principles define Project Finance as "a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. Project Finance transactions play an important role in financing development throughout the world. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure.").

¹⁷⁵ *About the Equator Principles*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/about-ep/about-ep> (last visited July 20, 2014).

¹⁷⁶ *Id.*

¹⁷⁷ *Members and Reporting*, EQUATOR PRINCIPLES, <http://www.equator-principles.com/index.php/members-reporting/members-and-reporting> (last visited July 20, 2014).

¹⁷⁸ See *supra*, note 59 and accompanying text.

¹⁷⁹ UN Framework, *supra* note 30, ¶ 100.

¹⁸⁰ *Equator Principles III*, EQUATOR PRINCIPLES ASS'N, http://equator-principles.com/resources/equator_principles_III.pdf (last visited July 20, 2014).

Between the 2011 IFC Performance Standards, the Equator Principles, and other collaborative efforts, it is apparent that the World Bank recognizes the importance of supporting the UN Guiding Principles. With the World Bank's direct business ties, its cooperation with the United Nations is an important component of the effort to legitimize and implement the Guiding Principles. By incentivizing IFC aid recipients to comply with Guiding Principles and by using the CAO as a grievance mechanism for those harmed by IFC aid recipients, the World Bank is bolstering the goals of both pillar two and three—corporate respect and effective remedies—of the UN Framework.

d. ICC

The International Chamber of Commerce (ICC) is perhaps the most prominent global business organization. Though technically not an IGO since its members are businesses rather than states, it is modeled after an IGO and behaves like one in many respects. Indeed, while similar to a corporation in that it is directed by a chairman and executive board, its main governing body is the ICC World Council, which “is the equivalent of the general assembly of a major intergovernmental organization. The big difference is that the delegates are business executives and not government officials.”¹⁸¹ Throughout the years the ICC has created several influential uniform business codes that regulate elements of business transactions such as contracts for international sale of goods¹⁸² and letters of credit,¹⁸³ and the ICC continually promulgates international business policies.

With business executives from around the world as its members and its influential business codes and policies, the ICC has a direct link to TNCs, and therefore it has immense potential to influence TNC behavior and respect for human rights. In recent years, the ICC has used its status as a global business leader to promote corporate responsibility. In 2002 the ICC released *Business in society: making a positive and responsible contribution*, expressing the opinion that “[t]he role of business in an open market economy system is to create wealth for shareholders, employees, customers, and society at large,” while at the same time “strongly encourage[ing] voluntary corporate responsibility initiatives by

¹⁸¹ *Organization*, ICC BELGIUM, <http://www.iccbelgium.be/index.php/quis/organization> (last visited July 20, 2014).

¹⁸² See Int'l Chamber of Commerce, *Incoterms 2010: ICC Official Rules for the Interpretation of Trade Terms* (2010).

¹⁸³ See International Chamber of Commerce, *Uniform Customs and Practices for Documentary Credits (UCP 600)*, ICC Publication No. 600 (July 1, 2007).

companies.”¹⁸⁴ Within the statement the ICC laid out “nine practical steps to responsible business conduct” that more or less defined the ICC’s basic idea about corporations’ social responsibilities.¹⁸⁵

Since 2002, the ICC has continued to make statements publicizing its opinion on business and human rights. For example, in 2007 the ICC publicized a policy statement on the United Nation’s role in promoting corporate responsibility.¹⁸⁶ Reemphasizing its position that a corporation’s most important global contribution is to increase wealth, it asserted that the United Nations could play a positive role in promoting corporate responsibility by supporting voluntary initiatives and by promoting stronger government policies in developing countries.¹⁸⁷ In 2008, mostly in response to the release of the UN Framework, the ICC began acknowledging specifically the connection between human rights and business.¹⁸⁸ In its 2008 statement, the ICC praised the SRSR for pointing out that while business has human rights obligations, they are distinct from and secondary to those of governments.¹⁸⁹ In this statement the ICC also addressed its role to promote “best practices to its members” through tools like the *ICC 9 steps to responsible business conduct* and the *ICC guide to responsible sourcing*.¹⁹⁰

Most recently, the ICC has participated more actively in the CSR movement. In January of 2011, the ICC, together with the BIAC and the International Organization of Employers (IOE) provided joint commentary to the SRSR on the then draft of the Guiding Principles.¹⁹¹ In that commentary, the organizations expressed their “commitment to working with the SRSR and the UN Human Rights Council” and that “[b]usiness is committed to meeting its responsibility to respect human rights.”¹⁹² The joint commentary went on to elaborate on many suggestions for clarification and improvement of the Guiding Principles. Several of these

¹⁸⁴ *Business in Society: Making a Positive and Responsible Contribution*, ICC, <http://www.iccwbo.org/products-and-services/trade-facilitation/9-steps-to-responsible-business-conduct/> (last visited July 20, 2014).

¹⁸⁵ *Id.*

¹⁸⁶ *The Role of the United Nations in Promoting Corporate Responsibility*, ICC (June 21, 2007), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2007/The-role-of-the-United-Nations-in-promoting-corporate-responsibility/>.

¹⁸⁷ *Id.* at 1.

¹⁸⁸ *ICC Views on Business and Human Rights*, ICC (Dec. 10, 2008), available at http://www.iccindiaonline.org/policy_state/HR.pdf.

¹⁸⁹ *Id.* at 1.

¹⁹⁰ *Id.* at 4.

¹⁹¹ ICC-IOE-BIAC Joint Submission on UN SRSR Draft Guiding Principles on Business and Human Rights (Jan. 26, 2011), available at <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ioe-icc-biac-comments-on-guiding-principles-26-jan-2011.pdf>.

¹⁹² *Id.* at 1.

suggestions reflect the ICC's position that state's have the primary duty to protect and respect human rights, and that as a voluntary code, the Guiding Principles should not use mandatory language in regard to any of business's human rights obligations.¹⁹³

In December of 2011, after the Guiding Principles had been unanimously accepted at the United Nations, the ICC, IOE and BIAC sent a similar joint commentary, praising and endorsing the final version of the Guiding Principles.¹⁹⁴ The organizations once again expressed the commitment of the business community to "meeting its responsibility to respect human rights" and to working with the United Nations bodies and the various other stakeholders "to advance the dissemination and implementation of the framework and the Guiding Principles in a way that creates a sense of ownership of the issues among [its] members."¹⁹⁵ The joint statement goes on to provide recommendations to the UN Working Group on Business and Human Rights including suggestions as to how the Working Group should proceed and what should guide the Working Group, general comments about the UN Framework's three pillars, and specific recommendations within each pillar.¹⁹⁶ Overall, this joint commentary expresses support of the Guiding Principles by the ICC and other members of the global business community and willingness to assist in seeing that the Principles are broadly accepted and applied.

While the ICC may not have been as actively involved in the CSR movement in the past, it has recently demonstrated broad support of the SRSG's work and the Guiding Principles. As the leading international business organization, the ICC's continued support of the Guiding Principles is critical since the ICC has significant influence over the actions of TNCs. The ICC has the ability to create powerful incentives and to put pressure on its members and other TNCs so that they will fulfill the business responsibilities described in the Guiding Principles. Additionally, because the ICC manages the International Court of Arbitration,¹⁹⁷ it has additional potential to provide a grievance mechanism against any of its members that fail to live up to their human rights responsibilities. Though the International Court of Arbitration currently only resolves disputes

¹⁹³ *Id.* at 2, 8.

¹⁹⁴ *ICC-IOE-BIAC Joint Recommendations to the United Nations Working Group on Business & Human Rights* (Dec. 8, 2011), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/Joint-Recommendations-to-the-United-Nations-Working-Group-on-Business-Human-Rights/>.

¹⁹⁵ *Id.* at 1.

¹⁹⁶ *Id.*

¹⁹⁷ *ICC International Court of Arbitration*, ICC, <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/> (last visited July 20, 2014).

between businesses, with the ICC's willingness to promote the implementation of the UN Framework and the Guiding Principles, including pillar three—effective remedies—perhaps at some point the ICC will open the International Court of Arbitration to human rights disputes. Thus, like the OECD, the ILO, and the IFC, the ICC has used its influence to turn the Guiding Principles into a more authoritative instrument that is moving toward universal and uniform acceptance.

e. WTO

As evidenced from the above discussions, the OECD, ILO, IFC, and ICC have made important strides toward integrating the Guiding Principles into their already existing CSR instruments and toward demonstrating their overall support and willingness to promote the implementation of the Guiding Principles. Though the Guiding Principles have not yet become the singular CSR authority, the organizations discussed above have legitimized the Guiding Principles by using their influence and ties to the global business community to incentivize and put proper amounts of pressure on TNCs to fulfill their human rights responsibilities. Despite all of this positive action, because each of these organizations relies mostly on soft power persuasion and incentives, none has the ability to correct the biggest criticism of the Guiding Principles—that is, to turn the Guiding Principles into a mandatory instead of voluntary code of conduct.

Often considered the most commanding IGO due to its binding rule-making powers and its built in enforcement mechanism—the Dispute Settlement Body¹⁹⁸—the WTO may have the greatest potential to transform the Guiding Principles into the ultimate authoritative code of business conduct. The WTO directly exercises its authority over its 154 member-states and therefore has only indirect influence over TNCs. But because TNCs drive free trade, they are often regarded as the “imminent and unequivocal beneficiaries of the WTO agreements.”¹⁹⁹ Furthermore, because all of the member-states of the WTO are also members of the United Nations, they all have some human rights obligations and “should therefore promote and protect human rights during the negotiation and implementation of international rules on trade liberalization.”²⁰⁰

Indeed, the human rights community has continually pushed for greater integration of human rights into trade policies. As the UN High

¹⁹⁸ See *Dispute Settlement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb (last visited July 20, 2014).

¹⁹⁹ Kinley & Tadaki, *supra* note 85, at 1006 (internal quotation marks omitted).

²⁰⁰ Rep. of the High Comm'r, Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2002/9, 54th Sess., Provisional Agenda Item 4, P 5 (2002).

Commissioner on Human Rights expressed in a 2010 statement on the human rights dimensions of trade, “to level the playing field and foster equitable development strategies, there is a clear need for an international trade regime to incorporate all human rights.”²⁰¹ Current WTO leadership appears to acknowledge the ability of trade policies to align with human rights policies. Pascal Lamy, the current Director-General of the WTO, recently expressed his sentiment that “human rights and trade rules, including WTO rules, are based on the same values: individual freedom and responsibility, non-discrimination, rule of law, and welfare through peaceful cooperation among individuals.”²⁰² Indeed, the preamble to the WTO Charter explicitly states that trade should be conducted in a way that “rais[es] standards of living,” leads to “sustainable development,” and promotes “full employment.”²⁰³ Each of these WTO Charter goals embodies human rights concepts.

Thus the core mission of the WTO—to increase global wealth through trade—is not at odds with human rights, despite the frequent strife between the trade and human rights advocates. Though the WTO has not generally been an outspoken promoter of human rights, it has made human rights accommodations in the past. Perhaps the WTO’s most well-known human rights concession took the form of the Doha Declaration, which abridged member-state obligations under the much disputed Trade Related Aspects of Intellectual Property (TRIPS) Agreement.²⁰⁴ In the Doha Declaration, the WTO acknowledged the concern that international protection of intellectual property could harm certain human rights like access to healthcare and essential medicines. The Doha Declaration therefore created some flexibility in the application of the TRIPS principles by allowing member-states to overlook intellectual property rights that have the potential to impinge on access to essential medicines.²⁰⁵ Additionally, some have argued that by merely incorporating intellectual property rights into its powerful free trade system, the WTO made itself vulnerable to being stretched to include other rights. As one scholar put it, “[t]he WTO opened up a Pandora’s box when it became involved in intellectual property rights.

²⁰¹ Navanethem Pillay, United Nations High Commissioner for Human Rights, Statement at UNITAR High Level Panel on Human Rights and Trade (Geneva, Sept. 27, 2010), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10380&LangID=E>.

²⁰² *Lamy Calls for Mindset Change to Align Trade and Human Rights*, WTO NEWS (Jan. 13, 2010), http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm.

²⁰³ Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments--Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994).

²⁰⁴ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

²⁰⁵ *Id.*

If IP rights are a fit subject for the WTO, why not labour rights, or human rights?²⁰⁶

The WTO also demonstrated a willingness to support human rights through its Kimberley Process waiver system. The Kimberley Process is an effort to eliminate the trade in diamonds that fund conflicts in countries like Sierra Leone and the Democratic Republic of Congo.²⁰⁷ After the Kimberley Process was initiated, the WTO eventually agreed to a waiver system, whereby WTO member-states could waive their obligation of equal trading treatment, thereby allowing members to limit their diamond trade to only non-conflict diamonds certified under the Kimberley Process.²⁰⁸ This waiver system demonstrates the WTO's willingness to bend its free trade principles to undermine the trade of goods that have negative human rights implications.

Finally, the General Agreement on Trade and Tariffs (GATT),²⁰⁹ which is the WTO's key trade-regulating instrument, contains certain exceptions to its general free trade principles. Specifically, under Articles XX of the GATT, member-states may impose "non-tariff barriers" to trade whenever necessary to "protect public morals . . . protect human, animal or plant life or health . . . to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]," or which relate "to the products of prison labour," among other exceptions.²¹⁰ Though the human rights dimensions of these exceptions have not been fully tested, scholars and human rights advocates assert that WTO member-states could justify trade restrictions based on human rights violations through Article XX.²¹¹

These examples make it clear that the WTO is not entirely opposed to supporting human rights initiatives through its free trade instruments. Despite being well positioned to make additional human rights accommodations by bolstering the UN Guiding Principles, the WTO has

²⁰⁶ Phillip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. OF INT'L L. 815, 818 (2002) (quoting John E. Stiglitz, *A Fair Deal for the World: A Review of "On Globalization"* by George Soros, NY REV. BKS. (2013), available at <http://www.nybooks.com/articles/15403>)).

²⁰⁷ *KP Basics*, KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/en/about> (last visited July 1, 2014).

²⁰⁸ *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds WT/L/518*, WTO (May 15, 2003), available at http://www.wto.org/english/thewto_e/gcounc_e/meeting_july05_e.htm; see also ISABEL FEICHTNER, *THE LAW AND POLITICS OF WTO WAIVERS* 152–157 (2012).

²⁰⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 St at. A-11, 55 U.N.T.S. 194.

²¹⁰ *Id.* at art. XX.

²¹¹ Office of the UN Higher Commissioner for Human Rights, *Human Rights and World Trade Agreements: using General Exception Clauses to Protect Human Rights* (Nov. 2005), HR/PUB/05/5 at 6, available at <http://www.ohchr.org/Documents/Publications/WTOen.pdf>.

remained completely silent about both the UN Framework on Business and Human Rights and the Guiding Principles. The WTO has made no indication that it plans to endorse the Guiding Principles or participate in their dissemination or implementation in any way. This omission by the WTO is perhaps the greatest gap in the validation and international promotion of the Guiding Principles by the global economic community.

Instead of remaining silent, the WTO could make a variety of moves, some small, some large, to show its support of the Guiding Principles and to increase their overall acceptance and effectiveness. First, the WTO could make a bold statement by explicitly committing to uphold the Guiding Principles in its trade negotiations and agreements, and to allow member-states to waive equal trading obligations against countries and TNCs that do not live up to their human rights responsibilities. The WTO could do this through a waiver system similar to its Kimberley Process waiver, or it could simply allow states to invoke Article XX exceptions and impose trade barriers against states and TNCs that do not comply with the Guiding Principles. Second, instead of enforcing a strict waiver or Article XX exception, the WTO could allow member-states to use a preference system, such as public procurement systems, whereby member-states could award government contracts only to companies that fulfill their human rights obligations.²¹² Third, the WTO could also allow member-states to create bilateral trade agreements that include human rights provisions. Finally, though least likely, the WTO could pass a binding agreement that would require member-states to satisfy their human rights responsibilities under the Guiding Principles, and could then use its Dispute Settlement Body to enforce such an agreement.

Though many of these options are extreme, and thus it is highly unlikely that the WTO will consider them, the WTO has the potential to take the Guiding Principles to a higher level of global authority through simple options like permitting trade preferences for Guiding Principle compliant TNCs or supporting human rights provisions in bilateral trade agreements. Because the WTO has more binding powers over its member-states than any of the other IGOs discussed in this Article, its support would help the Guiding Principles overcome their greatest weakness—their lack of enforceability.

IV. CONCLUSION

A synthesis of the above discussions reveals that while the OECD, ILO, the World Bank (through the IFC), and ICC have taken significant steps toward integrating the Guiding Principles into their human rights

²¹² Susan Ariel Aaronson, *How Policymakers Can Help Firms Get Rights Right* 10 (2012) (unpublished manuscript).

instruments, the WTO has not made a similar effort. Though the OECD, ILO, IFC, and ICC are well positioned to incentivize TNCs to comply with the Guiding Principles and to provide grievance mechanisms when TNCs fail to comply, their support alone falls short of transforming the Guiding Principles into an enforceable instrument. The WTO, with its strong enforcement mechanism and authoritative influence over global trade, could arguably take the Guiding Principles to the next step—beyond merely providing incentives to TNCs—and turn the Guiding Principles into a mandatory agreement.

Furthermore, while praise is due to the SRSR for his work at the United Nations and to the OECD, ILO, IFC, and ICC for the impressive strides they have made toward promoting corporate responsibility, caution must also be expressed that these IGOs' independent successes have led to a lack of uniformity in the CSR movement. Indeed, with each organization promoting its unique CSR instrument, corporations may be overwhelmed by number of CSR codes they are expected to follow, they may be uncertain of the expectations of each code, and the costs associated with complying with so many different codes may be excessive.

Therefore, as the UN, OECD, ILO, World Bank and ICC continue to promote their distinct CSR instruments, they must also work together to converge their instruments, and perhaps be willing to abandon their own codes and adopt a single, uniform code. Such a level of uniformity would provide corporations with the confidence of knowing that by complying with the singular code, they will be in good standing with all of the most powerful IGOs. If the WTO decides to join in the effort to promote the Guiding Principles, it could ignite the necessary catalyst to turn the Guiding Principles into the definitive authority on corporate social responsibility.

Indeed, with the business community's strong approval of the Guiding Principles, demonstrated most clearly through the ICC, and the influence that the Guiding Principles have already had on other CSR instruments like the OECD MNE Guidelines, the ILO MNE Declaration, and the IFC Performance Standards, the Guiding Principles have the potential to become the singular authoritative CSR standard. If the WTO chooses to join the CSR movement and endorse the Guiding Principles, the cohesive support of the Guiding Principles by the international economic community will solidify their authority as the preeminent CSR instrument.

**RENEGOTIATING INVESTMENT CONTRACTS: THE CASE OF MINING
CONTRACTS IN DEMOCRATIC REPUBLIC OF THE CONGO**

*Kapwadi F. Lukanda**

This article examines the issue of renegotiating an existing mining contract which does not provide for renegotiation clause. A prevailing theory in this respect asserts that a claim for renegotiating an existing agreement which contains no renegotiation clause should be disregarded as it amounts to an undue interference. This article addresses the question whether a contract concluded with unelected government or leaders of military factions in contravention to prevalent laws should escape revision. It assesses the rules and principles pertaining to renegotiation of an existing agreement against the Congolese process of renegotiation which involved over sixty mining contracts.

Key words: Renegotiation, revision, adaptation, long terms contract, investment, mining project, mining agreement, Congolese mining sector, DRC mining revision, renegotiation clause, contract flexibility.

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I. INTRODUCTION

The subject of renegotiating an existing agreement has often generated considerable discussion among resource rich countries and investors.¹ While the former seek increased control over natural resource operations, the latter envisage stability of the contract in order to meet lender and shareholder expectations.² Countries endowed with natural resources have a tendency to hide behind their sovereign prerogatives to modify or escape from their contractual commitments and those of their subordinate entities. The underlying rationale is the perception that the agreed commitments are imbalanced, exploitative or contrary to nationalistic feelings.³ In contrast, investors rely on the sanctity of contract principle to recover the upfront payment made at the very start of a project, and draw profit from their investment.

¹ The host state-investors discussion over revision of existing contracts goes back to the aftermath of World War II, as a result of the decolonization process that has taken place during that period. Newly independent states have sought to revamp the prevailing international regime by developing new principles and rules that would reflect the on-going change and match their social and economic needs. The one outcome of this motion has been the introduction of permanent sovereignty over natural resources principle in the United Nation (UN) debate and its embodiment in the subsequent resolutions of the General Assembly of the UN (UNGA). Alongside the UN, resource rich countries have benefited from the OPEC support, throughout their attempt to legitimize the renegotiation of existing contracts. See OPEC Resolution XVI, 90 (1968). For further development about the permanent sovereignty principle, see G.A. Res. 626 (VII), U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/2361, at 18 (Dec. 21, 1952); G.A. Res. 1515 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4648, at 9 (Dec. 15, 1960); G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217, at 15 (Dec. 14, 1962); G.A. Res. 3016 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8963, at 48 (Dec. 18, 1972); G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 50 (Dec. 12, 1974); G.A. Res. 37/7, UN Doc. A/RES/37/51 (Oct. 28, 1982); Nico Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties* 399-401 (Cambridge 2008); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 437-38 (1981).

² See Stephen M. Schwebel, *International Protection of Contractual Arrangements*, Proc, 53rd Meeting of AM. SOC. OF INT'L L. 266, 266 (1959); Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996); Thomas W. Wälde, *Renegotiating Acquired Rights in the Oil and Gas Industries: Industry and Political Cycles Meet the Rule of Law*, 1 J. WORLD ENERGY L. BUS. 55, 58-59 (2008).

³ The late rise in commodity prices has inspired many governments to seek to enhance their revenues from natural resource sector. In Sub-Sahara Africa, for instance, countries like South Africa, Zambia, Ghana, Nigeria Guinea, and Zimbabwe have taken measures to ensure either a bigger stake for public entities in the oil and mining agreements or increase in taxes. See *Resource nationalism in Africa: Wish You Were Mine*, The Economist, February 11, 2012, available at <http://www.economist.com/node/21547285>.

While host government initiatives to renegotiate state contracts is by no means peculiar to developing and least developed countries,⁴ investors have limited their countermeasures against this perceived interventionism to the sole aforesaid group of countries.⁵ A survey of industry practices has shown that the devil does not lie in the host government usage of its sovereign prerogatives, but rather in the nature of the contract per se.⁶ Implementing a natural resource contract can take a minimum of ten years from the exploration level to that of exploitation or operation. Commitments taken for such a long duration are undoubtedly prone to be affected by events not envisaged by the parties at the start of the contractual relationship. Both the host state and an investor may find themselves in a situation that requires revising the agreed contractual regime. Renegotiating an existing commitment seems to be a middle way solution between the absolute intangibility of the contractual regime sought by an investor and the need for the state to exert its sovereign prerogatives.

However, the main criticism of this approach of contract management is that a claim for renegotiating an existing agreement that contains no renegotiation clause or insistence on a third party intervention for adapting such a contract amount to an undue interference. Notwithstanding, the way contracts negotiated in countries exhibiting poor governance or situation of army conflict challenges this view. The question then is whether an existing contract – specifically those concluded with unelected government or leaders of military factions – in contravention of prevailing laws or subject to corruption, should escape revision.

The case of renegotiated mining contracts in the DRC presents a great opportunity for assessing prevailing rules and principles related to renegotiating an existing agreement which does not provide for renegotiation clause against host state-investor practices. The examined process took place between 2007 and 2010 and involved 63 mining

⁴ A recent survey commissioned by Ernest & Young suggests that over 25 countries worldwide have changed their fiscal framework applicable to mining and metal companies, and others have invoked ‘use it or lose it’ clauses – which conditions the maintenance of an investor’s rights to the fulfillment of some determined milestones. See Ernst & Young, *Resource Nationalism: The rise of Special Mining taxes – What are the Accounting Impacts?* 1-5 (Nov. 2011) Ernst & Young, *Resource Nationalism Update* 1-3 (June 4, 2012).

⁵ For instance, investors do not insert stabilisation provisions into contracts concluded with developed countries. Professor Wälde have explained this discrepancy in the contractual risk management: “companies tend to invest [in developed countries] with an expectation that the fiscal and regulatory regime will be adjusted reasonably and without too much surprise or predatory exploitations of tax opportunities.” Wälde, *supra* note 2, at 58.

⁶ See Abba Kolo & Thomas W. Waelde, *Renegotiation and Contract Adaptation in the International Investment Project: Applicable Legal Principles & Industry Practices*, 5-3(a) CPML/Dundee, 14-15 (2000).

contracts. The Congolese government set out very ambitious objectives such as: investor respect of legislation, use of local resources, social responsibility clauses, and revaluation of the equity shareholding to the point that the public entity side should be holding not less than 51%.

This article is aimed at contributing to the on-going debate over factors that ought to be taken into account in renegotiating an existing agreement. It unveils the limits of existing theory which argues that a claim for renegotiating an existing agreement that contains no renegotiation clause should be disregarded as it amounts to an undue interference. In the DRC renegotiation case, renegotiated mining contracts did not provide for such a clause. Instead, some contracts included a general stabilization clause restricting the legislative and administrative power of the Congolese state to amend the established contractual regime. Others provided for provisions guaranteeing either the freezing of economic advantages granted to investors for the duration of the contract or restoration of the economic equilibrium in case the equilibrium was breached by an act emanating from the state. Notwithstanding the absence of a renegotiation clause, almost all investors succeeded in securing their investments, and some have even managed to extend their contractual advantages. The renegotiation process undertaken by the Congolese government has shown that salvaging the contractual relationship is the pragmatic way to mitigate unpredictable investment risks. However, it failed to achieve its objectives and benefit the local population. The reason might be a combination of technical, strategic and political factors.

The first part of this article surveys what major legal systems, arbitral awards and scholars say about renegotiating an existing agreement whose clauses do not provide for such a mechanism and the consequence in case of failure to agree. The second part examines the legal framework of the mining sector in DRC. The third part assesses the Congolese renegotiation process and analyses its effects. Finally, the article ends with some concluding thoughts.

II. REGULATING THE RENEGOTIATION OF AN EXISTING AGREEMENT

It seems appropriate to begin with a survey of principles surrounding renegotiation of an existing agreement before examining the process of renegotiation that took place in DRC. This part attempts to respond to such questions as: is renegotiation of an existing long-term commitment acceptable in major system of law in general and Congolese law in particular? If so, which conditions should govern a sound renegotiation of such a contract? This part also examines the conceptual, theoretical and practical advantages of a flexible long-term investment contract approach. It discusses the jurisprudential reason underpinning the aforesaid approach. It argues that, subject to the feature of the applicable law, a long-term

investment contract should provide for a renegotiation clause, for any lawful subsequent request of renegotiation. The important argument, it asserts, is that the flexibility of the contractual regime brings more stability in the host state investor relationship.

A. Re-negotiability of Long term Investment Agreements: Stability vs. Flexibility

The concept of renegotiation, as an international contractual management tool, came into being in the second half of the last century as a result of the tension between investors and developing countries endowed with natural resources.⁷ While the former always sought a stability guaranty to secure their up-front investment, the latter looked for a bigger control over their non-renewable natural resources. The host state/investor tension extended even to developed world where increasing profits in the natural resource sector have triggered adjustments in the contractual regime, mainly by way of new windfall tax measures or increasing royalties.⁸ Renegotiating an existing contract also reveals tension between the compulsory nature of the legal instrument, and the economic difficulties of abiding by contractual commitments when a substantial change of circumstances badly impacts project profitability.⁹ Long-term contracts require particular tools to mitigate risks, such as long duration, the necessity of a large amount of up-front capital, stakeholder interest, the commodity's price volatility, and host government intervention.

1. The Sanctity of Contract Principle

The sanctity of contract (or *Pacta Sunt Servanda*) principle refers to the classical theory that a contract must be honored for it is an expression of parties' free will. It derives from natural justice¹⁰ and economic necessity¹¹ which convey the idea that nothing can be done without reliable promises. It is a cardinal principle of contract law recognized worldwide. International

⁷ Thomas W. Walde, *Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development*, 10 L. AM. 275-78 (1978).

⁸ See Eduardo Engel & Ronald Fischer, *Optimal Resource Extraction Contracts under Threat of Expropriation* (National Bureau of Economic Research, Working Paper No. 13742, 2008); A.F.M. Maniruzzaman, *The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL GAS & ENERGY L. 79, 86 (2009).

⁹ Kolo & Waelde, *supra* note 6, at 3 (2000).

¹⁰ Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 775 (1959).

¹¹ Peter J. Mazzacano, *Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance: the Historical Origins and Development of an Autonomous Commercial Norm in the CISG*, NORDIC J. COM. L. 1, 6 (2011).

Law embodied it in Articles 26 of the Vienna Convention of Law of Treaties and 1.3 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). Congolese law provided the principle applied to contracts and contractual obligations in Article 33 paragraphs 1 to 3 of the Decree of the King-Sovereign dated 30 July 1888.

The principle of sanctity of contract applies to agreements between states, but also to those between host state and investor. In the context of mining contracts between host state and investor, it suggests that the agreed regime should be implemented to the letter no matter how cumbersome it may prove to be. This interpretation seems to be unproved yet. No legal system gives a stiff meaning to the sanctity of contract principle.¹² This is because “there has been an increase in the number of vitiating factors the law of contract recognizes, based on the acceptance of the idea that the law should take into consideration the relative bargaining strengths of the parties”.¹³ These factors are sourced in the classic contract law¹⁴ whereby parties to a contract could be relieved from their commitments in case of duress or the strong taking advantage of the weak. In International Law, the limits to the said principle stem from the notion of fundamental change of circumstances (or *rebus sic stantibus*) as provided for in Article 62 of the Vienna Convention on Law of Treaties. The UNIDROIT Principles provide the same kind of counter-principle to the *pacta sunt servanda* in the notion of hardship and force majeure as stipulated in its Articles 6.2.1-2 and 7.1.7. The same is to be said with regard to Article 79 of the Convention on Contracts for the International Sale of Goods (CISG) which provides for excuses in case of non-performance. When the common law counter-balances the *pacta sunt servanda* principle with theories such as frustration, hardship, estoppel, or the public interest exception, the civil law jurisdictions limit the principle with theories such as lésion, imprévision, force majeure, etc.¹⁵

However, investors involved in long term agreements with developing counties¹⁶ are inclined to perceive exceptions to the *pacta sunt servanda* principle as risks that lessen the predictability of the contract; in particular,

¹² See R. Geiger, *The Unilateral Change of Economic Development Agreements*, 23 ICLQ, at 78 (1974) 78; Waelde & Kolo, *supra* note 6, at 4; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, Second ed. Cambridge, at 421 (2004).

¹³ Sornarajah, at 421.

¹⁴ Kolo & Waelde, *supra* note 6, at 4.

¹⁵ For developments in these major systems of law, see Geiger, *supra* note 12, 78-101; Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34 HONG KONG L.J. 1, 17-21 (2004); Mazzacano, *supra* note 11, 12-54.

¹⁶ For historical evolution of the contractual stability management, see Peter D. Cameron, *Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil & Gas Investors* 15 (Ass'n Int'l Petroleum Negotiators 2006).

its legal certainty.¹⁷ In light of this purported weakening of the contractual commitment, they developed special clauses aimed at freezing the contractual regime over the course of its implementation, called stabilization clauses.¹⁸ These clauses play the role of a risk-mitigation tool that protects investments from what investors perceive as ‘sovereign or non-commercial’ risks, namely changes in law, nationalization, expropriation, nullification of the contract pursuant to the national law, etc. Lenders consider them as an essential prerequisite to the ‘bankability’ of the project in certain markets. They shield investment from discriminatory and arbitrary measures that might impact it adversely. Sometimes, they even act as an incentive for attracting investors.

Stabilization clauses seem to conflict with other international principles.¹⁹ For instance, they clash with a state’s rights and obligations such as sovereignty over its natural resources, the state’s obligation to regulate the protection of human rights and the environment by investors. In addition, the stabilization clauses tend to play a disincentivizing role for investors to meet acceptable business standards.²⁰ They also raise the issue of compliance with the existing legal framework.²¹ On occasion, they are concluded with an unelected government²² or entity that is not empowered to undertake such a commitment.²³ The stiffest provisions are believed to have been subject to corruption.²⁴ Last but not the least, this technique of freezing the contractual regime has also proven ineffective.²⁵

In practice, stabilization clauses do not invalidate a host state’s unilateral action. At best, they make it unlawful so as to impact the amount

¹⁷ Abdullah Faruque, *Validity and Efficacy of Stabilisation Clauses: Legal Protection vs. Functional Value*, 23 J. INT’L ARB. 317, 322 (2006).

¹⁸ For further information on the nature, scope, implementation and interpretation of stabilization clauses, see Waelde & Ndi, *supra* note 2, at 216; Cameron, *supra* note 16; Faruque, *supra* note 17; Andrea Shemberg, *Stabilization Clauses and Human Rights* (IFC & U.N. May 2009).

¹⁹ Waelde & Ndi, *supra* note 2, at 230; Shemberg, *supra* note 18, at viii.

²⁰ Howard Mann, *Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result*, Investment Treaty News (Oct 7, 2011), <http://www.iisd.org/itn/2011/10/07/stabilization-in-investment-contracts-rethinking-the-context-reformulating-the-result/>.

²¹ Cameron, *supra* note 16, at 13.

²² Mann, *supra* note 20, at 7.

²³ Piero Bernadini, *Stabilization and Adaptation in Oil and Gas Investments*, 1 J. WORLD ENERGY L. BUS. 98, 99 (2008).

²⁴ Mann, *supra* note 20, at 7.

²⁵ See Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT’L L.J. 1319, 1362 (2000); Zeyad A. Al Qurashi, *Renegotiation of International Petroleum Agreements*, 22 J. INT’L ARB. 261, 264 (2005); Bernadini, *supra* note 23, at 101.

of compensation that a tribunal might award.²⁶ Therefore, the recourse to a flexible contractual management tool seems unavoidable for balancing the aforementioned flaws.

2. Flexibility in the Contract or Stability in the Relationship

To focus on the protection of legitimate expectations of an investor who commits significant capital to a project is understandable, although quite fruitless due to the volatility of the extractive industry sector. In the negotiation of a natural resource agreement, no party can capture all the surrounding facts that might impact the viability of the investment. Usually, the agreement is concluded based on speculative assumptions about the geological area, input costs, output, rate of return, cost of compliance with the legal framework, labor, taxation rate and other financial charges.²⁷ If these projections turn out to exceed what the parties expected at the signing of their contract, the host state may feel it is giving away its non-renewable natural resources and therefore seek the renegotiation of the agreed to regime. This attitude is not exclusive to the host state. An investor may likewise find itself in a position where asking for renegotiation could be the only gateway to escape the devastating effect of a marginal geological discovery or collapse in the commodity price at the international market.²⁸ An investor might also seek renegotiation when fiscal impositions became onerous. Such a renegotiation is not often publicly reported because investors and the host state prefer not to set a precedent.²⁹ Renegotiating an existing agreement is inherent to natural resource projects.³⁰

It is undoubtedly imperative to ensure stability in the contractual terms, but at the same time a certain degree of flexibility is necessary to allow parties to adjust their relationship when an unforeseen event occurs.³¹ Detlev Vagts argued: "it is idle to freeze the position of the parties for long periods to conditions that become so out of date. Either parties will include renegotiation provisions in their contracts or they will act as if they were there."³² This position depicts the reality on the ground. No party to a long-

²⁶ Cameron, *supra* note 16, at 15. It must be noted that a similar award was issued under an ICSID arbitration on November 30, 1979 in AGIP S.P.A. v. People's Republic of Congo, ICSID Case No. ARB/77/1, Award (Nov. 30, 1979), 1 ICSID Rep. 306 (1993). The same conclusion was reached by the *Aminoil* award of March 24, 1982; Bernadini, *supra* note 23, at 101.

²⁷ See Kolo & Waelde, *supra* note 6, at 15; Al Qurashi, *supra* note 25, at 263.

²⁸ Kolo & Waelde, *supra* note 6, at 21.

²⁹ *Id.* at 22.

³⁰ See Walde, *infra* note 54, 273-79; Wälde, *supra* note 2, 66-69.

³¹ Salacuse, *supra* note 25, at 1327.

³² Detlev F. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17, 22 (1978).

term agreement could keep implementing a commitment he acknowledges having given, but of which he draws no benefit. Certainly, he would seek either its adjustment or its termination. If parties agree to terminate their contract or one of them withdraws, it will also destroy their relationship that would have been mutually profitable otherwise.³³ Such a fiasco will raise criticism about the managerial capacities of both parties and affect the confidence that stakeholders may have on them.³⁴

A flexible approach of the contractual relationship can also be useful in a situation where parties, by virtue of their differing cultures, understand and perceive the basis of a business relationship in totally different ways.³⁵ In Asian countries, for instance, business executives consider the relationship between parties as a pillar of a business transaction. Frequent adjustments of such a relationship reflect their cultural conception of a business contract.³⁶ African businessmen also tend to give preference to the relationship with their partners. By contrast, western businessmen are inclined to consider “the transaction as set in the concrete of lengthy and detailed contract, without possibility of modification”.³⁷ It is imperative to find a middle ground that can satisfy all parties.

3. Consequence of the Distinction

Saving the contractual relationship is a pragmatic attitude to mitigate investment risks stemming from cultural differences or the occurrence of an unforeseen event. When entering into their contractual relationship, parties should define conditions under which the renegotiation might occur. Not all situations should give a right to adjust an existing agreement; otherwise the choice of a flexible approach in the risk management will fuel unlimited demand of adaptation, and result in the instability of the contractual regime. As the following discussion will show, there should be a renegotiation clause in the contract. However the applicable law should give guidance on whether and to what extent an existing contract can be renegotiated when a renegotiation clause is not included. In the absence of such prudential measures, the unilateral adjustment of an existing agreement may amount to an indirect expropriation entitling the aggrieved party to compensation.³⁸

³³ Kolo & Waelde, *supra* note 6, at 1.

³⁴ *Id.* at 22-23.

³⁵ Salacuse, *supra* note 25, at 1329.

³⁶ *Id.* at 1329-30.

³⁷ *Id.* at 1330.

³⁸ For development on indirect expropriation, see August Reinisch, *Expropriation*, in *The International Handbook of International Investment* 420-51 (Oxford Univ. Press 2008).

B. Renegotiating an Investment Contract in Major Systems of Law

The legal framework of the renegotiation or adjustment clause depends on the applicable law to a given contract. If parties opt for the national law, it will apply exclusively subject to the issues of expropriation and compensation that might fall in the competence of international law as far as state responsibility³⁹ for the property rights of aliens is concerned. Alternatively, parties may agree on the exclusive application of international law.⁴⁰ Lastly, parties may choose a solution that combines international law, national law and industry practices.⁴¹ In the DRC, by virtue of Article 320 of the new Mining Code, parties willing to operate in the mining sector have a compelling obligation to refer to the Congolese law as the applicable law to their contract. But as developments in part two showed, international law and extraterritorial legislation may also be applied to a certain extent.

When difficulties arise in the identification of the legal rules, such as when the law applicable to the contract is a combination of the national and international law, the solution will normally be found by applying the rules that are common to those different systems of law.⁴² What do the main systems of law say about renegotiating an existing commitment?

1. Common Law

Common law systems, especially English law, are known for their prominence in drafting detailed contracts. Its traditional position regarding the change of an existing commitment due to imperfections or the supervening of an unforeseen event is quite rigid. The common law principle regarding contractual commitments is that a positive obligation to do a thing must be performed, or compensation must be paid for not doing so.⁴³ Over time, this position has evolved to recognize the doctrine of discharge in limited circumstances- through notions such as implied terms, frustration, impossibility, hardship or impracticability.⁴⁴ Of the Common

³⁹ Waelde & Kolo, *supra* note 6, at 23.

⁴⁰ Different opinions take side on whether public international law alone can govern all aspects of a contractual relationship between a government and a foreign investor. See Sornarajah, *supra* note 12, 416-29; Geiger, *supra* note 12, 80-83.

⁴¹ Al Qurashi, *supra* note 25, at 269.

⁴² Waelde & Kolo argued that 'arbitrators have a natural tendency to select those principles which are international and are seen as a reflection of an international consensus, while they are likely to disregard principles of national law which are inconsistent with generally recognised principle of international law.' See Waelde & Kolo, *supra* note 6, at 24.

⁴³ Sir D. Hughes Parry, *The Sanctity of Contract in English Law*, Stevens & Sons Limited, at 47 (1959).

⁴⁴ Mazzacano, *supra* note 11, at 17.

law worlds, Anglo-American jurisdictions appear to have adopted the most progressive approach with regard to the excuse for non-performance.

a. English Law Jurisdictions

English law is hostile to the notion of change in circumstances or impracticability to perform. It “has placed greater emphasis on certainty and *pacta sunt servanda*, even though the result has occasionally been harsh on one of the parties.”⁴⁵ For instance, English courts have held “an unanticipated 88 per cent increase in the cost of goods to be supplied, or a rise in the price of raw materials to manufacture paper, or in freight costs of the seller that made the transaction unprofitable, are not grounds to discharge a contract.”⁴⁶ Similarly, in the *British Movietonews* case, after the Court of Appeal had upheld the argument based on an unanticipated turn of events to discharge parties of their contractual commitments, the House of Lord reversed the judgment. Lord Simon observed this:

[T]he parties to an executor contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made.⁴⁷

English courts accept discharging parties from their contractual commitments in a very narrow situation.⁴⁸ The reason given for this rigidity is that Common law countries did not experience the same degree of wartime destruction, as did civil law countries in continental Europe.⁴⁹

b. Anglo-American Jurisdictions

Anglo-American jurisdictions have taken a more flexible approach to the issue of excuse for non-performance. This approach is called

⁴⁵ *Id.* at 31.

⁴⁶ Mazzacano referred to *S. Instone & Co. Ltd. v. Speeding Marshall & Co. Ltd.* (1916), 33 T.L.R. 202; *E. Hulton & Co. Ltd. v. Chadwick Taylor & Co. Ltd.* (1916), 33 T.L.R. 202; *Blythe & Co. v. Richards, Turpin & Co. Ltd.* (1916), 85 L.J.K.B. 1425; See P. J. Mazzacano, *supra* note 11, at 30.

⁴⁷ *British Movietonews Ltd. v. London and District Cinemas* (1952) A.C. 166 [H.L.].

⁴⁸ Contractual parties can escape from their commitments under the notion of Frustration. For further development see R. Stone, *The Modern Law of Contract*, Cavendish publishing limited, 5th Ed (2002), H.G. Beale et. al. *Contracts case and materials*, Oxford University Press, 5th Ed (2008), Mazzacano, *supra* note 11, 12-36, Geiger, *supra* note 12, 87-91.

⁴⁹ See E. Ch. Zaccaria, *The Effects of Changed Circumstances in International Commercial Trade*, 9 INT'L TRADE & BUS. L. REV., at 138 (2005); Mazzacano, *supra* note 11, at 30.

'commercial impracticability' and is provided in section 2-615 of the Uniform Commercial Code (UCC) and section 268(2) of the Restatement (second) of Contracts. According to this theory, a party can withdraw from a contract or seek its adjustment when the cost of performance has increased so dramatically that his original commitment has become economically unviable.⁵⁰ A mere increase in the cost cannot discharge a party of his obligations. The performance must become excessively onerous to trigger the excuse of impossibility.⁵¹ The underpinning idea is that when a change was unpredicted at the signing of the contract, coercing a party to operating under the contract would lead him or his investment into bankruptcy.⁵² However, the tendency among American Courts is that without a renegotiation or adjustment clause provided for in the contract, parties cannot expect to obtain relief from their obligations because the unforeseen difficulty is believed to have been accepted implicitly.⁵³ This situation prompted professor Mazzacano's comment that US courts tend to follow the traditional approach of the *pacta sunt servanda* despite the enactment of the UCC and Restatement (second).⁵⁴ Nevertheless, the important thing to keep in mind here is that US law recognizes the renegotiability of long term contracts.

2. Civil Law

The excuse for non-performance of contractual commitments was developed differently in civil law jurisdictions. Although civilian lawyers had stated the *pacta sunt servanda* principle as their common law counterpart, they seemed to have given emphasis to the exception of that rule, the *rebus sic stantibus* principle.⁵⁵ According to this principle, a contract is valid as long as the underlying circumstances that were essential at its formation have continued to exist.⁵⁶ The popularity of *rebus sic stantibus* in civil law jurisdictions is due to efforts to deal with the devastation caused by several wars in Europe.⁵⁷ The underlying reasoning of the approach taken by civil law jurisdictions is that parties could not bargain to the impossible even if this was the term of the contract.⁵⁸ This does not mean that civil law systems offer parties an easy escape from their

⁵⁰ See Waelde & Kolo, *supra* note 6, at 25; Mazzacano, *supra* note 11, at 32.

⁵¹ Mazzacano, *supra* note 11, at 33.

⁵² Al Qurashi, *supra* note 25, at 271.

⁵³ Waelde & Kolo, *supra* note 6, at 25; Zaccaria, *supra* note 49, at 144.

⁵⁴ Mazzacano, *supra* note 11, at 37.

⁵⁵ *Id.*

⁵⁶ Waelde & Kolo, *supra* note 6, at 26.

⁵⁷ Mazzacano, *supra* note 11, at 38.

⁵⁸ *Id.* at 38.

contractual commitments. There are conditions that contractual parties must meet to benefit from the excuse for non-performance or contractual adjustment. These conditions are enshrined in theories such as *Wegfall der Geschäftsgrundlage*, *imprévision*, and to a certain extent *lesion*.

a. German principle of *Wegfall der Geschäftsgrundlage*

The German principle of *Wegfall der Geschäftsgrundlage* (disappearance of the transaction's basis) suggests that when unforeseen events have radically changed an essential condition of the contract, the foundation thereof has been destroyed; therefore, the parties are no longer bound to their original contractual obligations.⁵⁹ This doctrine is sourced in paragraph 242 of the *Bürgerliches Gesetzbuch* (BGB), the German civil code, which requires that agreements be implemented in good faith.⁶⁰ To hold a burdened party liable for its commitments of which unforeseen events have severely affected the financial equilibrium amounts to performing an agreement in bad faith. Unlike in Common law systems, German courts have the power to adapt the contract to the changed circumstances. As professor R Geiger stated these courts “are willing not only to supplement, but also to alter express contractual terms to permit an adjustment according to the presumed intent of the parties or to objective standards of fair dealing and good faith.”⁶¹ Alternatively, German courts may consider a premature termination of the contract if there is no ground to keep it alive. The 2001 amendment to the German civil code codified the courts' practice of adaptation.⁶²

b. French Theory of *Imprévision*

As with the preceding principle, the theory of *imprévision* is a variation of the *rebus sic stantibus* principle. It refers to an implied condition in contracts with the French Government or administrative entity according to which the continuation of the performance depends on the existence of fundamental circumstances contemplated by the parties.⁶³ Those external factors shall be independent of the parties' will, and mostly affect the financial balance of the contract.⁶⁴ As professor Maniruzzaman argued, “the rationale behind the doctrine of *imprévision* is that the public

⁵⁹ See Geiger, *supra* note 12, at 91; Zaccarria, *supra* note 49, at 149.

⁶⁰ See Zaccarria, *supra* note 49, at 149; Geiger, *supra* note 12, at 92.

⁶¹ Geiger, *supra* note 12, at 93.

⁶² Art. 313 of the BGB; See Mazzacano, *supra* note 11, at 48; Geiger, *supra* note 12, at 93; Zaccarria, *supra* note 49, at 149.

⁶³ Mazzacano, *supra* note 11, at 44.

⁶⁴ Sidonia Culda, *The Theory of Imprevision*, Fiat Iustitia, at 52 (2010).

interest requires that State contracts be performed and that private entities should not be discouraged from contracting with the government.⁶⁵

It was for the purpose of ensuring the continuation of the public service that the *Conseil d'Etat* (the French administrative Supreme Court) developed and expounded for the first time this theory in its judgment related to the case 'Gaz de Bordeaux' on March 30, 1916.⁶⁶ Afterwards, there were several attempts to extend the theory of *imprévision* to civil contracts, although the French civil code has not provided for such a provision expressly. Consequently, French civil courts have regularly rejected the extension of this theory to civil contracts.⁶⁷ The leading decision in this regard was issued by the *Cour de Cassation* (the French Civil Supreme Court) in the case 'Canal de Craponne'. The Court held:

*Dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants.*⁶⁸

The courts cannot - even in the interest of equity - take into consideration the time and circumstances in order to modify these agreements, and to substitute new clauses for those which have been freely accepted by the contracting parties.⁶⁹

The theory of *imprévision* allows the adjustment or termination of a contract when the threat to its economic viability is otherwise irreversible. Despite the reluctance of French civil courts to extend its application to civil contracts, this theory has been embodied in a number of other countries' civil codes.⁷⁰

⁶⁵ M. Maniruzzaman, *State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law*, 9 J. INT. ARB., at 153 (1992).

⁶⁶ *Id.*

⁶⁷ Geiger, *supra* note 12, at 94.

⁶⁸ *De Galiffet c. Commune de Pélissane (Canal de Craponne)*, Civ. 6 mars 1876, in Fr. Terré et Y. Lequette (eds) *Les grands arrêts de la jurisprudence civile* (2000) n° 163 Dalloz tome 2.

⁶⁹ Translated by the Institute for Transnational Law http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1186 accessed April 12, 2012.

⁷⁰ See 'Article 269 of the Polish Civil Code of 1932, Arts. 1467-69 of the Italian Civil Code of 1946, Art. 147 of the Egyptian Civil Code of 1948, Art. 107 of the Algerian Civil Code, Art. 388 of the Greek Civil Code, Art. 212 of the Czechoslovak Civil Code, Arts. 3183-85 of the Ethiopian Civil Code.' As quoted by Maniruzzaman, *supra* note 65, at 155.

c. Civil Theory of Lesion

Unlike the aforementioned principles, the civil theory of the *lesion* is not a variation of the *rebus sic stantibus* principle, but as with the latter principle, it allows the aggrieved party to seek adjustment of its existing obligations. The civil notion of the *lesion* refers to the situation whereby one of the contractual parties suffers a prejudice as a result of the gross disparity between the value of the performance he is indebted and that he will obtain in return.⁷¹ Without prejudice to the freedom of contract, the rationale of this theory is that parties entering into a bargain without full and fair awareness of what is involved shall have their property protected.⁷² The theory of the *lesion* is not to be confused with that of *imprévision*.⁷³ While the latter focuses on the economic viability of the contract during the performance of the contract, the former emphasizes on the viability of the contract at its formation. The civil *lesion* theory is similar to the common law notion of unconscionability though it does not operate the same way. In the occurrence of the civil *lesion*, the court can rescind the contract upon request of the aggrieved party.⁷⁴ In DRC, this theory is embodied in Article 131 *bis* of the Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations, as amended.

3. International Law

The preceding developments indicated that it is questionable that parties choose international law as the only law applicable to their investment agreement. The more realistic hypothesis is that international law may be called upon as an adjunct to the national law. With regard to the issue of renegotiating an existing commitment, it is worth mentioning that international law admits the principle of *rebus sic stantibus* as an excuse for non-performance, irrespective of its inclusion in the contract.⁷⁵ The principle or/and its variations are found in Articles 62 of the Vienna Convention, 79 of the CISG and 6.2.1-2 and 7.1.7 of the UNIDROIT Principles.

⁷¹ W. L. Church & N. Katouzian, *Lesion Contracts: A Comparative Review*, TEHRAN L. REV. No. 12, at 13 (1975).

⁷² A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States* 14 Loy. L.A. INT'L & COMP. L. REV., at 474 (1992).

⁷³ Church & Katouzian, *supra* note 71, at 14.

⁷⁴ For further developments, see Angelo & Ellinger, *supra* note 72, 460-501; Church & Katouzian, *supra* note 71, 13-47; Hermida, *supra* note 15, at 18.

⁷⁵ See Waelde & Kolo, *supra* note 6, at 35, Al Qurashi, *supra* note 25, at 277.

a. Excuse for Non-Performance in the Vienna Convention

Article 62 of the Vienna Convention⁷⁶ sets out the conditions under which a party may invoke a fundamental change of circumstances. When these conditions are met, the aggrieved party has a right to request withdrawal or renegotiation of his obligations. However, as some scholars pointed out the carefully wording of the Article suggests that its application is limited to exceptional cases for shielding the stability of international agreements as provided in Article 26.⁷⁷ In the *Gabcikovo-Nogymoros* case, the ICJ stated this:

A fundamental change of circumstances must have been unforeseen; the existence of circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna convention on law of treaties is a clear indication, moreover, that the ability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases⁷⁸

⁷⁶ '1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) if the treaty establishes a boundary; or
- (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances

as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for

suspending the operation of the treaty.'

⁷⁷ Al Qurashi, *supra* note 25, 277-78.

⁷⁸ *Gabcikovo-Nogymoros project*, Award, 25 September 1997, 37 I.L.M. 162 (1998).

b. Excuse for Non-Performance in the CISG

Article 79 of the CISG⁷⁹ deals with the change of circumstances, even though it does not contain any national concepts, such as frustration, hardship, *imprévision*, *wegfall der geschäftsgrundlag*, etc.⁸⁰ It reflects the negotiators' endeavors to find a middle ground position between the civil law and common law effects of the change in circumstances principle.⁸¹ For professor Mazzacano, this Article "is more than just a compromise provision; it is a self-contained, independent, concept that must be read and interpreted without reference to domestic legal principles."⁸² In the *Scafom International B.V. vs Lorraine Tubes* case, which was brought before the Belgian Supreme Court, it was decided that:

[T]his provision (Article 79 of the CISG) expressly covers force majeure cases as events exempting from performance, it does not implicitly exclude the relevance of less than force majeure situations such as hardship. (...) [A]n unforeseen change of circumstances leading to a substantial alteration of the contractual equilibrium might, under specific circumstances, constitute an event exempting from performance according to Article 79⁸³

The CISG does not give clear guidance as to what would happen to the contract after an impediment beyond a party's control has been acknowledged.⁸⁴ However, the last sub-paragraph of Article 79 stipulates that parties remain free to adopt any other remedy apart from the payment of damages. Therefore, one may deduce that the adjustment mechanism can be called upon as a mitigating tool, even within the CISG framework, when unforeseen impediments beyond the control of contracting parties arise.

⁷⁹ Article 79 of the CISG (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.(...)

⁸⁰ See A. Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, Rev dr unif, at 139 (2010); Mazzacano, *supra* note 11, at 48; Zaccarria, *supra* note 49, at 163.

⁸¹ Zaccarria, *supra* note 49, at 162.

⁸² Mazzacano, *supra* note 11, at 49.

⁸³ As quoted by Veneziano *supra* note 80, (2010) 139, Cass.,19 June 2009, *Scafom International BV v. Lorraine Tubes S.A.S.*

⁸⁴ Zaccarria, *supra* note 49, at 167.

c. Excuse for Non-Performance in the UNIDROIT Principles

Unlike the preceding convention, the UNIDROIT Principles of International Commercial Contracts (PICC) are not a binding international instrument. Despite that, practitioners have regarded them “as a useful restatement of the *lex mercatoria*.”⁸⁵ They are also believed to serve as a supplement to the CISG, by virtue of Article 7 (2) of the CISG,⁸⁶ insofar as they are part of the general principles applicable to international obligations.⁸⁷ The PICC’s drafters took a flexible approach in tackling the issue of extraordinary events beyond the control of contracting parties, in contrast to the drafting of the equivalent provision in the CISG. The PICC regulates the issue of impediment beyond the control of contracting parties towards two different notions, namely: hardship and force majeure.

The section of the PICC dealing with the notion of hardship starts with the reaffirmation of the necessity for each of the contractual parties to fulfill its commitments even when these later become more onerous. Then it provides for the definition⁸⁸ and effects of the hardship. Among the effects of the hardship concept defined in Article 6.2.2 of the PICC, is the entitlement of the disadvantaged parties to seek adjustment of their commitments.⁸⁹

The second notion in the PICC that deals with the issue of impediment beyond the control of contracting parties is force majeure. As with hardship, the drafters defined and gave the effect of the force majeure within the PICC framework.⁹⁰ However, the occurrence of force majeure does not give

⁸⁵ Frederick Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, paper presented to the spring meeting of the American Bar Association, at 9 (April 2006).

⁸⁶ M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law* 36 R.J.T., 343-53 (2002).

⁸⁷ See ICC Award No 7375 of 5 June 1996, ICC Award No 8261 of 27 September 1996, ICC Award No 7365 of 5 May 1997, as quoted by Bonell, *supra* note 86, 344-45.

⁸⁸ PICC art. 6.2.2 “There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.”

⁸⁹ PICC art. 6.2.3 (1).

⁹⁰ UNIDROIT Principles, art. 7.1.7:

rights to adjust the contract. Rather, it only exempts the party who invokes it from performing its obligations, without prejudice to the right of the other party to terminate the contract or to withhold performance or request interest on money due.⁹¹

C. Nature, Types and Conditions of Renegotiating an Existing Agreement

The foregoing developments show that major legal systems of law have provided for mechanisms - with different levels of flexibility- to deal with an unforeseen change of circumstances. To the exclusion of the Vienna Convention, which might not be seen as convenient for state-investor relationships, an examination of the CISG and PICC suggests that international investment law has reached a consensual position on this issue. Only the supervening of an exceptional and unpredictable change of circumstances can excuse parties for their contractual commitments. However, as professor Russi pointed out, "in long term contracts, complete relief from the duty to perform may turn out as an inappropriate solution in light of the complexity of the relationship - which makes it hardly replaceable - and of the costs and financial obligations already incurred by the parties."⁹² Thus, the reliance on the adjustment mechanism to mitigate the impact of a fundamental change of circumstances shall be clearly defined to prevent any of the contracting parties from acting arbitrarily when invoking the aforesaid impediment.

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

⁹¹ PICC art.7.1.7 (1), (4).

⁹² Luigi Russi, *Chronicles of a Failure: From a Renegotiation Clause to Arbitration of Transnational Contracts' Italian Legal Scholarship Unbound* Working Paper No 2008-11/EN, at 6 (2008) available at http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=ilsu_working_paper_series.

1. Nature and Scope of the Renegotiation

In long-term contracts the concept of renegotiation refers to a mechanism enshrined either in a contractual clause or the applicable law, according to which the supervening of an unpredictable event rendering performance impracticable for one side requires both parties to seek a solution to preserve their relationship. It also covers the case when in the absence of such an enshrinement, parties seek a common solution to an unpredictable fundamental change of circumstances grounded on the notion of hardship or force majeure.⁹³ Nonetheless, this approach seems to be quite limited since international arbitrators are reticent to adjust an existing agreement without a specific contractual basis.⁹⁴ It has been stated that:

It is not for the Arbitral Tribunal to question the motives or judgment of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties' agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism.(...) The arbitrators cannot usurp the role of government officials or business leaders. They have no political authority, and no right to presume to impose their personal view of what might be an appropriate negotiated solution. Whatever the purity of their intent, arbitrators who acted in such a fashion would be derelict in their duties, and would create more mischief than good. The focus of the Arbitral Tribunal's inquiry has been to ascertain the rights and obligations of the parties to the particular contractual arrangements from which its authority is derived.⁹⁵

Parties to a long-term contract are, in principle, responsible for their own interests. They should take precautions against adverse changes in circumstances by agreeing to renegotiation clauses at the outset of their relationship. If they fail to do so, force majeure or hardship concepts may

⁹³ Waelde & Kolo, *supra* note 6, at 34; For the distinction between hardship and force majeure, see Russi, *supra* note 92, at 6; Al Qurashi, *supra* note 25, at 279-85; Waelde & Kolo, *supra* note 6, at 34-35.

⁹⁴ Klaus Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VAND. J. TRANSNAT'L L. 1347, 1353 (2003).

⁹⁵ Berger, *supra* note 94, at 1353 citing UNCITRAL Award of 4 May 1999, 25 Y.B. COM. ARB. 13, 61 (2000).

not serve as a substitute for their negligence and will not serve as a pretext for diluting the *pacta sunt servanda* principle.⁹⁶ The stability in the contractual regime remains the fundamental of international business transactions.

The endeavors to bring flexibility in the host state-investors' long-term relationships necessitate the control of the mechanism of adaptation that is to be relied on. In principle, there is no inherent limitation of the scope of the renegotiation clauses aside from those expressly agreed to by the parties.⁹⁷ Nevertheless, practice in international business transactions does not provide for a large array of general renegotiation provisions to be inserted into a contract. Investors fear that such an insertion might undermine their legitimate expectation of stability.⁹⁸ To circumvent this obstacle, parties should not only agree upon specific events that trigger the renegotiation, but also determine the level above which the negative impact of the said events will be considered exceeding the reasonable limit.⁹⁹ In any event they should keep in mind:

[T]he function of [the renegotiation] clauses is limited to adapting the contract to the changed circumstances. They do not justify a restructuring of the entire contract (...) Renegotiation clauses should not result in a commercial advantage to one of the parties, but instead, function either to maintain or to restore the commercial balance of the contract to adjust to changed circumstances.¹⁰⁰

2. Types of Renegotiations

Professor Salacuse identified three types of renegotiations that may take place in the context of long-term contracts, namely: the post-deal renegotiations, intra-deal renegotiations, and extra-deal renegotiations.¹⁰¹

a. The Post-Deal Renegotiations

The post-deal renegotiations cover situations when both parties meet to negotiate the conditions of the extension or renewal of their relationship at the expiration of their contract, though legally free from their preceding commitments to go their own ways. At first glance, these renegotiations

⁹⁶ Jarvin & Yves Derains, Collection of ICC Arbitral Awards 1974-85 (1990) citing ICC AWARD No. 1512.

⁹⁷ See Russi, *supra* note 92, at 5; Qurashi, *supra* note 25, at 288.

⁹⁸ Waelde & Kolo, *supra* note 6, at 35.

⁹⁹ Russi, *supra* note 92, at 7.

¹⁰⁰ Berger, *supra* note 94, at 1365.

¹⁰¹ Salacuse, *supra* note 25, at 1320.

may look like negotiations the parties undertook at the signing of their original contract, but in practice they differ in approaches and results.¹⁰² Unlike the context in the first negotiation, the expired contract may contain a provision that compels parties to renegotiate in good faith the renewal of their contract or preclude them from entering into negotiations with a third party until the post-deal renegotiations have failed. The willingness of the parties to reach an agreement with each other will be influenced by what they had learned in their preceding relationship¹⁰³

b. The Intra-Deal Renegotiations

The second type of renegotiations refers to the intra-deal renegotiations. As its name suggests, this model of renegotiations covers the situation where parties, at the outset of their relationship, acknowledge the necessity of inserting into their contract a mechanism of adjustment for mitigating the contractual risk stemming from the supervening of unpredictable events beyond their control or imperfections in the contract.¹⁰⁴ It also designates the situation where both parties, acknowledging the existence of implicit minor renegotiation clauses in their contract, agree to mitigate practical issues that arise towards their on-going relationship.¹⁰⁵ Moreover, intra-deal renegotiations cover instances where parties agree to meet periodically with a view to considering in good faith whether their contract is still operating fairly to each of them and with the aim at further discussing in good faith any problems arising from the practical operation of their project.¹⁰⁶ In addition, intra-deal renegotiations may also include an automatic adjustment mechanism such as price indexation clauses for adapting the contract price.¹⁰⁷ Lastly, they may designate an open term-provision in the contract that enables parties to delay the discussion of certain matters to a later time after the signing of the contract. As professor Salacuse indicated, the negotiations that may occur thanks to the open-term clause are not in *stricto sensu* renegotiations for “the parties have not yet agreed to anything (...)”.¹⁰⁸ Parties may however use this opportunity to review certain aspects of their contractual regime.¹⁰⁹

¹⁰² *Id.* at 1321.

¹⁰³ *Id.* 1323-24.

¹⁰⁴ *Id.* 1327-30.

¹⁰⁵ *Id.* at 1327-31.

¹⁰⁶ Peter, *Arbitration and Renegotiation of International Investment Agreements*, Kluwer Law International, at 79 (1995).

¹⁰⁷ Russi, *supra* note 92, at 3.

¹⁰⁸ Salacuse, *supra* note 25, at 1333.

¹⁰⁹ *Id.*

c. The Extra-Deal Renegotiations

The last type of renegotiations refers to the extra-deal renegotiations. Unlike the preceding category where the adjustment of an existing contract is sought by both sides, extra-deal renegotiations encompass situations where one party insists on adapting the terms of a presumed valid contract that does not provide for an express provision authorizing renegotiation.¹¹⁰ Earlier developments showed that the party that fails to take advantage of the agreed regime tends to rely on the notion of force majeure or hardship in order to trigger the renegotiation. Additionally, the party may find room to adjust his commitments in the provisions of the applicable law.¹¹¹ The only problem is that such an approach is likely not enforceable. Indeed, when confronted by a demand for adaptation, which is not expressly envisaged in the contract, English law jurisdictions are reluctant to interfere in what contractual parties agreed upon. By contrast, civil law jurisdictions tend to be more flexible with regard to the issue of fundamental change of circumstances that renders the performance impracticable for one side. In some cases, civil judges can not only supplement, but also alter the contractual parties' desires by enabling the balance of performances burdened by either side to meet the standard of good faith.¹¹² Moreover, the upset party can invoke provisions of international instruments, namely the PICC and to a certain extent the CISG, to justify the extra-deal renegotiations, subject to specific conditions.¹¹³ In case of conflict, the willingness to reach an agreement or to pursue a legal remedy will ultimately depend on the parties' evaluation of the profitability of either option.¹¹⁴

3. Conditions of Renegotiating an Existing Agreement

It is of great importance that parties willing to be bound to a long-term relationship define the conditions that should give the right to renegotiate at the signing of their agreement. Preceding developments stressed the necessity of adopting a flexible contractual approach in long-term relationship. They also reaffirmed one of the primary goals of contracting,

¹¹⁰ *Id.* at 1335.

¹¹¹ Berger, *supra* note 94, at 1355.

¹¹² Geiger, *supra* note 12, at 93.

¹¹³ Al Qurashi, *supra* note 25, at 279-85; Waelde & Kolo, *supra* note 6, at 34-35; Zaccarria, *supra* note 49, at 167; Veneziano, *supra* note 80, at 145.

¹¹⁴ Salacuse, *supra* note 25, at 1336.

namely providing “predictability and certainty for the parties.”¹¹⁵ To avoid conflict between these two objectives— stability and flexibility in their contract, parties should control the mechanism that leads to renegotiation. Professor Berger suggested some key points parties should look to when drafting their agreement, namely:

- The definition of events triggering the duty to renegotiate (trigger events);
- The exact content of the contractual obligations, in particular
 - The question of an obligation to negotiate as well as
 - The question of an obligation to reach a (particular?) result;
- The legal consequences of failure to fulfill the contractual obligation to negotiate;
- The enforceability of the obligation to negotiate before an international arbitral tribunal, in particular the authority of the tribunal to adapt the contract to the changed circumstances in lieu of the parties.¹¹⁶

The below comments will develop these issues in three prongs. The first point will be discussed under the heading of the triggering events. The second issue will be examined under the heading of parties’ obligations, and the last issues will be partially covered under the heading of the duty to negotiate as well as in the paragraph that will follow.

a. The Triggering Events

There is no one size fits all formula for defining the events that give the right of renegotiation.¹¹⁷ Nonetheless, the effectiveness of the process depends on preconditions parties clearly set out in order to start a consensual adjustment.¹¹⁸ Studies in natural resources contracts¹¹⁹ revealed the existence of two main approaches with regard to the drafting of triggering events.¹²⁰

¹¹⁵ John Gotanda, *Renegotiation and Adaptation Clauses in Investment Contracts, Revisited*, 36 VANDERBILT J. TRANSNAT’L L. 1461, 1464 (2003) citing Interim Award in Case No. 1694 of 1996, reprinted in 23 Y.B. COM. ARB. 97, 110 (1998).

¹¹⁶ Berger, *supra* note 94, at 1361.

¹¹⁷ Al Qurashi, *supra* note 25, at 289.

¹¹⁸ Berger, *supra* note 94, at 1362.

¹¹⁹ For model of renegotiation clauses see Berger, *supra* note 94, 1358-60; Al Qurashi, *supra* note 25, at 286-87.

¹²⁰ Berger, *supra* note 94, at 1362.

The first approach refers to the case where parties avoid detailing events but prefer relying on a general review clause that will bring about renegotiation. This approach stems from the complexity of trying to capture all unforeseen events that might affect the commercial balance of the parties' future agreement.¹²¹ The other reason is the difficulty in determining the extent to which the aforesaid impact will have to be considered crossing the level of triviality to trigger the renegotiation. Therefore, if the drafting of a general renegotiation clause seems to meet the need of flexibility advocated above, it addresses the issue of stability imperfectly. Indeed, it gives way to spurious demands for renegotiation¹²² and fuels seeds of conflict amongst parties in determining whether the triggering event has occurred. In addition, a general review clause may "cast doubt on the efficacy and enforceability of such a clause."¹²³ For these reasons, a lot of modern investment contracts rely on the notions of hardship and force majeure rather than providing a general renegotiation clause.¹²⁴

The second method of drafting a triggering event encompasses the case where parties agree to begin the adaptation procedure at the occurrence of isolated or conjunctive events identified more precisely in the clause.¹²⁵ Unlike the preceding approach, this method has the advantage of identifying the starting point of the renegotiation process more precisely. However, it envisages the renegotiation of an existing agreement in very limited circumstances.

b. The Parties' Obligations in the Renegotiation process

The mere desire of one side to renegotiate is not sufficient to operate a contract's renegotiation clause. Parties should attach a certain number of obligations- good faith, in particular the notion of fairness and reasonableness that derive from the principle,¹²⁶ that are to be fulfilled towards the process of adaptation to such a clause. Renegotiation clauses "are not empty shells. Rather, by agreeing to the clause, both parties are legally obliged to cooperate in the renegotiation procedure in an efficient manner, i.e. in a manner aimed at successfully negotiating a solution."¹²⁷ The arbitral tribunal in the *AMINOIL* case summarized the content of the parties' obligations as follows:

¹²¹ *Id.* at 1362.

¹²² Waelde & Kolo, *supra* note 6, at 35.

¹²³ Al Qurashi, *supra* note 25, at 290.

¹²⁴ See Waelde & Kolo, *supra* note 6, at 35; Berger, *supra* note 94, at 1363.

¹²⁵ Berger, *supra* note 94, at 1362.

¹²⁶ See Peter, *supra* note 106, at 244; Berger, *supra* note 94, 1363-65.

¹²⁷ Berger, *supra* note 94, at 1364.

[Neither side has neglected] the general principles that ought to be observed in carrying out an obligation to negotiate, - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a preserving quest for an acceptable compromise.¹²⁸

Taking into account scholarly works pertaining to the issue, Professor Berger listed conduct that should be a feature of the parties' renegotiation process:

1. Keeping to the negotiation framework set out by the clause;
2. Respecting the remaining provisions of the contract,
3. Having regard to the prior contractual practice between the parties,
4. Making a serious effort to reach agreement,
5. Paying attention to the interests of the other side,
6. Producing information relevant to the adaptation,
7. Showing a sincere willingness to reach a compromise,
8. Maintaining flexibility in the conduct of negotiations,
9. Searching for reasonable and appropriate adjustment solutions,
10. Making concrete and reasonable suggestions for adjustment instead of mere general declarations of willingness,
11. Avoiding rushed adjustment suggestions,
12. Giving appropriate reasons for one's own adjustment suggestions,
13. Obtaining expert advice in difficult and complex consensus proceedings,
14. Responding promptly to adjustment offers from the other side,
15. Making an effort to maintain the price-performance relationship taking into consideration the parameters regarded as relevant by the parties,
16. Avoiding an unfair advantage or detriment to the other side ("no profit - no loss" principle),

¹²⁸ See *Kuwait v. Am. Indep. Oil Co.*, Final Award, Mar. 24, 1982, 21 I.L.M. 976, (1982) 1014, as quoted by K. P. Berger, *supra* note 94, 1364-65.

17. Prohibition on creating established facts during negotiations except in emergency situations (ban on 'escalation' strategies),
18. Maintaining efforts to reach agreement over an appropriate length of time, and
19. Avoiding unnecessary delays in the consensus proceedings.¹²⁹

Parties can utilize these guiding principles as a starting point to build a regime convenient for them, subject to the principle of good faith and especially the concept of fairness and reasonableness that derive from the principle.¹³⁰

c. The Duty to Negotiate and its Enforceability

The question that arises throughout the process of renegotiation is whether parties are compelled to reach an agreement. At the domestic level, there is not a clear-cut answer. English law jurisdictions appear reluctant to admit the existence of such an obligation, whereas civil law jurisdictions - especially German law, do acknowledge it as long as the renegotiation criteria and aim have been spelled out.¹³¹ Internationally, there seems to be a unanimous opinion on the matter. "Renegotiation clauses only contain an obligation on the parties to make the best possible effort to reach an agreement... They do not, however, require the parties to actually reach an agreement."¹³²

The duty to renegotiate becomes a justiciable obligation when it brings into play the notions of good faith and its derivatives. However, not reaching an agreement does not constitute *per se* a breach of the duty. It may turn out to be a breach however if it is proved that the other side acted in bad faith. That very case may entitle the aggrieved party to claim compensation.¹³³ For instance, a party does not breach the duty to renegotiate when he rejects the other side's proposals because of normal

¹²⁹ Berger, *supra* note 94, at 1365-66.

¹³⁰ *Id.* at 1366.

¹³¹ See Salacuse, *supra* note 25, at 1322-23; Berger, *supra* note 94, at 1367.

¹³² Berger, *supra* note 94, at 1367; see also *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. 976, 1004 (1982) (stating that an obligation to negotiate is not an obligation to agree); *Wintershall A.G. v. Gov't of Qatar*, 28 I.L.M. 798, 814 (1989); Permanent Court of International Justice *In re Ry. Traffic between Lithuania and Poland*, P.C.I.J., Series A/B, 116, *North Sea Continental Shelf (F.R.G. v. Den.)*, 1969 I.C.J. 4, 47 (Feb. 16).

¹³³ International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, art. 6.2.3. (2004) [hereinafter UNIDROIT Principles]; see also Salacuse, *supra* note 25, at 1323 (claiming that the details of good faith negotiations will vary from country to country and that failure by a party may result in liability in damages).

commercial judgment.¹³⁴ By contrast, failing to agree because of a refusal to enter negotiations, despite the existence of the triggering event is to be considered a breach of obligation to renegotiate.¹³⁵ The same applies to the case where a party takes “insufficient cooperative steps vis-à-vis the standard set by good faith”¹³⁶; such as “where proceedings are unjustifiably delayed...negotiations are intentionally obstructed or...proposals by one side are obviously rejected for reasons other than normal business judgment.”¹³⁷

D. The Practice in International Arbitration

The logical consequence of failing to agree when the renegotiation was conducted in good faith is that the contract will remain in force. The principle of *pacta sunt servanda* will apply to the contract as initially agreed.¹³⁸ However, when the source of the disagreement is in the conditions of the renegotiation clause, parties may call upon an arbitrator to determine whether the alleged triggering events have met the requirement(s) set forth in the contract. The arbitrator may also be requested to determine the extent to which the adjustment will restore the contractual equilibrium. The possible outcomes¹³⁹ will depend on the substance of the request filed by the parties. Indeed, a request based on a mere conflict of interpretation does not raise the same issues as those that involve a demand to supply an alternative contractual regime.¹⁴⁰

International arbitrators are reluctant to adapt a contract in the absence of a specific provision in the contract empowering the *ad hoc* arbitral tribunal to do so.¹⁴¹ Therefore, alongside with a renegotiation clause a long-term contract should contain an arbitration clause that expressly confers “the power to adapt the agreement and determine the manner for its exercise as well as the limits of the arbitrator’s authority in that regard.”¹⁴² This position has been recalled in the AMINOIL case: “an arbitral tribunal ...could not, by way of modifying or completing the contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.”¹⁴³ A mere reference to

¹³⁴ Berger, *supra* note 94, at 1368.

¹³⁵ Russi, *supra* note 92, at 14.

¹³⁶ *Id.*

¹³⁷ Berger, *supra* note 94, at 1369.

¹³⁸ Al Qurashi, *supra* note 25, at 292; *see also* UNIDROIT Principles, art. 6.2.3(2).

¹³⁹ *See* Bernadini, *supra* note 23, at 106-10; Berger, *supra* note 94, at 1370-77.

¹⁴⁰ Russi, *supra* note 92, at 16.

¹⁴¹ Berger, *supra* note 94, at 1353.

¹⁴² Bernadini, *supra* note 70, at 107.

¹⁴³ *Kuwait*, 21 I.L.M. at ¶ 76.

arbitration in case of disagreement is not sufficient to imply the empowerment of the arbitral tribunal to adapt the contract, unless it is expressly granted.¹⁴⁴ Nevertheless, the reference to certain texts,¹⁴⁵ especially those that provide for the third's party power either to terminate the contract or to adapt it with the aim of restoring its equilibrium may be sufficient to confer such a power to an arbitrator.¹⁴⁶ This is to recall that the choice of the applicable law to the contractual obligations should be made carefully.

However, even when parties empower the arbitral tribunal to adjust their agreement, doubts may rise regarding the jurisdictional power of the said tribunal.¹⁴⁷ Some procedural rules, such as the ICSID convention, do not expressly authorize an arbitral tribunal to undertake a contractual adjustment on behalf of the parties. It is crucial, when choosing an arbitral forum, to make sure that the *lex arbitri* does not prohibit the adaptation of contracts by an arbitrator.¹⁴⁸ In addition, it is worth noting the distinction between the function of settling a dispute in an adjudicatory context and that of filling a gap in the contract.¹⁴⁹ The former is of an adjudicatory nature- therefore, enforceable under the New York convention of 1958, whereas the latter is deemed of a contractual nature.¹⁵⁰

Scholars hold divergent opinions regarding the existence of a 'dispute' or 'legal dispute' when examining the issue of adapting a contract throughout arbitral proceedings.¹⁵¹ For Professor Berger, a dispute exists when an arbitral tribunal "is not called upon to make a creative legal decision but rather to decide the rights and obligations of the parties."¹⁵² Parties should "make it clear that they wish to transfer to the tribunal this 'creative competence' that goes beyond normal dispute adjudication".¹⁵³ For this end, they should allocate an express competence to the arbitral tribunal to adapt the contract.¹⁵⁴ This is the position the arbitral tribunal adopted in the Aminoil case:

¹⁴⁴ Bernadini, *supra* note 23, at 107.

¹⁴⁵ See e.g., UNIDROIT Principles at art. 6.2.3 (4).

¹⁴⁶ Bernadini, *supra* note 23, at 107.

¹⁴⁷ Berger, *supra* note 94, at 1371.

¹⁴⁸ Bernadini, *supra* note 23, at 107.

¹⁴⁹ See also Berger, *supra* note 94, at 1370-78; Bernadini, *supra* note 23, at 108; Russi, *supra* note 92, at 25-27.

¹⁵⁰ Bernadini, *supra* note 23, at 108.

¹⁵¹ Gotanda, *supra* note 115, at 1465; Georges R. Delaume, *ICSID Arbitration Proceedings: Practical Aspects*, 5 PACE L. REV. 563, 567 (1985).

¹⁵² Berger, *supra* note 94, at 1372.

¹⁵³ *Id.*

¹⁵⁴ Bernadini, *supra* note 23, at 107.

[T]here can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to ...modify a contract unless that right is conferred upon it by law, or by the express consent of the parties ...arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal—constituted on the basis of a ‘compromissory’ clause contained in relevant agreements between the parties to the case...could not, by way of modifying or completing a contract, prescribe how a provision [for the determination of the economic equilibrium] must be applied. For that, the consent of both parties would be necessary.¹⁵⁵

III. THE LEGAL FRAMEWORK OF THE MINING SECTOR IN DRC

The one motive that prompted the unilateral decision of the Congolese government to renegotiate some of the existing mining agreements is that the allocation and exploitation of mining rights were contravening existing regulations. This part examines the relevant regulations an investor should abide by when he intends to operate in the Congolese mining sector lawfully. It essentially covers the pertinent national, international and extraterritorial regulations applicable to the mining operation. It also discusses the issue of supervision of the said regulations as well as that of their enforcement.

A. The Applicable Regulations to the Mining Sector in DRC

The framework of the applicable regulations for the mining sector in DRC lies mostly in a set of multidisciplinary rules drawn from national and international laws, the contractual will of the parties expressed in accordance with the national law, and to a certain extent, extra-territorial laws related to some segment of the mining operations and voluntary principles applicable to the industry.

1. The National Law

At the national level, the mining code and its subsidiary mining regulations constitute the main source of the mining regulations. These texts were both drafted and respectively passed in 2002 and 2003, under the

¹⁵⁵ See Kuwait, 21 I.L.M. at 1016.

auspices of the World Bank. They are believed to be self-contained¹⁵⁶ rules in the sense that they cover almost every aspect pertaining to the mining.¹⁵⁷ In addition to these two texts, mining regulations are found in Article 34 of the Constitution of the Democratic Republic of Congo dated February 18, 2006, as amended on January 20, 2011, which sets the principles protecting the private property.

Nonetheless, there are a number of other regulations that cover issues outside the scope of the aforementioned texts but, still remain important to lawfully operating in the Congolese mining sector. This is the case of the laws on commercial companies, the law on public enterprises, the contract law, the land law, the labor code, the law of social security and the law combating money laundering.

a. The 2002 Mining Code

The rules provided for in the 2002 Mining Code superseded those laid down by the 1981 Mining Law. Their purported aims were to address, amongst other things, issues related to the lack of clarity and attractiveness in the issuing of mining rights seen with the former mining law. The law also intended to end tax exonerations that were disadvantageous to the Public Treasury.¹⁵⁸ In addition, the new Mining Code was designed to bring more transparency in the management of the mining sector.¹⁵⁹ The 2008 assessment report commissioned by the World Bank considers the novel code consistent with the international standard and a foundation for a sustainable development of the DRC's mineral resources.¹⁶⁰

One of the big innovations of the new mining code is to suppress the contentious mining concession scheme provided for in the Mining Law of 1981¹⁶¹. This scheme subjected the ownership of mineral rights by private corporations to a partnership agreement with a state-owned enterprise or a specific agreement with the Congolese state. In the new code such ownership is opened up without restriction to the private corporations,

¹⁵⁶ H. André-Dumont, *Mining in the Democratic Republic of Congo*, Rocky Mountain Mineral Law Foundation, June 2011, at 37.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 37.

¹⁵⁹ Conference Presentation, Colloquium on Exploitation of Natural Resources in Conflict situations: International Liability and Prospect of Solution in DRC, *Réforme de la législation minière et rôle des institutions multilatérales de financement dans le développement du secteur minier en RDC*, (April 2, 2004), <http://www.ieim.uqam.ca/IMG/pdf/MMazalto-presentation.pdf>.

¹⁶⁰ World Bank, Democratic Republic of Congo: Growth with Governance in the Mining Sector, Report No. 43402-ZR, at 17 (May 2008).

¹⁶¹ *Id.* at 43.

inasmuch as land for exploration and/or exploitation is vacant.¹⁶² The 2002 Mining Code has made it possible for investors whose partnerships with the state-owned enterprises were fully compliant with the 1981 Mining Law to remain in force until their expiration, unless both sides take the option to subject the partnership to the new code.¹⁶³

The Article 3 of the new mining code lays down the principle of State ownership of the mining resources. Eligible individuals and corporations can acquire mining or quarrying rights on a first come, first serve basis, subject to compliance with the law.¹⁶⁴ However, the new Mining Code establishes a strict distinction between the ownership of the land and ownership of the mining rights.¹⁶⁵ The mining titleholder is not necessarily entitled to the land above the mine, unless he applied for the ownership of the land.

Any investor in possession of a valid mining right can take part in exploitation of mineral substances specified in its permit. Nonetheless, non-Congolese nationals cannot engage into artisanal mining. The 2002 Mining Code establishes a clear distinction between mining rights and quarrying rights. While mining rights can be requested either for industrial purpose (industrial mining) or small-scale mining, such an option is not available for quarrying rights. Articles 50 to 96 of the 2002 Mining Code lay down principles for industrial mining, whereas Articles 97 to 108 provide rules for small-scale mining. Moreover, the new Mining Code set rules for artisanal mining¹⁶⁶.

Three types of industrial mining rights exist, namely research (exploration), exploitation (operation) and tailing exploitation permits. The small-scale mining category includes a sole mining right: the small-scale mining exploitation permit. Although they produce nearly 90 per cent of the mineral exported by the DRC, the 2002 Mining Code does not provide for mining rights to artisans¹⁶⁷. Provincial authorities deliver a mere 'digger's card', for the equivalent of U.S. \$25 per year, to authorize the diggers to mine in a special area called artisanal exploitation zone.¹⁶⁸ Finally,

¹⁶² See 2002 MINING CODE, art. 23. (DEM. REP. CONGO).

¹⁶³ See 2002 MINING CODE art. 340. (DEM. REP. CONGO).

¹⁶⁴ See 2002 MINING CODE, arts., 23-27. (DEM. REP. CONGO).

¹⁶⁵ See 2003 Mining Regulation, art. 3, ¶ 3; G Bakandja, *Droit Minier et des Hydrocarbures en Afrique Centrale*, Larcier, at 97 (2009); Vale Columbia Center on Sustainable International Investment (VCC), Extractive Industries and Sustainable Development: The Challenges of Implementation Background Notes of the Fifth Columbia International Investment Conference jointly organized by the Columbia Law School and The Earth Institute at University of Columbia on 27- 28 October 2010, at 3 (2010).

¹⁶⁶ See 2002 MINING CODE, arts. 109-26 (DEM. REP. CONGO).

¹⁶⁷ See World Bank, *supra* note 160, at 10.

¹⁶⁸ See Bakandja, *supra* note 165, at 116-18; World Bank, *supra* note 160, at 60.

quarrying rights are rules by Articles 229 to 167 of the new Mining Code. Two types of quarrying rights are present, namely the exploration license of quarry products and the exploitation (operation) license. An exploitation license can be issued on temporary or permanent basis.

A number of requirements, of which non-compliance may result in the cancelation of mining rights, affect the granting or maintenance of each and every one of the mining rights cited above. For instance, the new Mining Code limits the issuing of an exploration permit to only those who can prove a minimum financial capacity.¹⁶⁹ By contrast, it allows an investor to acquire an exploitation permit if he submits an application including a feasibility study along with a technical work plan and a rehabilitation plan among other documents. In addition, the new Mining Code requires an investor to demonstrate the existence of financial resources for carrying out its project from the building of facilities to the closure of mine. The state must also be granted 5 % of the shares of the company applying for a mining license free of charge and on a non-dilutable basis.¹⁷⁰

Moreover, the new Mining Code provides for environmental and safety provisions. The issuing of a temporary quarrying exploitation license and the operation of an exploration permit are subject to the prior approval of a mitigation and rehabilitation plan (MRP). However, the granting of any other exploitation permits or license is conditional on the prior approval of an environmental impact study (EIS) and an environmental management plan (EMP).¹⁷¹

Furthermore, any holder of a mining or quarrying right shall, subject to the nature of his mining or quarrying rights, commence the work within a specific time period—either six months, one or three years, of the date the title evidencing his right is issued.¹⁷² A mining titleholder shall also pay the annual surface area fees per quadrangle relating to his title, before the deadline set by the law.¹⁷³

Lastly, the 2002 Mining Code provides for a strict liability¹⁷⁴ scheme, in the sense that the victim does not need to demonstrate the fault of the mining operator. The mere fact of proving a connection between the damage suffered by the victim and the mining operation is enough to trigger the compensation.¹⁷⁵ Moreover, without prejudice to the transferee's right

¹⁶⁹ Some commentators have seen the amount required negligible and therefore worthy to be revised. See World Bank, *supra* note 160, at 17.

¹⁷⁰ See 2002 MINING CODE, art. 71 (DEM. REP. CONGO).

¹⁷¹ See 2003 Mining Regulation, art. 407 (DEM. REP. CONGO).

¹⁷² See 2002 MINING CODE, art. 197. (DEM. REP. CONGO).

¹⁷³ See MINING CODE art. 280 (DEM. REP. CONGO).

¹⁷⁴ MINING CODE art. 198 (DEM. REP. CONGO).

¹⁷⁵ André-Dumont, *supra* note 156, at 41.

of recourse against the transferor, both the transferor and the transferee bear the liability for damage caused before the transfer.¹⁷⁶

b. The Laws on Commercial Companies

The laws applicable to commercial companies operating in DRC encompass regulations mostly borrowed from Belgian or French law. The main regulations are: (a) the Decree of the King-Sovereign dated 27 February 1887 on commercial companies, as amended to date and its related regulations; (b) the Royal Decree of June 22, 1926 on companies limited by shares, as amended to date and its related regulations; (c) the Decree on the commercial registry enacted on March 06, 1951, as amended to date; (d) the Decree passed on August 13 1973 related to the national identification number; and to a certain extent, (e) the Decree enacted on June 09, 1966 pertaining to the notarized acts.

In accordance with the mining law, the laws on commercial companies do not stop a foreign investor from operating in DRC. The relevant features to point out, with regard to the mining operation, relate to the requirements an investor could be subject to when operating as a foreign company or incorporated subsidiary. According to Articles 8 and 9 of the Decree of the King-Sovereign dated 27 February 1887 on commercial companies, as amended to date, a lawfully incorporated foreign company can operate in DRC, subject to the registration of its articles of association with the commercial registry and the publication thereof in the official gazette. When operating as a subsidiary, an investor shall abide by the same conditions. In this latter instance, the registration is conditional upon the notarization of the Articles of association.¹⁷⁷

As H. André-Dumont wisely argued, investors mainly use two types of domestically incorporated companies to carry out mining activities.¹⁷⁸ The first is a private limited liability company (*société privée à responsabilité limitée* "SPRL"). This company has a minimum of two shareholders. But, it is not eligible to benefit from tax deductions for interest on shareholders' advances.¹⁷⁹ The second is a company limited by shares (*société par actions à responsabilité limitée* "SARL").¹⁸⁰ This type of company has a minimum of seven shareholders as well as a presidential decree approving its incorporation and substantial changes to its bylaws, in

¹⁷⁶ MINING CODE art. 192. (DEM. REP. CONGO).

¹⁷⁷ See Decree of the King-Sovereign On Commercial Companies, Feb. 27, 1887, art. 2 as amended to date (DEM. REP. CONGO).

¹⁷⁸ André-Dumont, *supra* note 156, at 36.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

addition to the general conditions imposed to other categories of company.¹⁸¹

c. The Contract law

As already mentioned, the new Mining Code overrules the conventional scheme laid down by the 1981 Mining Law.¹⁸² There is no requirement to enter into a partnership with a state-owned enterprise to operate in the sector given that the granting of mining and quarrying rights is done on a first come first served basis. Nonetheless, the 2002 Mining Code has made it possible for any exploitation license holder to lease and/or transfer its rights.¹⁸³ However, it does not give any model of contract to be used especially when the lessor or transferor is a state-owned enterprise.¹⁸⁴

The only existing guidance refers to a compulsory insertion in the contract of an accelerated termination clause in case the lessee fails to comply with the existing laws.¹⁸⁵ In addition, the new Mining Code requires a clause compelling joint and several liability of the lessor and the lessee vis-à-vis the State to be included in the contract as well as the clauses setting out the conditions for the maintenance and the reinvestment necessary for the appropriate exploration and development of the deposit.¹⁸⁶ Furthermore, the exploration permit holder is entitled to enter freely into an option contract with a third party.¹⁸⁷ Once again, the 2002 Mining Code gives no guidance when one of the contracting parties is a state-owned enterprise.

Furthermore, the new Mining Code is silent on whether a state-owned enterprise can enter into a public private partnership with an investor to operate the mining or quarrying rights belonging to the former.¹⁸⁸ No apparent ground exists to hold such a convention unlawful, inasmuch as it derives from an agreement of the contractual parties. However, prospective contractual parties should keep in mind that without prejudice to the provisions provided for in the new Mining Code and in the Public Enterprises Law, their contract will be subject to the Contract Law.

¹⁸¹ *Id.*

¹⁸² MINING CODE, art. 2 (DEM. REP. CONGO).

¹⁸³ MINING CODE, art. 65, 89, 100, 137, 148, 177-95 (DEM. REP. CONGO).

¹⁸⁴ *See* MINING CODE, (DEM. REP. CONGO).

¹⁸⁵ MINING CODE, (DEM. REP. CONGO).

¹⁸⁶ MINING CODE, art. 177 (DEM. REP. CONGO).

¹⁸⁷ Which is mainly that conferring on the beneficiary the right to obtain a participation in the exercise of the mining exploitation right deriving from an exploration license. *See* MINING CODE art. 193 (DEM. REP. CONGO).

¹⁸⁸ *See Id.*

In DRC, the Contract Law refers to Decree of the King-Sovereign dated 30 July 1888 on contracts or contractual obligations, as amended.¹⁸⁹ This text contains provisions mostly inspired by the Napoleonic Code as is the case in the majority of civil law countries. The Congolese contract law does not enumerate many specific rights and duties to be protected and enforced.¹⁹⁰ Rather, it has a number of limiting principles, under which the contracting parties may create their own rights and duties.¹⁹¹ Then, the law will uphold only those rights and duties created in accordance with the principles thereof.¹⁹²

One of the prominent principles enshrined by the contract law is that lawfully concluded agreements (conventions) become the law for those who make them.¹⁹³ However, for a convention to be legally enforceable, it cannot contravene any existing public law. According to Article 8 of the same law, a contract is valid when: (a) There is a consent between contracting parties; (b) the parties agree within their contractual capacity; (c) the agreement is based on a certain object and; (d) the cause of the obligation is lawful. Additional requirements may also apply to enforcing a convention legally. These include compliance with the rules governing the conditions and termination of contractual obligations. Therefore, it is safe to say that a mining agreement is governed by the contractual will of the parties provided that it was expressed in accordance with the principles set out in the contract law.

2. International Law

At the international level, the applicable law for mining operations in the DRC covers both hard law and soft law. The former encompasses specific legally binding obligations that delegate authority for interpreting and implementing the law,¹⁹⁴ whereas the latter refers to situations where “legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.”¹⁹⁵ The soft law facilitates compromise and, therefore, collaboration between actors with different interests, value, and degree of power.

¹⁸⁹ DECREE OF THE KING-SOVEREIGN ON CONTRACTS OR CONTRACTUAL OBLIGATIONS, JULY 30, 1888 (DEM. REP. CONGO).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at art. 33.

¹⁹⁴ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance* 54 INT'L ORG., no. 3, 2003, at 421.

¹⁹⁵ *Id.* at 422.

a. The Hard Law

The binding international principles applicable to mines operating in the DRC cover, without prejudice to the international treaties related to human rights, labor and environmental issues, multilateral and regional economic or investment treaties to which the State is party or has adhered to namely, WTO, WIPO, ISCID, OHADA, SADC, etc. It specifically refers to the bilateral investment treaties (BITs) signed by the Congolese state. These include BITs between DRC and Switzerland, USA, UK, France, Germany, Rep of Korea, Italy, Guinea, Egypt and Belgium.¹⁹⁶ Only four of these BITs have entered into force (those with France, Germany, Switzerland and the US).¹⁹⁷

Some salient features can be raised in connection with investment treaties. The first is the principle of non-discrimination, the second is fair and equitable treatment, and the third is the regulation of expropriation or takings and related compensation. Additionally, investment treaties may provide for the strengthening of the legal value of investment contracts by requiring the host state to respect its commitments vis-à-vis investors originating in the other state party to the investment treaty.¹⁹⁸ This kind of provision is known as an “umbrella clause”.¹⁹⁹ It should be noted, however, that the above list shows only a few examples and should not in any event be considered as being exhaustive of the salient features of investment treaties.

The non-discrimination principle underpins most treaties and agreements governing investments. It provides a two-pronged obligation: (a) a government shall not treat companies controlled by nationals or residents of another country less favorably than domestic companies in like situations (national treatment); (b) or give companies of most-favored nations special treatment.²⁰⁰ It must be borne in mind that the principle of

¹⁹⁶ U.N. Conference On Trade and Dev., Full List of Bilateral Investment Agreements Concluded June 1, 2013, http://unctad.org/Sections/dite_pccb/docs/bits_congo_dr.pdf.

¹⁹⁷ André-Dumont, *supra* note 156, at 50.

¹⁹⁸ Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments* 14 (IIED, 2010).

¹⁹⁹ For more information on the umbrella clause, see Thomas Walde, *The “Umbrella” (Or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on original Intentions and Recent Cases*, *Transn’l. Dispute Mgmt.* Oct. 2004; Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 *MINN. J. INT’L L.* 1 (September 2008).

²⁰⁰ For further information about the evolving, scope and implementation of the principle of non-discrimination see Santiago Montt, *State Liability in Investment Treaty Arbitration*, (2009); Dr. Nicolas F. Diebold, *Non-Discrimination and the Pillars of International Economic Law*, ILLJ Emerging Scholars Paper 18 (2010).

non-discrimination does not suggest the host state provide advantages to foreign investors.²⁰¹

The fair and equitable treatment of investors is a concept that has fuelled many controversies between host states and capital importing states because it was perceived as a likely catch all provision that could be invoked with respect to almost any adverse treatment of an investor.²⁰² The 2007 UNCTAD report on bilateral treaties treats this principle as providing a basic standard, detached from the host country's domestic law, against which the behavior of the host country vis-à-vis foreign investments can be assessed.²⁰³ It covers, amongst other, issues: (a) the stability, predictability and consistency of the host state's legal framework; (b) the protection of confidence and legitimate expectation of the investor; (c) administrative and judicial due process; (d) transparency and; (e) reasonableness and proportionality.²⁰⁴

The regulation of expropriation or takings is another salient feature of the international investment treaty that is worth mentioning. The concept of expropriation refers to "an outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person."²⁰⁵ It may even occur indirectly, from a decisive act that does not imply a taking but deprives foreign investors of their property rights. Regardless the manner of its occurrence, a lawful expropriation shall meet following requirements: (a) it must be enacted for a public purpose; (b) it must not be discriminatory; (c) it shall imply a prompt, full and adequate compensation of the dispossessed parties.

b. The Soft Law

Mining operations are subject to another broad type of international rule called soft law. As its name suggests, it consists of non-judicial

²⁰¹ *Id.*

²⁰² Fiona Marshall, *Fair and Equitable Treatment in International Investment Agreements, Issues in International Investment Law, Background Papers for the Developing Country Investment Negotiator's Forum* (Sing. Oct. 1 – 2, 2007).

²⁰³ U.N. Conference on Trade And Dev., *Bilateral Investment Treaties 1995 – 2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5 (2007), available at http://www.unctad.org/en/docs/iteiia20065_en.pdf.

²⁰⁴ See ILA German Branch/Working Group, *General Public International Law and International Investment Law A Research Sketch on Selected Issues*, at 14-22 (December 2009). For further information on the definition, evolving, scope, interpretation and implementation of the fair and equitable principle see OECD, *Fair and Equitable Treatment Standard in International Investment Law* (September 2004), available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf>, accessed on February 17, 2012, R. Dolzer & Chr. Schreuer, *Principles of International Investment Law*, Oxford University Press, at Chapter 7 (2008); UNCTAD, *supra* note 57; Marshall, *supra* note 191.

²⁰⁵ Reinisch, *supra* note 38, at 408.

international standards mostly developed by subjects of international relations on a single or collaborative basis. It aims to enhance the responsibility of corporations in almost every aspect of their business operation, from the outset of the mining project to the closure of the mine. It covers various topics such as human rights, indigenous people and woman, labor, health and security, land use and displacement, transparency, reporting, etc.

Although there is no hierarchy between existing international standards, an investor will pay much more attention to the standards of instruments both the Congolese state and its home state have assented to, as well as the standards specified by the lenders and customary international law. In particular, mining projects must comply with the standards set out by the OECD Guidelines for Multinational Enterprises, the Extractive Industry Transparency Initiative (EITI), the Kimberly Process, the IFC Corporation's Policy on Environment and Sustainability, the World Bank Pollution Prevent Abatement Handbook and, the Equator Principle. As in former instances, this is only a partial list and should not in any event be considered as providing a comprehensive survey of the existing standards.

The OECD Guidelines comprise a set of voluntary principles in all the major areas of any business operation, including employment and industrial relations, environment protection, information disclosure, combating bribery, consumer interests, science and technology, completion, and taxation. Its latest update completed in 2011 encompasses, among other thing, new recommendations on human rights consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.²⁰⁶

EITI is a multi-stakeholder initiative to monitor the flow of resource revenues to insure a sound natural resource management.²⁰⁷ It came into being in 2003, following the momentum of the U.K. government, several large extractive industry companies and other stakeholders.²⁰⁸ It commits participants to disclose payments to governments (or payments received by companies) consequent to the extractive industry operations in countries that have joined that initiative.²⁰⁹ The framework encompasses twelve principles pertaining to resource management, transparency, accountability, sustainable economic growth, and sovereignty, and contains six criteria designed to ensure that signatories implementing the initiative comply with

²⁰⁶For further information see: OECD, OECD Guidelines for Multinational Enterprises, (2011) OECD Publishing available at <http://dx.doi.org/10.1787/9789264115415-en>, accessed on January 12, 2012.

²⁰⁷ EITI International Secretariat, *FAQ*, EITI (July 2, 2014), <http://eiti.org/faqs>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

the defining standards.²¹⁰ The DRC has been an EITI candidate since February 2008.²¹¹

The Kimberley Process Certification Scheme (KPCS) is another multi-stakeholder instrument for extractive industry designed to stem the trade of conflict diamonds.²¹² It entered into force in 2003 pursuant to UN General Assembly Resolution 55/56 of 1 December 2000, and concerns 75 countries.²¹³ The DRC implemented the KPCS since May 31, 2003.²¹⁴

The IFC Corporation's Policy on Environment and Sustainability, World Bank Pollution Prevent Abatement Handbook and the Equator Principle are performance standards developed by lenders.²¹⁵ The first two standards provide benchmarks used in a project financed by the IFC or World Bank.²¹⁶ The Equator principle is applicable to projects funded by commercial lenders that have agreed to the principles.²¹⁷

3. Extraterritorial Legislation

The last group of principles applicable to mining operation in the DRC finds its origin in extraterritorial legislation. It consists of foreign legislation that may impact mining operations conducted by companies linked to foreign states where the legislation was enacted. Succinctly, one can mention the United States Foreign Corrupt Practices Act (FCPA) which makes it unlawful for certain classes of persons and entities to make payments to foreign government officials for the purpose of obtaining or retaining business.²¹⁸ The UK Bribery Act also contains provisions that have an extraterritorial coverage.²¹⁹ Lastly, the mining operations in the DRC might be subject to the Cardin-Lugar provision in the US Dodd-Frank Wall Street Reform and Consumer Protection Act (known as Dodd-Frank Act).²²⁰ The Cardin-Lugar provision is named after an amendment to the Dodd-Frank Act submitted by Senators Cardin and Lugar- based on the

²¹⁰ EITI International Secretariat, *FAQ*, EITI (July 2, 2014), <http://eiti.org/eiti/principles>.

²¹¹ For more information consult <http://eiti.org>.

²¹² *The Kimberly Process*, <http://www.kimberleyprocess.com> (last visited July 3, 2014).

²¹³ *The Kimberly Process*, <http://www.kimberleyprocess.com> (last visited July 3, 2014); G.A. Res 55/56, 55th Sess., (Jan. 29, 2001).

²¹⁴ Democratic Republic Congo, *Kimberly Process* (July 3, 2014)

<http://www.kimberleyprocess.com/en/democratic-republic-congo>.

²¹⁵ IFC, *Policy on Environmental and Social Sustainability* (Jan. 1, 2012); *The World Bank Group*, U.N. Environment Programme & U.N. Indus. Dev. Org., *Pollution Prevention and Abatement Handbook* (1998); *About the Equator Principles*, Equator Principles (July 2, 2014), <http://www.equator-principles.com/index.php/about-ep/about-ep>.

²¹⁶ IFC *supra* note 215; World Bank Group *supra* note 215.

²¹⁷ Equator Principles *supra* note 215.

²¹⁸ The Foreign Corrupt Practices Act, 15 U.S.C. §§ 78(dd)(1)- et seq.

²¹⁹ Bribery Act, 2010, c.23 (U.K.).

²²⁰ PUB. L. No. 111-203.

Energy Security through Transparency Act (S. 1700) of 2009.²²¹ Following this amendment, all listed extractive companies must disclose their payments in all the countries they operate.²²² Another key provision of the Dodd-Frank Act that is worth mentioning is section 1502, which, in accordance with the EITI, requires companies that utilize certain conflict minerals to conduct and report due diligence on their supply chains in order to ascertain whether the source of these minerals is supporting the on-going conflict in the Democratic Republic of Congo.

B. The Supervision of the Mining Regulation

The preceding part discussed the normative framework applicable to the mining operations in DRC. It has shown that the normative framework includes, without prejudice to the contractual will of the parties, a large number of national, international, and even extraterritorial laws. To make these regulations effective, there should be a body empowered to oversee the implementation of existing regulations, especially with regard to the issuing or withdrawal of the mining or quarrying license. This body would also look at the public-private partnerships state-owned enterprises holding a mining title enter into. The same analysis should be undertaken with regard to the contracts signed with the lenders or insurers.

It must be kept in mind that the Congolese mining legal framework does not empower a single regulatory body to supervise every segment of the mining operation. Instead, several institutions within and outside the Mining Ministry supervise the implementation of mining regulations.²²³ As a result, some issues, such as compliance with company law and aligning existing trading companies' by-laws with regional business regulations (OHADA, COMESA and SADC), do not enjoy the supervision of any regulatory body. There is not a well-established nexus of information sharing between existing supervisory bodies even between institutions attached to the Mining Ministry. Consequently, the lack of compliance with the law as well as the fraud is wildly disseminated in the Congolese mining sector.²²⁴

²²¹ Energy Security through Transparency Act.

²²² *Id.*

²²³ See World Bank, *supra* note 160, at 37.

²²⁴ There is a wealth of literature discussing how Government officials collude with extractive companies to circumvent procedures related to the grant of mining license and the payment of taxes. Existing literature has also mentioned that significant portion of Congolese minerals is mined informally and exported illegally. See Bakandeja, *supra* note 165, at 135 and 146-149; World Bank, *supra* note 160, at 41, Global Witness Report, Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines, at 4 (July 2006).

The main supervisory bodies involved in mining operations in DRC are.²²⁵

- The President of the Republic, who is solely entitled to (i) classify, declassify or reclassify mineral substances as mine or quarry products; (ii) declare, classify or declassify an area as a prohibited area for mining activities or quarry work; (iii) declare, classify or declassify a mineral substance as a 'reserved substance'; and (iv) confirm the reservation of a deposit which is subject to tender pursuant to a Ministerial Decree. He exercises his powers by ordinances passed on his own initiative or on the proposal of the minister, after having obtained the opinion of the Geological Department or the Mining Registry.
- The Minister of Mines, who has jurisdiction over (i) the granting, refusal and cancellation of mining rights; (ii) the creation of artisanal exploitation zones as well as the granting and withdrawal of approval for the purchasing of artisanal exploitation products; (iii) the supervision of the institutions, essentially public or semi-public entities, that carry out mining activities and quarry works. He exercises his powers by way of decrees.²²⁶
- The Governor of the Province is responsible for: (i) Issuing traders' cards for artisanal exploitation products; and (ii) the decision to open quarries to carry out public utility works on public land.
- The Head of the Provincial Mining Division has jurisdiction over (i) the issuing of artisanal miners' cards; and (ii) the granting of exploration rights for quarry products, and of permanent or temporary quarry exploitation rights for standard construction material.
- The Mining Registry or *CAMI*, a semi-autonomous agency within the Ministry of Mines. It is in charge of administrative proceedings concerning the application for, and registration of mining rights, as well as the withdrawal, cancellation and expiration of those rights.

²²⁵ See Arts. 9-16 of the 2002 MINING CODE; World Bank, *supra* note 160, at 37-39; G. Bakandjeja, *supra* note 165, at 52-60; H. André-Dumont, *supra* note 156, at 47-49.

²²⁶ For more information about the Minister of mine, see <http://mines-rdc.cd>.

- The Directorate of Mines is in charge of the monitoring and assessing of mining activities with regard to safety, health, work practices, production, transport, sale and social matters, as well as establishing statistics, inspecting mining operations.
- The Small-scale and Artisanal Mining Extension Service or *SAESSCAM*, an office within the Mining Ministry that aims to facilitate small-scale mining and artisanal mining.
- The Diamond Expertise and Evaluation Office or *CEEC*, the official state agency responsible for the evaluation and certification of diamonds. It is involved in the implementation of the Kimberley Process, and the valuation of exported gold and diamonds to ensuring the government receives their fair market value. In any case, the affectivity of its operation remains questionable.
- The Central Bank of Congo, the *BCC*, which has jurisdiction over foreign exchange control and exports.
- The National Comity of The EITI or *CN-ITIE/RDC* which is in charge of the monitoring of the implementation of the principles and criteria of the Extractive Industries Transparency Initiative.
- The institutions supervised by the Finance ministry (namely *DGI*, *DGRAD* and *DGDA* previously called *OFIDA*) that are in charge of the collection of taxes, duties and royalties.²²⁷
- The President of the Republic and the Commercial Registry's Clerk who are respectively empowered with regard to the acquisition of legal personality of companies shaped into *SRPL* and *SARL*.

C. The Enforcement of the Mining Regulation

The normative framework applicable to the mining operations is enforced first and foremost by the supervisory bodies mentioned in the preceding part. These bodies are empowered to implement the law related to their specialty. Unfortunately, this is not the case on the ground. Supervisory bodies are very often remiss in aligning mining operation with

²²⁷ See World Bank, *supra* note 160, at 24-28.

the applicable law. The 2008 World Bank report on the mining sector in DRC clearly stated:

[T]he monitoring and evaluation of work performed by [exploration] permit holders is non-existent. The Directorate of Mines, which is nominally responsible for inspections, does not have the personnel, equipment, or presence in the mining areas to conduct the inspections. As a result, the Government is largely ignorant of a company's compliance with its work program obligations, stipulated in the Mine Law The situation is particularly acute with respect to compliance with environmental, health, and safety standards. In addition, ... permits may change hands or be leased to other companies without the knowledge of the Government and in violation of the Mine Law.²²⁸

In addition to the supervisory bodies, national courts and tribunals enforce laws applicable to the mining operations. According to Article 46 of the 2002 Mining Code, if the Mining Registry does not proceed to the registration of the mining or quarrying right within the conditions and time frame set forth therein, the applicant can seek the granting of the rights by submitting a request to the Tribunal of the High Court that has territorial jurisdiction. Article 315 of the 2002 Mining Code lists supervisory body decisions, which can be challenged before an administrative court, grounding on the new Mining Code provisions. It must be noted that any aggrieved party affected by the mining operation, can seek relief by filing a case with the competent Tribunal.

Lastly, a domestic or international arbitral tribunal can enforce mining regulations, subject to the provisions pertaining to breaches, penalties and sanctions set forth by the new Mining Code.²²⁹ According to the Explanatory Memorandum, these issues cannot be directly submitted to arbitration. They must first be brought through administrative and judicial procedures; otherwise the arbitration recourse will be deprived of its effectiveness.²³⁰

²²⁸ *Id.* at 23.

²²⁹ According to the Article 319 of the 2002 MINING CODE, the recourse to international arbitration shall be done under the ICSID forum.

²³⁰ See Articles 46, 57 and 317 of the 2002 MINING CODE. For further information see H. André-Dumont, *Dispute and their Resolution under the Mining Code 2002 in the Republic Democratic of Congo*, 4 J. OF ENERGY & NAT. RESOURCES L., 362-71 (November 2007).

IV. THE STATUS OF MINING CONTRACTS RENEGOTIATED

The preceding part surveyed the legal framework applicable to the Congolese mining sector. While Part II advocated the pre-existence of a renegotiation clause in the contract defining the triggering events, rights and obligations of the parties throughout the process of renegotiation as well as the enforceability thereof. This part shows that mining contracts renegotiated in the DRC did not provide for the mechanisms suggested in Part II. An overall glance at litigious contracts reveals that some included a general stabilization clause restricting the legislative and administrative power of the Congolese state to amend the established contractual regime.²³¹ Others provided for a provision guaranteeing the freezing of economic advantages granted to investors for the duration of the contract or restoration of the economic equilibrium, in case this latter was breached by an act emanating from the Congolese state.²³²

It is difficult to come to the conclusion that the renegotiation of mining agreements undertaken by the Congolese government was arbitrary, though they were unilaterally decided. The general premise, according to which there should be a renegotiation clause inserted into the contract for any subsequent demand of adaptation to be lawful, falls short of proving valid in the very case vitiating factors affect the contract. The one advantage of the renegotiation process undertaken by the Congolese government is that it strengthens the idea that saving the contractual relationship is the pragmatic attitude to mitigate investment risks. However, it failed to achieve its objectives and benefit the local population. The reason may be a combination of technical, strategic and political factors.

A. Recalling the Context which Prevailed before the Mining Review

From independence to the first half of 1990s the state-owned enterprises²³³ dominated the Congolese mining sector. They enjoyed a

²³¹ Convention between the state-owned enterprise Miba and BHP Billiton World Exploration Inc., convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd., Paru Ltd., Mboko Ltd., Mofia Ltd. and Tembo Ltd., the agreement between the OBM B.V & Groupe Goeorge Forrest and the state-owned enterprise Gecamine *available at* http://minesrdc.cd/fr/index.php?option=com_content&view=Article&id=92, accessed November 11, 2011.

²³² Convention between the Congolese State and Anvil Mining NL, convention between the state-owned enterprise Gecamine and Kin-Forrest Ltd., convention between the state-owned enterprise Miba and De Beers Centenary AG, convention between the state-owned enterprise Okimo and Mwana Africa Holdings (PTY), *available at* http://minesrdc.cd/fr/index.php?option=com_content&view=article&id=92, accessed November 11, 2011.

²³³ Including: Gécamines (Générale des Carrières des Mines), MIBA (Minière de Bakanga), Sominki (Société Minière et Industrielle du Kivu), Okimo (Office des Mines d'Or

monopoly over large surfaces of exploration and exploitation ground including the most valuable mining deposits known.²³⁴ Far from taking advantage of this position, these enterprises were mismanaged and finally became moribund. Then, in an attempt to redress them, the Congolese government decided to privatize half of their assets, with the encouragement of the international financial institutions.

In 1995, the Congolese state started negotiations with a number of mining firms, including: Swipco, Lundin Group, Cluff Mining, Banro, Mindev, Barrick Gold, South Atlantic Resources, Union Minière, Anvil Mining, Gencor, Iscor and Broken Hill, to sell them the mining rights the state-owned enterprises failed to exploit. As a result of the process, Gécamines entered into a joint venture with the Lundin Group for the exploitation of the Tenke-Fungurme project, and Anvil Mining was granted a cobalt and silver deposit of almost 13,000 square kilometers. Mindev and the Barrick Gold Corporation were granted 2,000 and 82,000 square kilometers of gold exploitation surfaces. Sominki (a state-owned enterprise) was acquired by a consortium including Banro Resources Corporation and Mines d'Or du Zaïre (MDDZ), a Belgian corporation.²³⁵

However, as commentators have pointed out, the majority of mining contracts concluded that time was with junior companies, without any capacity to develop a large scale project but only interested in speculating in mining titles on the international market.²³⁶ The rebellion that started in September 1996 and ended a year later with the overthrow of President Mobutu worsened the situation. Mining contracts were granted that rewarded the multinationals that logistically had supported the rebellion, rather than granting those that would benefit the Congolese state and its population.²³⁷ In 1998, just two years after the leader of the rebellion became President, a second rebellion started with almost the same involvement of multinationals in the supply of military equipment and service to rebel groups.²³⁸ When this second rebellion officially ended, in

de Kilomoto), EMK-Mn (Entreprise Minière de Kisenge-Manganèse, SODIMICO (Société de Développement Industriel et Minier du Congo).

²³⁴ See The World Bank, *supra* note 160, at 40.

²³⁵ Assemblée Nationale, Rapport de la Commission Spécial Chargée de l'Examen de la Validité des Conventions à caractère économique et financier conclues pendant les guerres de 1996-2003, (also known as Lutundula Commission Report), 6 (2005).

²³⁶ The World Bank, *supra* note 160, at 46, 50.

²³⁷ Assemblée Nationale, *supra* note 213, 6-7.

²³⁸ The UN Secretary-General, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, U.N. Doc. S/2002/1146 (16 Oct. 2002) 12.

2002 with the signature of the Global and Inclusive Agreement, also known as the Sun City Agreement, several concerns arose about the legality of the agreements signed with leaders of different rebel factions.²³⁹

The Congolese National Assembly commissioned a special committee in 2004 to survey the validity of economic and financial contracts signed during the two wars (1996-1997 and 1998-2002) known as the Lutundula Commission. The report submitted in June 2005 found that the majority of contracts signed during the war period were illegal or contributed little or nothing to the development of the country.²⁴⁰ For instance, it highlighted contracts in which the state had agreed to tax exemptions of joint ventures for periods of 15 to 30 years. The report also denounced the failure of conducting feasibility studies as well as interference of high-level politicians in the negotiation process. Moreover, it found that joint ventures with state-owned enterprises have failed to resolve the social problems of the population in an adequate manner. In fact, the companies that were born out of the partnerships were incapable of absorbing the staff of the public enterprises that work on the sites and their installations. Finally, the report recommended that some of these contracts be rescinded and others be renegotiated. In addition, it suggested that no new mining concessions be granted during the remaining transitional period until a new government is in power after elections.²⁴¹

Disappointingly, the report was never discussed by the parliament. The allocation of mining concession even increased afterwards according to some observers. Indeed, the transitional government officials who acted had an interest to line their pockets in order to influence the outcome of the elections, whether by increased advertising, by buying votes outright or by bribing electoral officials to favor their party.²⁴² The contracts that were signed during the transition period were considered extremely unfavorable to the DRC and are suspected to be tainted by corruption. Some of the joint ventures the state-owned enterprises entered into were signed thanks to a blatant conflict of interest.²⁴³ Others were concluded with a total lack of

²³⁹ See Rights & Accountability in Development (RAID), Unanswered Questions: Companies, Conflicts and the Democratic Republic of Congo, at 18 (May 2004); Global Witness Report, Under-Mining Peace The explosive Trade in Cassiterite in Eastern DRC, at 8 (June 2005); International Crisis Group Africa Report No 114, Escaping the Conflict Trap: Promoting Good Governance in the Congo, 6-7 (July 2006); Human Right Watch Report, Democratic Republic of Congo: Election in Sight, Don't Rock the Boat, at 14 (December 2005).

²⁴⁰ Assemblée Nationale, *supra* note 213, at 6.

²⁴¹ *Id.* at 270.

²⁴² Human Right Watch Report, *supra* note 217, at 14.

²⁴³ Global Witness Report, *supra* note 202, at 37.

transparency, on the basis of flawed or non-existent international tendering procedure.²⁴⁴

A survey commissioned by the World Bank found that many of these contracts diverged from international practice.²⁴⁵ It also pointed out the failures of supervisory bodies to enforce the law with respect to labor, environment, health and safety issues.²⁴⁶ This survey noted, however, that other contracts conformed to international standards but required certain additions or supplements such as operating agreements, accounting practices, and internal governance procedures.²⁴⁷ These developments corroborate the idea that it was widely recognized, at both the national and international level, that the Congolese mining sector has been and continues to be characterized by high levels of fraud, corruption and obfuscation as well as a disregard for the right of the Congolese population to benefit from the country's natural wealth.²⁴⁸

Against this backdrop, the Congolese government enacted a decree calling for the review of mining agreements and set up a commission to this end in April 2007, just after the nation wide elections. Article 2 of the ministerial decree stipulates that the Commission's mission was to examine the partnership contracts concluded by the state and/or public companies with private investors in the mining sector and assess their impact on the DRC's public companies and national development. In addition, it requires the Commission recommend the terms and conditions to review the audited contracts with the aim of correcting the related imbalances and flaws.²⁴⁹ The Congolese government did not question the renegotiability of existing mining agreements, nor did it voice concerns over the willingness of investors to adjust the existing regime. It merely made a unilateral decision, using its sovereign prerogatives, to attempt to restructure the agreements almost completely as a result of societal and international NGOs pressure.

B. The Process Followed by the Congolese Government

The use of a renegotiation mechanism in the Congolese context aimed at aligning mining agreements, especially those signed during the transitional period, to what the Congolese government perceived as an

²⁴⁴ Rights & Accountability in Development (RAID), Key Mining Contracts in Katanga: The Economic Argument for Renegotiation, at 4 (April 2007).

²⁴⁵ The World Bank, *supra* note 160, at 47.

²⁴⁶ *Id.* 23, 63.

²⁴⁷ *Id.* at 47.

²⁴⁸ Global Witness Report, The Congolese mining sector in the balance: lack of transparency risks undermining review of mining contracts, at 4 (October 2007).

²⁴⁹ Arrêté ministérielle No 2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la revisitation des contrats miniers (2007).

acceptable standard. To achieve this the Congolese government followed a two-step approach. First, it commissioned a taskforce to assess existing agreements and audit the mining agreements. Secondly, it appointed another taskforce to renegotiate or cancel those contracts that were non-compliant to what the Congolese government perceived as an acceptable standard.

1. The Audit of Mining Agreements

Few official documents have been disclosed with regard to the setting up of the ad hoc Commission to review mining contracts. The ministerial Decree that announced this audit outlined the objectives of the Commission; it would;

- examine the partnership contracts concluded by the state and/or public companies with private investors in the mining sector and assess their impact on the DRC's public companies and national development;
- propose, if necessary, terms and conditions of their review with the aim of correcting any imbalances and related flaws.

This ministerial Decree does not include the Commission's terms of reference, nor does it set the scope and conditions of the review process. Nonetheless, the Commission adopted its terms of reference that, unfortunately, have not been made public.²⁵⁰ The Commission was entirely composed of members of the government and civil servants including, amongst others, representatives of the Presidency, the Prime Minister's office, the Ministry of Mines, the Ministry of Finance and several others ministries.

Article 3 of the ministerial Decree setting up the Commission stipulates that the Commission can resort to external expertise, without giving additional details. In accordance with this Article, the report submitted by the Commission acknowledged the assistance of national and

²⁵⁰ A Global Witness report suggest that these terms of reference was drawn from 'Guidelines for the Revision of Mining Contracts in DRC: the Quest for Justice, Fairness, Transparency and Accountability' published by the Southern Africa Resource watch. The draft terms of reference that has been disclosed to the aforesaid organisation listed five main aspects, namely: (1) the distribution of share capital within joint venture, (2) the breakdown of the allocation of revenues from joint venture companies, (3) the respect of social clause, (4) the disempowerment of statutory management bodies of the joint venture company in favour of operating company, the subsidiary of the majority partner, (5) the confidentiality clause with respect to the principles of the Extractive Industries Transparency Initiative. Global Witness report, *supra* note 226, 5-6.

international non-governmental organizations.²⁵¹ The national organizations that participated in the process were appointed by the Congolese government as mere observers. Commentators have noted that the opportunity for Congolese NGOs to provide meaningful input toward the process was limited in practice.²⁵² Of the five organizations selected by the Congolese government, only one, *Avocats Verts*, could be considered to be an 'activist' NGO working for the protection of rights. The other committed Congolese NGOs as well as networks of NGOs that have been working on mining issues in DRC for many years, were not chosen.²⁵³ The local population living in mining areas was not involved in the process of assessing mining agreements.

At the time mining agreements were audited the CAMI, the governmental body empowered to issue mining permits and keep appropriate records, had already issued over 3,000 mining rights, of which no less than 416 were issued to the state-owned enterprises.²⁵⁴ The review commission assessed only 63 mining agreements, including 57 partnerships with state-owned enterprises and 6 contracts involving the Congolese state. As of the writing of this article there had been no disclosure on how the Commission chose these agreements and if the process of auditing them included any prioritization. The Commission report divides the reviewed agreements into three categories: category A was for agreements that were to be unchanged; category B dealt with agreements that needed to be renegotiated; and category C was for those that were to be cancelled.²⁵⁵ Of the all agreements subjected to the review, not a single agreement was classified in category A. 23 agreements were assigned in category C, 40 agreements were put in category B.²⁵⁶

²⁵¹ Commission de Revisitation des Contrats Miniers, *Raport des Travaux*' tome 1 (Novembre 2007) 5, available in French only http://www.miningcongo.cd/pdf/TOME%201%20RAPPORT%20CRCM%20VERSION%20FINALE-%20270208%20&_h%C3%A9C3%A8.pdf, accessed September 14, 2011. The outside expertise came from three organisations, namely: Carte Centre, Open Society Initiative for Southern Africa (OSISA), both not-for-profit organisations, and Companies Benjamin de Rothschild.

²⁵² Global Witness report, *supra* note 226, at 17.

²⁵³ Apart from *Avocat Vert*, following organisations were selected by the Congolese government: the *Centre d'études pour l'action sociale (CEPAS)*, a Jesuit research, and study centre focusing on social issues), the *Conférence Episcopale nationale du Congo (CENCO)*, National Bishops' Conference), the *Fédération des Entreprises Congolaises (FEC)*, Federation of Congolese Businesses), the *Association Nationale des Entreprises du Portefeuille (ANEP)*, National Association of Public Companies).

²⁵⁴ The World Bank, *supra* note 160, at 41.

²⁵⁵ *Id.*

²⁵⁶ Commission de Revisitation des Contrats Miniers, *supra* note 229, at 4.

Listed per public partner, the picture is as follows:

| Public Partner | Category B | Category C |
|-----------------------|-------------------|-------------------|
| State | 3 | 3 |
| EMK-Mn | 1 | 1 |
| Miba | 6 | / |
| Okimo | 6 | 3 |
| Sakima | 1 | 5 |
| Sodimico | 1 | 5 |
| Gécamines | 22 | 6 |
| Total | 40 | 23 |

The Commission's report did not provide clear recommendations about how renegotiations should be carried out, nor did it provide for guidelines with regard to the obligations of the parties whose contracts have to be cancelled. In addition, it did not refer acts of illegality that it disclosed to the relevant judicial authorities. The Commission's report also did not identify new problems in the mining contracts concluded in DRC, The Commission's mandate ended with the notification of its findings to respective companies. The Congolese government appointed a new task force for proceeding with renegotiation.

2. The Renegotiation of Mining Agreements

Unlike the preceding stage, the Congolese government has disclosed the terms of reference applicable to the task force that proceeded with the renegotiation and cancellation of mining agreements.²⁵⁷ These terms of reference encompass 15 headings, of which 14 deal with renegotiation.²⁵⁸

²⁵⁷ Ministry of Mines, Terms of Reference for the Renegotiation and/or the Termination of Mining Contracts, 1-6 (August 2008). An English translation is *available at* <http://www.atol.be/docs/ebib/TDR%20RENEGOCIATION%20ENGLISH.pdf>, accessed March 22, 2012.

²⁵⁸ Here are the headings of the terms of reference applicable to the task force that proceeded with the renegotiation and cancellation of mining agreements, namely: (a) preliminaries to the renegotiation, (b) evaluation of the inputs of the partners, (c) financial repercussions in the short, medium and long term, (d) financing of projects, (e) rate of remuneration of the projects, (f) respect of legislation, (g) control of the movements of shares

The developments underneath these headings reveal that the Congolese government attached a lot of importance to the financial and management aspects of the mining projects. The expected standard in this respect included the increase of the state-owned enterprises' shares in the targeted joint ventures up to 51% of the capital stock, involvement of representatives of the Congolese side in the operational and management bodies, adjustment of the profit redistribution, and supplement of the transfer bonus (also called key money or *pas de porte*) paid for access to reserves.²⁵⁹

The presumed intent of the Congolese government, to get fair bargains and align the contentious agreements with the Congolese laws, contrasts with certain suggestions in the terms of reference. A blatant example of this ambiguity is the moratorium declared before the start of the renegotiation process on feasibility studies' submission and payments of duties related to surface rent and royalties.²⁶⁰ Article 69 of the 2002 Mining Code provides that the granting of an exploitation permit is subject to the submission of a feasibility study. Articles 196 and 197 of the same code stipulate that the validity of mining rights depends on the commencement of the operations within six months time following the issuance of the title evidencing the mining and the payment of the surface area fees relating to the mining title, each year before the deadline specified in Article 199 of this code. The mining Code provides for sanctions in case of failing to meet these requirements.²⁶¹ In light of these provisions, the legality of the moratorium is deeply questionable.

The terms of reference give no guidance in connection with the human rights and environmental aspects of the mining operation. The developments under the headings referring to the termination of the contract are silent with regard to the rights and obligations of the Congolese side after the cancellation of a mining agreement. The contracts involved in the Congolese renegotiation process did not provide for a clause enabling the use of the adaptation mechanism in the way described in the preceding

or parts, (h) effective participation in the daily management of the partnership, (i) taking into account the blocking minority, (j) respect of the obligations of the partners, (k) Use of local resources, (l) Contracts or partnerships concluded on the basis of calls for tender, (m) Social responsibility clauses, (n) Applicable law in case of dispute, (o) Termination of contracts.

²⁵⁹ Ministry of Mine, *supra* note 229, 1-4.

²⁶⁰ *Id.* at 1, 6.

²⁶¹ According to Article 289 of the 2002 Mining Code, the failure to pay surface rights fees and to start work within the deadline set forth under the law constitutes a cause of forfeiture of mining rights.

part.²⁶² Nonetheless, some of them did provide for a general review clause subjecting the adjustment of the contractual provisions to a common agreement of the parties:

*La présente convention ne peut être amendée ou modifiée que par un écrit signé par toutes les parties ou par leurs successeurs et cessionnaires autorisés respectifs.*²⁶³

The present agreement shall not be amended or modified but through a written agreement between all the parties or their respective authorized successors and the transferees..

Others did provide for a stabilization clause freezing wholly or part of the contractual regime, or seeking the economic balancing of the contractual benefits:

L'Etat garantit pendant toute la durée de la présente convention, à Anvil Mining Zaïre (Congo), à ses actionnaires étrangers et, à son ou ses gestionnaires et à leurs sociétés affiliées, à ses mandataires sociaux et à ses agents salariés expatriés et ses bailleurs de fonds et assureurs, la stabilité de la législation et réglementation zaïroise (congolaise) en vigueur à la date de la signature de la convention et notamment dans les domaines judiciaire, foncier, fiscal, des conditions de séjour, de mouvement et de travail des étrangers, de la santé, de la protection et de la réglementation minière.

*Aucune disposition législative ou réglementaire prenant effet à une date postérieure à la date de la signature de la convention ne peut avoir pour conséquence de restreindre et de diminuer les avantages particuliers ou entraver l'exercice des droits résultant de la présente convention*²⁶⁴

The State guarantees Anvil Mining Zaire (Congo), his foreign shareholders, administrators and their affiliated companies, his social representatives, foreign

²⁶² A clause which defines the conditions of carrying out the renegotiation including, among others, the triggering events, rights and obligations of the parties throughout the process as well as the effect of the failure to agree.

²⁶³ Art. 20.1 of the convention between the state-owned enterprise Gecamine and the group of corporates Luding Holdings, Chui Ltd., Paru Ltd., Mboko Ltd., Mofia Ltd. and Tembo Ltd. for the development of the Tenke Fungurume Mining project.

²⁶⁴ Art. 34 of the convention between the State and Anvil Mining NL for the development of the Dikulushi-Kapulo mining project.

workers, financiers and insurers, the stability of the current Zairian (Congolese) rules and legislations, during the term of this agreement, in particular fields such as judiciary, land law, fiscal law, conditions of stay, movement and work of foreigners, health and safety, and mining regulations.

Any legislative or regulatory measure coming into effect after the signature of this agreement shall not amount to an impairment of specific advantages or a hindrance to the exercise of rights specified hereunder.

L'exactitude de chaque stipulation, déclaration et garantie, ainsi que l'engagement de les respecter, constituent pour chacune des parties une condition déterminante de la signature du présent contrat.

Il ne peut être renoncé, en tout ou en partie, à une de ces stipulations, déclarations et garanties que par la partie en faveur de laquelle la stipulation, la déclaration ou la garantie est faite comme stipulé au présent article, pour autant que CMSK continue d'exister. Chaque partie s'engage à tenir indemne et à indemniser l'une ou l'autre partie de tout dommage résultant de toute violation d'une stipulation, déclaration ou garantie quelconque contenue dans le présent contrat.²⁶⁵

The accuracy of every condition, statement and guarantee, as well as the commitment to respect them, constitute for each of the parties a substantive requirement of entering into this agreement.

None of these conditions, statements and guarantees shall be waived but by the party in favor of which they were made, throughout the existence of CMSK, in accordance with the present article. Each of the parties commits not to change any condition, statement or guarantee specified hereunder, and to indemnify the other party(ies) for any damage resulting from any violation thereof.

Similarly, Article 22.6 of the convention between the State, state-owned enterprise Gécamines and Congo Mineral Development (a First Quantum's subsidiary) for the development of the Kingamyambo Musinoi tailing project:

²⁶⁵ Art. 24 of the convention between the state-owned enterprise Gécamines and Enterprise General Malta Forrest for the development of the Luiswishi mining project.

Si conformément à l'article 18 du présent contrat une décision définitive de la cour d'arbitrage de la chambre de commerce internationale constate que l'Etat a imposé à KMT ou aux parties contribuant au financement un prélèvement fiscal ou parafiscal anormal ou excédant ce qui existait à la date de la signature du présent contrat et si, dans les trente jours de cette décision arbitrale, l'Etat n'a pas remboursée le prélèvement trop perçu à celui qui l'a payé, et si aucune autre solution n'est trouvée, l'Etat et Gécamines s'engagent à prendre en charge le montant des prélèvements trop perçus en autorisant KMT et les parties contribuant au financement à faire jouer la compensation avec toutes avances, paiements, primes et/ou distributions quelconques payables par KTM ou par CMD à l'Etat et/ou Gécamines en vertu du présent contrat, étant entendu que tout remboursement ultérieur par L'Etat sera, dans ce cas, immédiatement remboursé à Gécamines .

If, pursuant to Article 18 of this contract the Court of Arbitration of the International Chamber of Commerce issues a final award which find that the State imposed on KMT or parties contributing to finance the project an abnormal tax or administrative levy exceeding the threshold set out at the signature of this contract and if, within thirty days of this arbitral award, the State has not paid back the excessive tax collected to the one who paid it, and if no other solution is found, the State and Gécamines make a commitment to bear the excessive burden of such a tax by authorizing KMT and the parties contributing to finance the project to compensate for whatever advances, payments, or any bonus payable and distributed by KTM or CMD to the State and/or Gécamines by virtue of the present contract, provided that.

The above listed contractual provisions are far from exhaustive. They may suffice, however, to reveal some of the legal issues that arise from the approach taken by the Congolese government. The shared characteristic between these clauses is that the decision to renegotiate any provision of the existing mining agreements should have been a consensual one. In any event, it should have not consisted of attempting to restructure the mining

agreements on the whole, as the terms of reference issued by the Congolese government suggested.²⁶⁶

In September 2008, the taskforce appointed by the Congolese government entered negotiations with the companies that were notified of the Review Commission's findings. This taskforce also renegotiated some of the partnerships that should have been cancelled.²⁶⁷ The conditions surrounding this choice remain unknown. A large number of companies agreed to adjust their mining agreement, though to a lesser degree than that suggested in the terms of reference. Others initially rejected the Congolese government's demand however they later agreed to tiny adjustments. The most difficult negotiations were with six firms, including AngloGold Ashanti, Banro, First Quantum, Freeport-McMoRan, Gold Fields and Mwana Africa.²⁶⁸ These firms, with the exception of First Quantum, reached an agreement with the Congolese side in August 2009. First Quantum's contract was cancelled.²⁶⁹

The salient features that can be drawn from the renegotiation include²⁷⁰ the increase of the State-owned enterprises' share in the partnership from less than 20 percent to approximately 30 percent, with some exceptions,²⁷¹ the involvement of representatives of the state-owned companies in the management bodies of the partnership,²⁷² and the increase in the amount of the transfer bonus and royalties.²⁷³

²⁶⁶ See Ministry of Mine *supra* note 257 for further development in connection with this issue, *see* 3.4.3 Conditions of Renegotiating an Existing Agreement in Section two above.

²⁶⁷ SARW/CENCO, Rapport de l'Atelier sur l'Evaluation du Processus de Revisitation et de Renégociation des Contrats Miniers, 6 (14 décembre 2009).

²⁶⁸ Mining Journal, The Democratic Republic of the Congo, A supplement to Mining Journal, at 5 (March 2010), *available at*

http://www.mining-journal.com/_data/assets/supplement_file_attachment/0004/209074/DRC_2010scr.pdf, accessed July 7, 2014.

²⁶⁹ This unfortunate decision was based in political considerations. Other investors whose mining agreement contemplated the same criticisms succeeded to secure their investment.

²⁷⁰ Including the few contracts published in the website of the Congolese Ministry of Mine http://mines-rdc.cd/fr/index.php?option=com_content&view=article&id=166&Itemid=126, public speeches of government representatives, information disclosed by private companies and NGOs involved in the mining sectors in DRC.

²⁷¹ Gécamines' shares in the Tenke Fungurume project increased from 17.5 % to 20. By contrast, the initial OKIMO's stake in the Moto gold project, 30 % of the stock share, decreased to 13.78%, as a result of the sale of half thereof to the private partner.

²⁷² Art. 5 of the amended Tenke Fungurume project.

²⁷³ Statement made by the Minister of mine representative in a workshop organized by SAWR and CENCO the 14 December 2009, SARW/CENCO, *supra* note 257, 6-7.

C. Appraisal of the Renegotiation Process

From the above examination of the processes followed by the Congolese government, it became quite clear that the outcome of the renegotiation does not correspond to what one may call a success, with regard to the objectives set forth in the terms of reference. Rather, this attempt to bring fairness and compliance with the Congolese laws into existing mining agreements has opened up the Congolese mining sector to a new era where traditional taboos are little by little given up. For the first time, mining agreements have been made public by the Congolese government. Some of the mining agreements the State and/or state-owned enterprises entered into before and after the renegotiation process can be consulted on the website of the Mining Ministry.²⁷⁴

The Congolese renegotiation process also showed that the absence of a renegotiation clause does not dilute the worthiness of the adjustment demand. Although the existing agreements did not provide for a specific renegotiation clause, not a single investor among those requested to adjust their existing agreements did reject the Congolese state's demand. Far from using this legitimate exception, they all entered negotiations and adjusted some provisions of their contracts. Both the Congolese government and investors used the renegotiation mechanism to attempt to validate the agreements they entered into. It is not surprising that the benefits drawn from these contractual adjustments were not limited to the Congolese side.²⁷⁵ These facts truly prove that salvaging the contractual relationship is the pragmatic way to mitigate investment risks. However, as previously shown, the legal issues that arise when parties fail to agree cannot be overcome to the satisfaction of the side that seeks the adjustment, if the original contractual regime does not provide for an adjustment mechanism, and regulate the intervention of third parties.

The renegotiation of mining contracts in the DRC showed that the mining sector is extremely politicized. The investor and Congolese sides have benefited from this condition with different fortunes. The negotiators that acted on behalf of the Congolese side were politicians, without the appropriate skills to handle the renegotiation process successfully; the Congolese government forwent external expertise at this critical stage of the process.²⁷⁶ Of the data gathered for this study, it seems that the Congolese

²⁷⁴ See <http://minesrdc.cd>.

²⁷⁵ The Carter Center, *The Mining Review in the Democratic Republic of the Congo: Missed Opportunities, Failed Expectations, Hopes for the Future*, (3 April 2009) available at http://www.cartercenter.org/news/pr/drc_040309.html accessed July 7, 2014.

²⁷⁶ The Carter Center, *The Mining Review in the Democratic Republic of the Congo: Missed Opportunities, Failed Expectations, Hopes for the Future*, (3 April 2009) available at

negotiators did not take advantage of their best alternative (Batna) to either reach a mutually satisfactory agreement or walk away to a better alternative. A report submitted by one of the NGOs involved in the renegotiation process corroborates this conclusion: “the government sought short-term benefits at the expense of long term improvements”.²⁷⁷ Finally, the overall process of renegotiation does not appear to meet a reasonable standard of transparency.²⁷⁸ The final report of the renegotiation process has not been published thus far. Except for the few amended agreements available on the Mining Ministry’s website, it seems that contractual parties did not attempt to regulate future demand of adaptation.

D. Remaining issues

The renegotiation process left a lot of unresolved issues, with regard to the reasons that prompted it. These issues cover, among others, the non-renegotiated agreements kept secretly,²⁷⁹ as well as the appraisal and valuation of mineral assets granted to private companies.²⁸⁰ Similarly, amended agreements cannot be deemed fully compliant with the Congolese laws with respect to the tender procedures, the granting of tax exemption, submission of feasibility studies and the deadline for the payment of the surface area rent, royalties and others duties. In addition, there is a lot of public concern over new agreements that the Congolese government has concluded since the enactment of the ministerial Decree calling for the review of mining agreements.²⁸¹

http://www.cartercenter.org/news/pr/drc_040309.html?printerFriendly=true, accessed March 22, 2012.

²⁷⁷ *Id.*

²⁷⁸ See the development beneath subsection B ‘The process followed by the Congolese government’.

²⁷⁹ It is worth recalling that the renegotiation of mining contracts involved only 63 agreements. At the time this process started, the CAMI has already issued over 3 000 mining rights, of which no less than 416 were issued to the state-owned enterprises, see The World Bank, *supra* note 160, at 41.

²⁸⁰ Recently, the Great Britain announced that an investigation will be carried out regarding the involvement of British-connected shell companies and London-listed mining groups in opaque deals to acquire prime mining assets in the Democratic Republic of the Congo. See S. Goodley & J. Borger, *Mining firms face scrutiny over Congo deals*, The Guardian, (8 May 2012) available at <http://www.guardian.co.uk/business/2012/may/08/mining-firms-congo-deals>, accessed May 20, 2012.

²⁸¹ For instance, the infrastructure for minerals deal with Chinese companies – strongly criticized by the IMF for it implied new massive debt.

V. CONCLUSION

Long-term agreements are concluded on speculative assumptions, which may turn out to be untrue. This justifies a renegotiation clause that allows parties to adjust the original contractual regime when imperfections, cultural differences or unforeseen events occur. Renegotiating an existing agreement is a common feature of international business transactions and does not necessarily conflict with the contract's stability. Major systems of law have confronted the issue of non-performance of a contractual obligation. The stability of the contractual terms is important, but a certain degree of flexibility is necessary to allow parties to adjust their relationship in case of imperfections, cultural differences or supervening of unforeseen events.

However, to be effective, the renegotiation mechanism must be regulated so as to not fuel unlimited demand for adaptation resulting in contracts that might ultimately have counterproductive effects on host state attractiveness. If an existing contract does not provide for a renegotiation clause, its adaptation is still possible so long as the applicable law regulates that issue. Nonetheless, the absence of a specific clause regulating third party intervention might hinder the third party in adjusting a contentious agreement on behalf of the parties.

This article revealed that constant suspicions of illegal mining exploitation have prevailed on the Congolese mining sector as a result of ill-enforcement of the applicable regulations, corruption and mismanagement. These suspicions prompted national and international calls for renegotiating mining agreements concluded in DRC. The dominant position is there should be a renegotiation clause inserted into the contract, or applicable law should regulate the issue for any subsequent demand or adaptation to be lawful, falls short of proving valid in this case study where vitiating factors affecting the existing contracts. Both Congolese and investors sides used the renegotiation mechanism for attempting to legitimate the agreements they entered into, although the latter did not provide for renegotiation clause. An examination of the amended agreements that have been disclosed so far reveals many unresolved issues, particularly with regard to the reasons that prompted the renegotiation and regulation of future demands of adaptation.

It is crucial that forthcoming conclusions of the mining agreement include a renegotiation clause and regulate the intervention of third parties. The Congolese government should endeavor to lessen political interference throughout mining contract negotiations. It should also build negotiation skills among its representatives involved in that process. Investors should increase among them awareness of corporate social responsibility standards for preventing illegal exploitation of mining resources which, ultimately, results in triggering unilateral contract adjustment. The remaining issues in connection with the amended agreements should be resolved amicably for this approach is more likely to bring mutual satisfaction to either side.

ANYTHING BUT “FKING BRILLIANT:”
THE FCC’S PROBLEMATIC NEW INDECENCY DEFINITION AND
ENFORCEMENT POLICY**

*Azadeh Malek**

INTRODUCTION

Imagine that your entire family gathers for a momentous occasion, one of the most important annual events in American history: the Super Bowl. This year the New England Patriots face off against the Carolina Panthers in Super Bowl XXXVIII.¹ While the game itself will likely be exciting, many people are equally excited about the halftime presentations. For example, you and your five-year-old cousin look forward to the commercials. Your older brother wants to see the musical performances during the Halftime Show.

The first half of the game was, in fact, thrilling, particularly because the contest looked to be a genuine nail-biter. Everyone, from your youngest cousins to your oldest grandparents, is now ready for funny commercials, good music, and a much-needed food break. The commercials prove to be quite amusing. Janet Jackson’s solo performance was enjoyable; surprise guest Justin Timberlake joins her onstage to perform a duet of Timberlake’s hit song, “Rock Your Body.”²

Then the unthinkable happens: Justin Timberlake rips off Janet Jackson’s corseted top, revealing her bare breast to almost 90 million viewers.³ The image is on the screen for just over half a second.⁴ The camera quickly cuts away to an aerial shot of the stadium.⁵ Half of the guests at your house did not even see the image, as it was that quick of a shot. A few of the younger children saw it, but they did not understand what happened or why it mattered. A few adults sat frozen in their seats, jaws hitting the floor.

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¹ *Super Bowl XXXVIII* (CBS television broadcast Feb. 1, 2004).

² *CBS Corp. v. FCC*, 663 F.3d 122, 135 (3d Cir. 2011).

³ *Id.* at 135.

⁴ *Id.*

⁵ Marin Cogan, *In the Beginning, There Was a Nipple* (Jan. 28, 2014), http://www.espn.go.com/espn/feature/story/_/id/10333439/wardrobe-malfunction-beginning-there-was-nipple.

This was the scenario that unfolded during the Halftime Show of the 2004 Super Bowl,⁶ which aired on CBS.⁷ Following the incident, the network received hundreds of thousands of complaints from viewers.⁸ The Federal Communications Commission (“FCC”) decided to ensure that either (1) such an incident would never happen again or (2) that an offending broadcasting station would suffer severe, potentially crippling financial penalties. The FCC subsequently fined CBS \$550,000.⁹

The FCC is an administrative agency created by the Federal Communications Act of 1934.¹⁰ As dictated by Congress, one of the FCC’s objectives is to regulate content broadcast on television and radio stations in order to block indecent content from the airwaves.¹¹ The FCC may also impose monetary penalties on television and radio stations that violate its indecency standards.¹² The FCC is the sole authority on the regulation of indecent content.¹³ Therefore, if the 2015 Super Bowl becomes the setting for another unfortunate wardrobe mishap, only the FCC has the authority to handle the matter (it was this authority that allowed the FCC to impose the \$550,000 fine on CBS in 2004).

The Supreme Court further recognizes the FCC’s exclusive authority to regulate indecent content on both television and radio. The Court first recognized this authority and defined “indecent” in media contexts in the 1978 landmark case of *FCC v. Pacifica Foundation*.¹⁴ The Court’s holding, however, only addressed whether repeated expletives, as opposed to isolated (one-time-use) expletives, were indecent.¹⁵ As a result, the FCC and broadcast networks inferred that isolated expletives, or “fleeting expletives,”¹⁶ were not punishable by fines and maintained that policy for the next 25 years.

Starting in the early 2000s, however, there was a noticeable and sudden shift in the FCC’s definition of “indecent” and the subsequent policy enforcement. Penalties resulting from more than a few live-award-show broadcasts that included isolated incidents of profanity suggested that fleeting expletives would no longer be exempt from sanctions. Theories suggesting the motivation behind this shift include political pressure from

⁶ *Supra* note 1.

⁷ *CBS Corp.*, 663 F.3d at 134.

⁸ S. REP. NO. 108-253, at 5 (2004).

⁹ 663 F.3d at 135, *supra* note 2.

¹⁰ 47 U.S.C. §§ 151-613 (2010).

¹¹ 47 U.S.C. § 303 (2010).

¹² 18 U.S.C. § 1464 (1994).

¹³ *See FCC v. Pacifica Found.*, 438 U.S. 726, 737-38 (1978).

¹⁴ *See generally id.*

¹⁵ *Id.* at 732.

¹⁶ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446 (2d Cir. 2007).

Congress and the then-current Bush Administration,¹⁷ as well as networks' increased willingness to broadcast risqué or objectionable content, in order to keep up with society.¹⁸ The most prominent and likely of these theories is the political pressure argument, but regardless of the underlying motivation, a policy shift certainly occurred and now appears poised to substantially impact the television industry.

The purpose of this Note is two-fold: 1) to discuss the most likely negative effects of the new indecency standards and 2) to offer a proposal that will best combat those negative effects and, specifically, prevent any financial damage. This Note addresses the probable negative impact these new indecency standards will have on the broadcast television industry. While most other scholarship on this subject has focused on the First Amendment implications of a stringent indecency policy or the motivation behind the shift,¹⁹ this Note focuses on the likely damaging commercial implications that the new policy will have.

Part I explores the source of the FCC's regulatory powers as well as the evolution of those powers and, specifically, the FCC's indecency regulations from 1934 to the present. Part II discusses the current problems that exist because of the sudden shift in the FCC's regulations in the early to mid-2000s. It also discusses the further potential negative impact that these now-current FCC regulations will have on the television industry if they do not change.

Part III explores the current indecency standards employed by the United Kingdom and Canada in order to offer comparisons between those systems of operation and that of the United States. These comparisons demonstrate that the United States need not employ such a stringent policy to combat the current progressive social trend towards acceptance of arguably indecent content on the television screen. These comparisons also trace the influence of these countries' indecency regimes on the proposed policy for the FCC.

Part III also proposes a solution to the existing problems, which will serve to prevent the potential future problems that will likely arise if the FCC continues using its current indecency standards. This solution is a

¹⁷ Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15 MEDIA L. & POL'Y 7, 7-8 (2005).

¹⁸ Treasa Chidester, *What the #§ Is Happening on Television? Indecency in Broadcasting*, 13 COMMLAW CONSPECTUS 135, 137 (2004).

¹⁹ Regarding the First Amendment implications of the FCC's new indecency policy, see generally Samantha Mortlock, *What the [Expletive Deleted] Is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193 (2006); Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW. 1 (2004). Regarding the motivation behind the shift, see generally, Botein & Adamski, *supra* note 17; Chidester, *supra* note 18.

hybrid of indecency standards utilized in Europe and Canada, traditional FCC standards (post-*Pacifica* and pre-2003), and a call on lawmakers and the FCC to help change a few culturally-cemented perspectives on indecency. Lastly, Section D of Part III specifically outlines the other proposed solutions to the problem and explains why these other solutions will not work.

I. BACKGROUND

A. Origin of the FCC's Regulatory Authority

The FCC is a product of the Federal Communications Act of 1934 ("Act").²⁰ Established as a regulatory agency for commerce in radio and wire communications, the FCC must not engage in any censorship activity of the public airwaves.²¹ The FCC is also, however, a public trustee charged with providing programming that serves the public interest.²² It is this charge that allows the FCC to regulate speech deemed inappropriate for the viewing public.²³ The power entrusted to the FCC through the Act itself permits the FCC to regulate radio and broadcast television content "according to the public convenience, interest, and necessity,"²⁴ per Congress's own mandate.²⁵ In addition, the FCC also relies on federal criminal law for its authority.²⁶ The FCC's regulations only reach broadcast television, meaning those channels that a viewer may access by simply plugging a television into an outlet – NBC, ABC, CBS, PBS, local

²⁰ 47 U.S.C. §§ 151-613 (2010).

²¹ *See id.* at §§ 303, 326. Technically, the FCC does not censor any broadcast material; the FCC just monitors the material. If the FCC called what it did censorship, it would violate the First Amendment, so there is a fine line. Justice Stevens noted in the *Pacifica* opinion that censorship would be editing broadcasts in advance, not reviewing them *ex post* as part of the FCC's regulatory duties. 438 U.S. at 734.

²² *Id.* at § 303. *See also* Justin Winquist, *Arbitrary and F^@#*! Capricious: An Analysis of the Second Circuit's Rejection of The FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC (2007)*, 57 AM. U. L. REV. 723, 725-26 (2008).

²³ Winquist, *supra* note 22, at 726.

²⁴ 47 U.S.C. § 303 (2010).

²⁵ *See generally* 47 U.S.C. §§ 151-303 (2010).

²⁶ 18 U.S.C. § 1464 (1994) (stating "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). While the FCC cannot technically censor broadcasts, because of First Amendment protections, Congress empowered the agency to "enforce a criminal statute that prohibits the broadcast of obscene, indecent, and profane language on the public airwaves." Abigail T. Rom, *From Carlin's Seven to Bono's One: The Federal Communications Commission's Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U. L. REV. 705, 713 (2010). *See also* 47 U.S.C. § 503(b)(1)(D) (2010) (allowing the FCC to punish violators of 18 U.S.C. § 1464 with fines, not to exceed \$27,500, for each violation); 47 U.S.C. § 312 (a)(6) (2004) (authorizing the FCC to revoke broadcast licenses for violations of 18 U.S.C. § 1464).

channels, and a few select others depending on the geographic area; basic cable, premium channels, and pay-per-view programming are outside of the FCC's regulatory scope.²⁷

B. The FCC as Moral Compass – FCC v. Pacifica Foundation

In the 1978 case, *FCC v. Pacifica Foundation*, the Supreme Court officially upheld the FCC's authority to enforce indecency restrictions for the first time.²⁸ At issue was a radio broadcast of late comedian George Carlin's monologue, "Filthy Words."²⁹ In the monologue, Carlin discussed the seven words that people cannot say on the public airwaves.³⁰ Ironically, a New York radio station aired the monologue at 2 p.m. and a soon-to-be disgruntled parent and his son heard it.³¹ The parent filed a complaint with the FCC.³² In *Pacifica*, the Supreme Court faced a case of first impression: whether government restriction on indecent speech was valid.³³

The Court upheld the FCC's administrative sanction – a fine – and held that the FCC could enforce a regulation prohibiting indecent speech against licensed broadcasters during hours children would most likely watch television or listen to the radio.³⁴ The Court held that the proper definition of indecent speech was "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."³⁵

The Court's holding in *Pacifica* was narrow.³⁶ The holding only addressed the indecency of the repeated use of expletives, not the indecency of simply fleeting expletives.³⁷ Notably, the Court did not specifically address whether any word with a sexual connotation was indecent or whether profanity was indecent if used as an exclamation instead of for its literal meaning.³⁸ Using this general guidance, the FCC employed relatively lax indecency regulation policies for the next two decades. For example, the

²⁷ See 47 C.F.R. § 73 (1995).

²⁸ See 438 U.S. at 734; Fallow, *supra* note 19, at 26-27.

²⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

³⁰ The filthy words are sh*t, piss, f**k, c**t, c**ksu**er, motherf**ker, and tits. *Id.* at 751.

³¹ *Id.* at 729-30.

³² *Id.* at 730.

³³ See *id.* at 734.

³⁴ *Id.* at 749-50.

³⁵ 438 U.S. at 732 (quoting *In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, New York, N.Y., 56 F.C.C.2d 94, 98 (1975)).

³⁶ *Id.* at 750.

³⁷ *Id.* at 732.

³⁸ See generally 438 U.S. at 745-46.

FCC repeatedly rejected viewer complaints about fleeting expletives, thus exempting the offending broadcast stations from fines.³⁹

C. The FCC's Attempted Expansion of *Pacifica*

The test for indecency, as traditionally employed by the FCC and inspired by the *Pacifica* holding, has two prongs. Broadcast material is indecent if it: 1) “depict[s] sexual or excretory organs or activities” and 2) is “patently offensive as measured by contemporary standards for the broadcast medium.”⁴⁰ Between 1978 and 1987, the FCC and the broadcast networks read this test as banning only the seven expletives named in the “Filthy Words” monologue.⁴¹

In 1987, however, the first major shift in the post-*Pacifica* enforcement policy went into effect: the FCC announced, and the Court upheld, that indecency determinations would be made without regard to whether alleged violations contained one of the seven words.⁴² The FCC firmly established that for speech to be indecent, it must describe or depict sexual or excretory organs or activities and be patently offensive.⁴³ Therefore, if the speech itself was not patently offensive, it could not be indecent. Alleged violations would now be evaluated, therefore, in context.⁴⁴

This new contextual-standard test was very similar to the *Pacifica* test, but it included an extra requirement: that the language appear at a time in the day when children were likely to be in the audience – between 6 a.m. and 10 p.m.⁴⁵ Thus, 10 p.m. was the cut-off for monitored programming and, after 10 p.m., shows could theoretically employ the use of expletives and not be fined. The FCC successfully defended this context- and time-based test against several First Amendment challenges throughout the next decade.⁴⁶

³⁹ Shelly Rosenfeld, *An Indecent Proposal? What Clamping Down on Fleeting Expletives on the Airwaves Means for the TV Industry*, 12 TEX. REV. ENT. & SPORTS L. 225, 228 (2011).

⁴⁰ FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2313 (2012).

⁴¹ See *id.*

⁴² See *Action for Children's Television v. FCC (Act I)*, 852 F.2d 1332, 1336-38 (D.C. Cir. 1988).

⁴³ See *id.* at 1338-39. The test was always conjunctive but now it appeared that its two-prong nature was taken more seriously and emphasized more frequently.

⁴⁴ See *id.*

⁴⁵ *Id.* at 1334; 47 C.F.R. § 73.3999 (1995). The safe harbor period between 6 a.m. and 10 p.m. has not changed since 1995.

⁴⁶ See generally *Act I*, 852 F.2d at 1332; *Action for Children's Television v. FCC (Act II)*, 932 F.2d 1504 (D.C. Cir. 1991); and *Action for Children's Television v. FCC (Act III)*, 58 F.3d 654 (D.C. Cir. 1995).

D. 2001 Policy Statement – The FCC Tries to Clear Up the Confusion

As the post-*Pacifica* era progressed, however, confusion arose regarding the definition of “patently offensive” within a contextual-standard test.⁴⁷ While the first part of the test was a relatively objective measure, the latter part of the test required context-based, subjective analysis. In an attempt at clarification, the FCC issued a policy statement in 2001.⁴⁸

The 2001 policy statement provided yet another standards-based regime, this time in the form of a three-prong test defining “patently offensive.”⁴⁹ This definition arises from an analysis of the speech’s context, which includes:

(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.⁵⁰

The statement further added that sexual or excretory references that were fleeting in nature were characteristics of speech not generally found to be indecent.⁵¹ This comparatively still-relaxed standard would soon change after three high-profile incidents in the early to mid-2000s.

E. 2003 Golden Globe Awards on NBC

The surface impetus, as opposed to the underlying motivation, for the change in the FCC’s traditional, pre-2003 indecency standards came in the form of the live telecast of the 2003 Golden Globe Awards on NBC.⁵² During his acceptance speech, the lead singer of the band U2 exclaimed, “This is really, really f**king brilliant.”⁵³ Soon after, the FCC received hundreds of viewer complaints.⁵⁴

⁴⁷ Winkist, *supra* note 22, at 730.

⁴⁸ In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001).

⁴⁹ 16 F.C.C.R. 7999, *supra* note 48, at 8003.

⁵⁰ *Id.*

⁵¹ *Id.* at 8008.

⁵² *The Golden Globe Awards* (NBC television broadcast Jan. 19, 2003).

⁵³ *Id.*; In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 F.C.C.R. 19859, 19859 (2003).

⁵⁴ 18 F.C.C.R. 19859, *supra* note 53, at 19863, n. 1.

Procedure dictates that viewer complaints be investigated by the FCC Enforcement Bureau (“Bureau”), the division of the FCC that is responsible for investigating the merit of viewer complaints regarding alleged indecency, profanity, or obscenity, and for holding hearings to determine the gravity of the reported issue.⁵⁵ After the Bureau conducts a hearing and considers the evidence, most of which is provided by the complaint, the Bureau issues a ruling on the matter, which usually determines the FCC’s ultimate decision.⁵⁶ In the Golden Globes case, however, the FCC did not afford the Bureau its usual deference.⁵⁷

After reviewing the complaints about the incident, the Bureau ruled that there was no actionable indecency since the alleged indecent word was fleeting and meant as an intensifier, rather than to imply a sexual connotation.⁵⁸ The FCC, under pressure from Congress, overruled the Bureau’s decision.⁵⁹ The FCC determined that “f**k” always carried a sexual connotation and, therefore, was always patently offensive and consequently actionable.⁶⁰ Thus, the test evolved from (a) and (b) to something more along the lines of (a) then (b). The deviation of this decision from the traditional FCC policy on fleeting expletives surprised and confused network executives.⁶¹

F. The Billboard Music Awards on Fox

In addition to the 2003 Golden Globes, subsequent Second Circuit and Supreme Court decisions in the Fox Television cases⁶² demonstrated the continuing shift regarding indecent content. These collective actions stemmed from two respective incidents at the 2002 and 2003 Billboard Music Awards, both of which aired on Fox.⁶³ At the 2002 awards show,

⁵⁵ *Enforcement Bureau: Investigations and Hearings Division* (last updated May 5, 2011), <http://transition.fcc.gov/eb/ihd>.

⁵⁶ *Enforcement Primer*, <http://www.fcc.gov/encyclopedia/enforcement-primer> (last visited on Aug. 14, 2014); Stacy Katz, *The Lewd, Crude, or Partially Nude: Indecency Regulation, Fleeting Expletives, and the High Price We Pay for Not-So-Free “Free Speech”*, 60 SYRACUSE L. REV. 347, 354 (2010).

⁵⁷ See Winquist, *supra* note 22, at 731-32 (discussing the history of usual deference the FCC commissioners afforded the Enforcement Bureau).

⁵⁸ 18 F.C.C.R. 19859, *supra* note 53, at 19861.

⁵⁹ See Winquist, *supra* note 22, at 732.

⁶⁰ In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4978-82 (2004).

⁶¹ See Winquist, *supra* note 22, at 732-34.

⁶² See generally *In Re Complaints Regarding Various TV Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 F.C.C.R. 2664 (Mar. 15, 2006); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

⁶³ *Fox Television Stations, Inc.*, 613 F.3d at 323.

singer Cher told the audience, "People have been telling me I'm on the way out every year, right? So f**k 'em."⁶⁴ At the 2003 awards show, reality star Nicole Richie said, "Have you ever tried to get cow sh*t out of a Prada purse? It's not so f**king simple."⁶⁵

The FCC continued employing the new indecency standards established in the Golden Globes case by finding these two incidents indecent and determining that "[any use of 'f**k' or 'sh*t' was] presumptively indecent and profane."⁶⁶ The FCC further held that the two incidents were "'patently offensive' because the material was explicit, shocking, and gratuitous, notwithstanding the fact that the expletives were fleeting and isolated."⁶⁷

G. 2004 Super Bowl Halftime Show on CBS

The 2004 Super Bowl Halftime Show, discussed *supra*, added a new element to the confusion, when the FCC applied its fleeting-expletives-standard-is-obsolete policy to fleeting images of nudity.⁶⁸ Even though Ms. Jackson and Mr. Timberlake both asserted that CBS knew nothing of the intended stunt, the FCC still fined CBS \$550,000.⁶⁹ One principal proffered argument urged that, given the sexually suggestive nature of the song "Rock Your Body," CBS knew or should have known that something indecent might happen.⁷⁰ There was also time-delay technology in place, though the FCC disregarded the fact that the technology was for language only and could not edit out a delayed indecent image.⁷¹

II. LEGAL ANALYSIS

A. The Problem — A New, Confusing Definition of "Indecent"

Starting with the Golden Globes case, the new approach to indecency was an unprecedented and troubling shift from the traditional post-*Pacifica* policy of relative leniency. Not only was the Golden Globes decision inconsistent with case law precedent and the FCC's history of leniency towards fleeting expletives, but it also offered a new definition for

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ CBS Corp. v. FCC, 663 F.3d 122, 134-35 (3d Cir. 2011).

⁶⁹ *Id.* at 135.

⁷⁰ Elizabeth Jensen, *Indecency Penalty Against CBS Is Rejected* (July 22, 2008), <http://www.nytimes.com/2008/07/22/business/media/22cbs.html>.

⁷¹ In the Matter of Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 F.C.C.R. 2760, 2770 (2006).

“indecent” that was confusing and seemingly unpredictable. The test technically remained the same, but context, while required by the standard, was basically irrelevant. Sanctioning a fleeting expletive completely contradicts the notion of assessing factors of context, including whether a broadcast is live or pre-taped, whether the allegedly indecent word describes or depicts a sexual or excretory organ, or whether the word or activity is simply an exclamation. Arguably worse is that the FCC’s current stance is a teasing threat: the FCC’s recent treatment of fleeting expletives does not necessarily guarantee that every such occurrence will be actionable, just that such occurrences could be actionable.⁷²

In early 2005 and early 2006, the FCC issued indecency determinations on five televised presentations: an episode of the CBS crime procedural drama *Without a Trace*; ; a PBS documentary entitled *The Blues: Godfathers and Sons*; an episode of the ABC drama *Alias*; an episode of ABC’s *The Oprah Winfrey Show*; and ABC’s telecast of the Steven Spielberg film *Saving Private Ryan*.⁷³ Sharply contrasting decisions on similar incidents concerning similar content made the inconsistency inherent in the FCC’s policies impossible to conceal.⁷⁴ In these decisions, the FCC delved into topics ranging from the propriety of discussing sexual activity to even considering the artistic decisions of some shows’ producers.

In the 2005 *Without a Trace* episode, the FBI tried to find a missing high school student.⁷⁵ During their investigation, the agents discovered that the student’s classmates frequently held raucous parties involving a great deal of sexual activity and inebriation.⁷⁶ The episode featured a flashback to one of these parties.⁷⁷ Notably, the flashback sequences did not involve any traditionally indecent language or nudity.⁷⁸ There were numerous viewer complaints and the FCC responsively ruled that the sexual elements involved in the episode went beyond the accepted limits of decency.⁷⁹ The

⁷² Winquist, *supra* note 22, at 740-43 (citing *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 458, n.7 (2d Cir. 2007)).

⁷³ In the Matter of Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program “Without a Trace,” 21 F.C.C.R. 2732 (Mar. 15, 2006); 21 F.C.C.R. 2664, *supra* note 62, at 2683-87, 2700-01, 2705-07; In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,” Memorandum Opinion and Order, 20 F.C.C.R. 4507 (Feb. 20, 2005).

⁷⁴ Stephen A. Weiswasser & Robert M. Sherman, *Oprah and Spielberg vs. Without a Trace and Scorsese: Indecent Inconsistency at the FCC*, 24 COMM. LAW. 3, 3-5 (2006).

⁷⁵ *Without a Trace: Our Sons and Daughters* (CBS television broadcast, Dec. 21, 2004); 21 F.C.C.R. 2732, *supra* note 73, at 2735.

⁷⁶ *Id.*; 21 F.C.C.R. 2732, *supra* note 73, at 2735.

⁷⁷ *Id.*; 21 F.C.C.R. 2732, *supra* note 73, at 2735.

⁷⁸ *Id.*; 21 F.C.C.R. 2732, *supra* note 73, at 2735.

⁷⁹ 21 F.C.C.R. 2732, *supra* note 73, at 2735-36.

FCC then issued a \$32,500 fine against each CBS affiliate in the Central and Mountain Time Zones that aired the episode earlier than the East Coast 10 p.m. time slot.⁸⁰

The FCC's ultimate judgment of the creative determinations — use of flashbacks as a storytelling device — made by networks is disturbing, but this type of judgment is minimal compared to how the FCC handled the indecency determination for an episode of *Alias*. In a January 5, 2005, episode of ABC's *Alias*, aired from 9 p.m. to 11 p.m. Eastern Standard Time, a male and a female were shown in bed, kissing passionately and caressing each other.⁸¹ The FCC determined that the sexual content in *Alias* was not indecent and did not fine ABC.⁸² The FCC ruled that, because there were no visual depictions of sexual organs nor any sexually graphic language, "it [was] not clear whether the characters [were] engaged in sexual intercourse."⁸³ The same language, however, accurately describes the *Without a Trace* episode *supra*. Essentially, the FCC made sharply contrasting indecency determinations for two instances of televised sexual content and ultimately fined the network airing the less explicit content.

Perhaps the FCC is simply concerned with the glorification of teenage sexuality, and this concern was a motivating factor in the otherwise inconsistent determinations it reached. Therefore, the inconsistency resulted from the FCC failing to mention the distinguishing fact that the *Alias* episode involved adult relations. Such a concern, though arguably valid, does not make sense in light of the following ruling relating to "The Oprah Winfrey Show" ("*Oprah*"). In an episode of the former ABC talk show, there was a discussion of the recent increase in teenage sexual activity, as well as a "discussion of teenage sexual practices"⁸⁴ The FCC determined that because, there was no intention to pander to or titillate the audience, the presentation of the material was not vulgar.⁸⁵ The purpose of the discussion was simply to inform the audience of the emerging dangers of teenage sexual activity.⁸⁶ The FCC further ruled that the discussion was not indecent because the material discussed was only shocking due to the fact that the sexual activity exists, not because of the vulgarity with which it was described.⁸⁷

⁸⁰ *Id.* at 2736.

⁸¹ *Alias: Authorized Personnel Only (Part I)* (ABC television broadcast Jan. 5, 2005); 21 F.C.C.R. 2664, *supra* note 62, at 2701.

⁸² 21 F.C.C.R. 2664, *supra* note 62, at 2701.

⁸³ *Id.*

⁸⁴ *The Oprah Winfrey Show: Is Your Child Leading a Double Life?* (ABC television broadcast Oct. 2003); 21 F.C.C.R. 2664, *supra* note 2705.

⁸⁵ 21 F.C.C.R. 2664, *supra* note 62, at 2706.

⁸⁶ *Id.*

⁸⁷ *Id.*

The FCC's determinations regarding the *Alias* and *Without a Trace* episodes make more sense if the concern is the glorification of teenage sexuality, but that concern seems invalid when considered in light of the ruling for the episode of *Oprah*. There, the host and audience members did not praise teenage sexual practices but certainly discussed them graphically and at length, almost as if to exalt those practices. Further, the *Without a Trace* episode did not attempt to pander to audiences via the flashback sequence — the flashbacks told a story, or at least a part thereof, analogous to the discussion within the *Oprah* episode. The flashbacks were also not vulgar. If the concern is that highlighting teenage sexuality is dangerous for teenage audiences, then the *Without a Trace* ruling cannot coexist with the *Oprah* ruling.

Films must also succumb to television edits when networks choose to air them on the small screen.⁸⁸ The extent of the edits depends on the channel hosting the broadcast (cable channels make fewer edits, if any, generally because the FCC's regulations do not apply to cable), but ultimately films are subject to the same confusing FCC treatment as television shows.

In *The Blues: Godfathers and Sons* ("The Blues"),⁸⁹ a PBS documentary about the growth of blues music in Chicago, there was occasional coarse language used by historical blues figures interviewed in the documentary.⁹⁰ The FCC held that these occasional uses were indecent and it fined PBS \$15,000.⁹¹ The FCC then sought to reconcile this determination with that of another film.

In November 2004, ABC affiliates aired Steven Spielberg's film, *Saving Private Ryan*, on Veteran's Day at 8 p.m.⁹² The film contains graphic and frequent violence and expletives.⁹³ The FCC nevertheless held that the uses of "f**k" and "sh*t" were not of a sexual or excretory nature but rather were essential to "the nature of the artistic work."⁹⁴ The FCC mentioned the *Saving Private Ryan* indecency analysis in its indecency analysis for *The Blues* and noted that the distinction between the two films, and consequently the two different indecency determinations, was vested in the purpose of the works.⁹⁵ According to the FCC, the documentary's

⁸⁸ It follows from the FCC's regulatory scope, dictated in 47 U.S.C. § 303 (2010), that films that air on broadcast networks must follow the guidelines that apply to all other broadcast presentations.

⁸⁹ *The Blues: Godfathers and Sons* (PBS television broadcast Mar. 11, 2004).

⁹⁰ *Id.*; 21 F.C.C.R. 2664, *supra* note 62, at 2684-85.

⁹¹ 21 F.C.C.R. 2664, *supra* note 62, at 2686.

⁹² *Saving Private Ryan* (ABC television broadcast Nov. 11, 2004); 20 F.C.C.R. 4507, *supra* note 73, at 4507.

⁹³ 20 F.C.C.R. 4507, *supra* note 73, at 4508.

⁹⁴ *Id.* at 4512-14.

⁹⁵ 21 F.C.C.R. 2664, *supra* note 62, at 2683-87.

educational purpose could have been fulfilled without the broadcast of expletives.⁹⁶ But this begs the question, couldn't the purpose of *Saving Private Ryan* have been served without at least the expletives?

From these decisions, networks can only conclude that “reality is permissible when fictionalized but prohibited when real people [are] involved.”⁹⁷ This contradiction is exactly the type of irregularity created by the current indecency standards regime. In truth, there is no difference between the expletives in the two films; if anything, the use of such language is arguably less necessary in a scripted Hollywood film. It is understandable if network executives are baffled when it comes to editing the content of their programming to conform to the FCC's expectations. There should not be such a stark contrast between a film about American history that airs on a national holiday and a film about American history that airs on any other day, especially when the former contains considerably more profanity and violence. Similarly, a relatively moderate implication of teenage sexual activity should not be ruled indecent because it is part of an entertainment program while explicit teenage sexual activity discussed on a talk show is not ruled indecent.

B. The Aftermath — Chilled Speech and Economic Harms

i. Chilled Speech — Networks Stifled

The new indecency standards lead to confusion, but that confusion in turn leads to other, greater concerns. One such concern is that the indecency standards might unduly chill speech, causing broadcasters to often censor perfectly legitimate speech out of fear of sanctions and ultimately stifle network creativity.⁹⁸ As a result of the FCC's constantly-changing definition of indecency and what content offends the typical viewer, networks predictably face difficult decisions about what content to air. A network essentially has three “easy” options, not including heavy censorship (which is time-consuming, tedious, and expensive): 1) air the questionable material and pay any resulting sanctions; 2) air the questionable material and take the matter to court if sanctions are imposed;⁹⁹ or 3) avoid the material altogether.

⁹⁶ *Id.*

⁹⁷ Weiswasser & Sherman, *supra* note 74, at 5.

⁹⁸ Winquist, *supra* note 22, at 753. The public interest argument appears in other scholarship on the subject of indecency and the FCC's new policy shift in the form of predicting First Amendment violations. See generally Blake Lawrence, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency from George Carlin to Cher and into the Digital Age*, 18 UCLA ENT. L. REV. 148 (2011); Fallow, *supra* note 19; Shelly Rosenfeld, *supra* note 39.

⁹⁹ For more discussion on these two alternatives, see generally Botein & Adamski, *supra* note 17, at 25-27. Some networks paid the sanctions upfront, after taking the risk and airing

Unfortunately, some networks have chosen option #3, opting to avoid airing certain programs or parts of programs that contained possibly actionable indecent content. The following are examples of decisions networks made in order to avoid any possibility of sanctions, all made just days after the broadcast of and fallout from the 2004 Super Bowl:

1. Just after the 2004 Super Bowl, NBC removed a scene from its medical drama, *ER*, which showed an 80-year-old woman's breast.¹⁰⁰ The woman underwent emergency surgery in the scene and her breast was on camera, in the background of the scene, for just over a second.¹⁰¹ *ER* aired after 10 p.m.,¹⁰² so it fell into the safe harbor allowed by the FCC. Further, per the 2001 policy statement,¹⁰³ the shot of the breast, while arguably a depiction of a sexual organ, is not patently offensive because it was not dwelled on nor repeated, nor was it presented to pander, titillate, or shock the audience. The executive producer of *ER* even commented that the show had previously depicted nudity in a medical context and received no complaints.¹⁰⁴ He went on to explain that the shot contributed to the atmosphere of the scene by highlighting the urgency of care required and the vulnerability of the patient.¹⁰⁵ Nevertheless, given the FCC's reaction to the Super Bowl and its then-recent Golden Globes decision, NBC decided to steer clear of any controversy.

2. In early February 2004, the National Football League ("NFL") cancelled a Pro Bowl performance by singer JC Chasez because the

ultimately indecent material, as an out from litigation because most knew that their chances of a fair trial in court were slim. Therefore, they paid the fine to avoid paying outside counsel hundreds of thousands of dollars more just to go back to square 1.

The networks that decided to litigate their particular cases ended up in seemingly endless litigation battles. *See generally* CBS Corp. v. FCC, 663 F.3d 122, 135 (3d Cir. 2011); Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010). Given the current state of the FCC's indecency standards and the way the Supreme Court decided these types of cases before, it seems that either the networks will again lose and accept defeat or again lose and continue the battle. *See generally* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

¹⁰⁰ Lynn Elber, *Post Janet, NBC Edits 'ER' Shot of Patient's Breast* (Feb. 5, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A14233-2004Feb4.html>.

¹⁰¹ Elber, *supra* note 100.

¹⁰² *Id.*

¹⁰³ 16 F.C.C.R. 7999, *supra* note 48.

¹⁰⁴ Bill Carter, *After Furor, Janet Jackson Is to Be Cut from Grammy Awards* (Feb. 5, 2004), <http://www.nytimes.com/2004/02/05/business/after-furor-janet-jackson-is-to-be-cut-from-grammy-awards.html>.

¹⁰⁵ Elber, *supra* note 100.

NFL was “afraid of his choice of [song] – ‘Blowing Me Up (With Your Love)’ – and the accompanying choreography.”¹⁰⁶

3. ABC imposed a five-second delay on its broadcast of the 75th Annual Academy Awards in 2004.¹⁰⁷ Prior to 2004, the Academy Awards had never been subject to a time-delay for content censorship, but ideally the time-delay was the safest way to avoid another Golden Globes-like incident.¹⁰⁸ Regarding the Academy Awards’ historic first use of time-delay technology, the Executive Director of the show said that “the absolute liveness on both coasts was part of the appeal.”¹⁰⁹ He went on to state that the networks were afraid of the newly proposed bills in Congress that would exponentially increase the fines for indecent content.¹¹⁰ If the bills passed, he said, the networks would face massive and detrimental penalties.¹¹¹

As these examples demonstrate, while encouragement of self-censorship lay at the heart of *Pacifica*, the current indecency standards lead to overbroad self-censorship.¹¹² Consequently, the threat of a fine or other disciplinary measures influences artistic decisions and ultimately stifles network creativity. There is no reason to assume that there will be consistency in the FCC’s rulings if an objective test is not adopted. Whether it is the solution proposed here, a more relaxed version of the current regime or an even more stringent version of the current regime, creation of a bright-line rule will benefit the broadcast television industry.

ii. Economic Harms — Commercial Impact

With regard to the Super Bowl Halftime Show, the FCC asserted that punishing fleeting expletives is fair given the new technological climate wherein time-delay technology is relatively cheap for big networks to

¹⁰⁶ Corey Moss, *JC Chasez Slams NFL after Being Cut from Pro Bowl Halftime* (Feb. 5, 2004), <http://www.mtv.com/news/articles/1484842/jc-slams-nfl-after-being-cut-from-pro-bowl.jhtml>.

¹⁰⁷ Matt Carey, *ABC to Impose Delay on Oscar Telecast* (Feb. 5, 2004), <http://www.cnn.com/2004/SHOWBIZ/Movies/02/05/sprj.aa04.abc.oscar.delay/index.html>.

¹⁰⁸ *Id.*

¹⁰⁹ Brian J. Rooder, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”: Has the FCC Grown Too Big for Its Britches?*, 74 *FORDHAM L. REV.* 871, 890 (quoting Lisa de Moraes, *Flags Keep Dropping on Super Bowl Stunt* (Feb. 2004), http://www.washingtonpost.com/wp-dyn/articles/A14340-2004Feb4_2.html).

¹¹⁰ Rooder, *supra* note 109, at 890. *See also* Broadcast Decency Enforcement Act of 2005, H.R. 310, 109th Cong. (2005); Broadcast Decency Enforcement Act of 2005, S. 193, 109th Cong. (2005).

¹¹¹ Rooder, *supra* note 109, at 890. *See also* H.R. 310, *supra* note 110; S. 193, *supra* note 110.

¹¹² Winquist, *supra* note 22, at 753-54.

procure and use.¹¹³ It follows that the FCC was arguing that fleeting indecent content was previously permissible because there was no way to prevent every incident on live broadcasts. Now that a solution is available, however, the FCC seems to argue that a radical change in policy is permissible.

Admittedly, these bigger networks are billion-dollar industries, but the costs of acquiring, maintaining, and using time-delay equipment add up. During every live broadcast, at least two members of a network's Standards and Practices Department¹¹⁴ sit in a booth and watch the telecast.¹¹⁵ Usually, several other members of the department are present to serve as extra eyes.¹¹⁶ For mitigating the airing of a live indecent image, there needs to be equipment in place that will allow for an instantaneous-reaction shot called a "God Shot," which is an aerial view of the telecast.¹¹⁷ This equipment cost approximately \$150,000 in 2005 (all estimates that follow are also as of 2005).¹¹⁸ For an audio time-delay, which is usually either a three- or five-second delay, at least one person – a screener – sits in the production booth wearing special headphones.¹¹⁹ In one ear he can hear the live broadcast and in the other he can hear a delayed version of the same broadcast.¹²⁰ He manually presses a button every time he hears an indecent word or phrase to censor, or bleep, it out so it does not carry over into the delayed version of the broadcast.¹²¹ An analogous system does not exist for video delays; instead, networks can only digitally pixelate, or blur, indecent images in prerecorded broadcasts before they air.¹²²

Both types of delay require different equipment for standard and high definition video, which totals approximately \$600,000.¹²³ Most networks also utilize independent review in audio-delay scenarios, which entails a second screener (or second team of screeners) who provides backup for the primary screener/screener team.¹²⁴ The equipment for this

¹¹³ FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808 (2009).

¹¹⁴ This is the Department responsible for censoring content in accordance with FCC regulations. *Standards and Practices*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotvsection.php?entrycode=standardsand>.

¹¹⁵ Botein & Adamski, *supra* note 17, at 32.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 33.

¹¹⁹ *Id.* at 32.

¹²⁰ Botein & Adamski, *supra* note 17, at 32.

¹²¹ *Id.*

¹²² Cheryl Wetzstein, *TV Viewers Weary of Nudity and Obscenity Look for Decency from FCC Nominee* (June 17, 2013), <http://www.washingtontimes.com/news/2013/jun/17/tv-viewers-weary-of-nudity-and-obscenity-look-for-/?page=all#pagebreak>.

¹²³ Botein & Adamski, *supra* note 17, at 33.

¹²⁴ *Id.*

review costs approximately \$50,000.¹²⁵ In case of a technological malfunction, all of the big networks have at least one extra piece of each type of equipment on hand.¹²⁶ Therefore, an adequate set of time-delay equipment, not including the cost of labor, totals roughly \$1.6 million.¹²⁷ While this sum may in the short-run be pocket change for bigger networks, it is crippling to smaller stations, like public television stations and local network affiliates (the local and regional offices of the big networks as well as the third-party owned stations that are licensed to air major network broadcasting).¹²⁸ Even the bigger networks could start to suffer, though, as a result of the consistent use of this equipment and the still-present risk of losing a sizable amount of money if one word or image slips past the censors.

Another option is of course litigation. A network choosing to litigate an indecency issue against the FCC assumes many costs. The network may have to hire outside counsel for further consultation and representation or it may assume transaction costs because of the discovery involved in the proceedings and meetings it may have with the FCC.¹²⁹ As previously noted, these networks are big companies, but the costs of litigation are not minimal, especially when that litigation is drawn out. These costs may affect the business of the company, even if without disastrous effects. Furthermore, such litigation is generally a waste of the courts' time and resources because these cases arise from ultimately subjective interpretations that make the outcomes even more unpredictable.¹³⁰ Clearer indecency standards could rid the dockets of these cases substantially.

Stringent but confusing indecency standards could also ultimately hit the networks where it hurts the most – advertisement revenue.¹³¹ Companies buy commercial time from networks in order to advertise their services and products.¹³² Selling this commercial time brings in revenue for the networks.¹³³ If popular shows, during which advertisers are normally most likely to purchase commercial airtime, begin to severely edit their content,

¹²⁵ *Id.*

¹²⁶ *Id.* at 32.

¹²⁷ (\$150,000 (God-shot equipment) + \$600,000 (SD and HD time-delay equipment) + \$50,000 (independent review equipment)) x 2 (back up of all equipment in case of a malfunction) = \$1.6 million.

¹²⁸ Botein & Adamski, *supra* note 17, at 33.

¹²⁹ *Id.* at 34.

¹³⁰ It is also problematic that inconsistent and confusing indecency standards could lead to inconsistent and confusing court rulings, which would simply perpetuate the problem by providing troubling precedent.

¹³¹ Rosenfeld, *supra* note 39, at 238.

¹³² *Id.*

¹³³ *Id.*

viewership may decrease. As a result of decreased viewership, advertisers will not want to buy commercial time. Perhaps, down the line, this will cause the shows to get cancelled. Engaging in excessive self-censorship could conceivably cause networks to lose many lucrative advertising deals.

Finally, expanding the amount of allowable indecent content could not only prevent financial loss for networks, but also greatly benefit the networks and the domestic economy at large. When big companies are successful, they put more money into the economy because they hire more employees and those employees are consumers that fuel the economy. Currently, the United States entertainment industry exports almost all of its media: American television shows air in other countries¹³⁴ and Hollywood films stage international premieres.¹³⁵ The United States, by contrast, imports almost no media from other countries. It does not take extensive research to find that BBC America is the only international channel regularly broadcast throughout America,¹³⁶ and BBC shows are among the few international programs generally available in the United States.

This exportation is beneficial to the United States; the more the global community craves American popular culture, the more Hollywood, and every business associated with Hollywood, will benefit. If, however, the FCC relaxed its current indecency standards and adopted the proposed policy, discussed later, perhaps the American entertainment industry would be open to importing more foreign media. As it stands, several other Western countries generally have a more liberal understanding of what constitutes “indecent” television content.¹³⁷ Perhaps that difference is the reason why there is so little foreign media imported into this country. If the

¹³⁴ Eric Pfanner, *As U.S. Is Reviled Abroad, American TV Charms* (Oct. 16, 2006), http://www.nytimes.com/2006/10/16/business/media/16tv.html?_r=0.

¹³⁵ See generally FESTIVAL DE CANNES, <http://www.festival-cannes.fr/en.html> (last visited Aug. 29, 2014); TIFF, <http://tiff.net> (last visited Aug. 29, 2014).

¹³⁶ Depending on the region, television sets can pick up some other international channels. For example, southern California and southern Texas get a few Mexican channels. See generally *Verizon FiOS Channel Lineup*, <http://www.verizon.com/home/fiostv/#channels> (typing in a zip code will generate the list of available channels in that area and almost all of Southern California and many parts of south Texas get at least one Mexican channel, like Azteca 13 or Antena 3). Meanwhile, northern Washington northern Minnesota, much of New England, northern North Dakota, and northern Michigan get a few Canadian channels, like CBC, CTV, and TVA. *Id.*

¹³⁷ See generally *Verbotene Liebe* (Das Ertse television broadcast 1995); *Celebrity Juice* (ITV2 television broadcast 2007); *Los Hombres de Paco* (Antena 3 television broadcast 2005). Clips for all these shows can be found on YouTube. These shows ran from the start dates indicated in Germany, the United Kingdom, and Spain, respectively. All shows occasionally use the words “sh*t” and “f**k” in their respective native languages, in addition to all the offensive language permissible on American broadcast television. All shows, which air at various times throughout the day, also have rather explicit love scenes, occasional nudity in a sexual context, and controversial storylines.

United States adopted a more international approach to indecency, it could gain financially by importing popular international television shows with which people may already be familiar because of exposure through the Internet. Advertisers may see the shows' appeal and buy more commercial time. New FCC indecency standards could not only prevent the broadcast industry's demise, but also give it new life by allowing the importation of more diverse programming.

III. Solution

A. Influence

What follows is a proposed solution to the problem at hand in the form of new legislation. Legislation, as opposed to an agency decision or developing case law, can reach all branches of government and have greater influence than other alternatives.¹³⁸ Furthermore, legislation lasts longer than a mere policy change; as the past ten years of FCC actions can attest, policies can change with every new executive administration and confusion will likely reappear.¹³⁹

As shown below, this suggested solution incorporates the FCC's traditional, post-*Pacifica* indecency standards as well as international influences. Before discussing the proposed solution, however, it is helpful to first review the indecency standards of those international influences, those of the United Kingdom and Canada. These are ideal choices because of their proximity to American culture, values and lifestyle, and language.

i. United Kingdom's Broadcast Regulations

The United Kingdom takes its initial cues from the European Community ("EC"), a branch of the European Union ("EU"), through legislation called directives.¹⁴⁰ In the case of indecency standards, the Television Without Frontiers Directive ("Directive")¹⁴¹ is an EC directive with the stated purpose of ensuring freedom of broadcast services between member states of the EU.¹⁴² Article 22 of the Directive sets out the EC's indecency standards.¹⁴³ Member States must:

[t]ake appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not

¹³⁸ Botein & Adamski, *supra* note 17, at 35.

¹³⁹ *See id.*, *supra* note 17, at 18-23.

¹⁴⁰ *See generally European Commission: Legislation* (last updated Aug. 10, 2013), http://ec.europa.eu/legislation/index_en.htm.

¹⁴¹ Council Directive 97/36/EC, 1997 O.J., (L 202) 60.

¹⁴² *Id.* *See also* Botein & Adamski, *supra* note 17, at 40-53, for a more detailed explanation of the inner workings of some European countries' indecency regimes, including the United Kingdom.

¹⁴³ Council Directive 97/36/EC, art. 22, 1997 O.J., (L 202) 60.

include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.¹⁴⁴

In case a program is likely “to impair the physical, mental or moral development of minors,”¹⁴⁵ the nature of that program merits either elimination of the program or careful timing of the broadcast of the program,¹⁴⁶ akin to the safe harbor provision that exists in the United States. The EC is careful not to enact and then attempt to apply any uniform standard for indecency because of the very nature of the EU – numerous Member States with varying laws, morals, and cultural landscapes.¹⁴⁷

While the EU has no central enforcement agency for its broadcast regulations, like the United States does with the FCC, the EU does have the European Commission, which can involve itself in the Member States’ broadcast industries under certain circumstances. Before the European Commission can interfere, however, there must first be a violation of the Directive; a broadcaster “must manifestly, seriously and gravely infringe” on either the indecency provisions or the incitement-of-hatred provisions of Article 22.¹⁴⁸ After the first violation, but before the Member State takes any action against the broadcaster, it must notify the Commission in writing of the alleged infringements and the measures it plans to take.¹⁴⁹ The Directive dictates that there must be Commission-attended consultations between the broadcaster and the Member State.¹⁵⁰

Ultimately, and within two months of receiving notifications from the Member State of measures taken against the broadcaster, the Commission must decide whether those measures comply with EC law.¹⁵¹ If the measures are not compatible with the law, “the Member State will be required to put an end to the measures in question as a matter of

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Admittedly, there are also varying laws, morals, and cultural landscapes within the United States, but the key difference between the States and the EU might be that the latter is a conglomeration of different countries while the former is still one nation. That shared nationality to some extent serves as a very binding common denominator that provides many common perspectives and interests. Thus, the EC relies on input from all Member States when determines what is likely to impair the development of minors. There is a standard in some sense of the word, certainly not to the degree existing in the United States.

¹⁴⁸ Council Directive 97/36/EC, art. 2a, 1997 O.J., (L 202) 60.

¹⁴⁹ *Id.* at art. 2a(c).

¹⁵⁰ *Id.* at art. 2a(d).

¹⁵¹ *Id.* at art. 2a.

urgency.”¹⁵² Therefore, not only does the EC’s involvement in the broadcast affairs of a Member State require notification directly from that State, but also the EC has little contact with the broadcaster. This less stringent approach encourages the Member States to customize their respective indecency standards so as to provide the best approach for their given country’s community standards. Furthermore, this procedure keeps the EC from having to rule on the indecency standards of each individual Member State.

In the United Kingdom, the Office of Communications’ (“Ofcom”) Code of Conduct (“Code”) covers “standards in programs, sponsorship, fairness and privacy.”¹⁵³ The Code forbids most offensive language before 9 p.m. and states that all other offensive language is permissible when justified by the context, as long as the language is infrequent.¹⁵⁴ The Code even implies that offensive language is part of British culture and exempts those instances when “mitigated by a humorous context.”¹⁵⁵ While this last standard is admittedly subjective, it at the very least exemplifies an understanding that culture occasionally dictates policy.

Two examples of the Code at work demonstrate not only a specific look at the real-world application of the United Kingdom’s indecency standards, but also the key difference between American and British indecency standards: differing values. First, in December 2004, the United Kingdom’s MTV2 channel broadcast a music video countdown at 10 a.m.¹⁵⁶ Two members of one of the music groups featured on the countdown appeared via a prerecorded piece.¹⁵⁷ The entire show was also prerecorded.¹⁵⁸ One of the musicians used an expletive, which was bleeped, followed by the word “f**k” only seconds later, which was not bleeped.¹⁵⁹ A viewer subsequently filed a complaint with Ofcom.¹⁶⁰

This situation is analogous to the Golden Globes and Billboard Music incidents, but this program was pre-recorded and checked before

¹⁵² *Id.*

¹⁵³ Botein & Adamski, *supra* note 17, at 47.

¹⁵⁴ *Id.*; Ofcom, *The Ofcom Broadcasting Code* §§ 1.14, 1.16 (Mar. 2013), <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/protecting-under-18s>.

¹⁵⁵ Botein & Adamski, *supra* note 17, at 48 (quoting Ofcom, *Guidance Notes, Section 1, Protecting the Under 18s: Rule 1.14 to 1.16 Offensive Language* at 5, <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf>).

¹⁵⁶ Botein & Adamski, *supra* note 17, at 48; Ofcom, *Ofcom Broadcast Bulletin, Issue 33*, at 5 (Apr. 25, 2005), <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb33/issue33.pdf>.

¹⁵⁷ *Broadcast Bulletin, Issue 33, supra* note 156, at 5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

airing.¹⁶¹ Therefore, there was no unexpected-fleeting-expetive excuse. Nevertheless, after MTV2 publicly apologized for the error and Ofcom stressed to the network the inappropriate nature of airing such an expletive, no person, agency, or organization seemed to take any further action.¹⁶² The involved parties seemingly understood that the word was exclamatory in nature and the failure in the editing process was considered forgivable human error.

The second example occurred in 2005, after a 5 p.m. broadcast of a music video entitled *My Neck, My Back*.¹⁶³ The video featured women in bikinis washing a truck while being hosed down by firemen.¹⁶⁴ Ofcom released a statement expressing disappointment, but stated that it understood that modern music videos portray women in not-universally-agreeable ways.¹⁶⁵ Ofcom did not issue any penalties, however, because it apparently determined that, while the combination of the song's "clean" lyrics and the overtly sexual imagery made the video inappropriate for airing during the day (when children could be watching), the re-scheduling of the video exclusively to after 10 p.m. cured the problem and prevented any further damage.¹⁶⁶

These two examples demonstrate the reason for the clarity of the British indecency standards: the focus on the country's values. The indecency standards in the United Kingdom seem to reflect a desire to shield anyone from seeing or hearing discriminatory, hateful images and remarks.¹⁶⁷ There is an emphasis on not needlessly insulting people or their beliefs. There is not much attention paid to whether a five-year-old hears profanity. Ofcom understands a very common notion: there is a chance that the five-year-old has already heard an inappropriate word at home. Even with that understanding, there are regulations in place so that children are not hearing excessive profanity or seeing graphically violent or sexual content on television. If there is a fleeting indecent expletive or image, however, the decision over whether or not to fine the broadcaster is based on the context and effects of the expletive or image, not the isolated content itself.

This key difference influences the proposed solution for the United States. Before any new legislation goes into effect, there must be an

¹⁶¹ *Id.*

¹⁶² See *Broadcast Bulletin, Issue 33*, *supra* note 156, at 5.

¹⁶³ Botein & Adamski, *supra* note 17, at 52-53; Ofcom, *Ofcom Broadcast Bulletin, Issue 29* (Feb. 28, 2005), at 6-7, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/pcb66/final29bulletin1.pdf>.

¹⁶⁴ *Broadcast Bulletin, Issue 29*, *supra* note 163, at 6.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 6-7.

¹⁶⁷ See generally Council Directive 97/36/EC, 1997 O.J., (L 202) 60.

understanding that indecency standards should serve a higher purpose – promoting entertainment in conjunction with culturally accepted values. Otherwise, there is room for **major** disagreement (admittedly, there will likely always be disagreement on this subject) and subjective standards for menial violations.

ii. Canada's Broadcast Regulations

The Canadian Radio and Telecommunications Act established the Canadian Radio-Television and Telecommunications Commission (“Telecom”) and gives it the power to regulate broadcast indecency generally.¹⁶⁸ Telecom does not, however, get directly involved in the regulation of indecent content. The Canadian Broadcast Standards Council (“CBSC”), a non-governmental organization created by the Canadian Association of Broadcasters (“CAB”) and operating with the approval of Telecom, encourages the self-regulation of private broadcasters per the Code of Ethics (“Ethics Code”), the codification of the regulations for broadcast television compiled by the CAB.¹⁶⁹ The CBSC is thus the main “regulatory body” for broadcast media in Canada.¹⁷⁰

The Ethics Code defines the safe harbor for broadcast networks as the hours between 9 p.m. and 6 a.m.¹⁷¹ Outside of these hours, the Ethics Code prohibits the broadcasting of sexually explicit material or offensive language.¹⁷² Many Canadian broadcast stations may, however, air unedited programming that contains sexual content or coarse language if they also air viewer discretion advisories before the broadcast.¹⁷³

The CBSC also allows nudity before the late-viewing hours if it is non-sexual.¹⁷⁴ For example, the CBSC allowed a 4 p.m. network broadcast of the film *Wildcats*, containing full frontal male and female nudity (the individuals involved were just changing in locker rooms and stepping out of bathtubs, respectively),¹⁷⁵ and an 8 p.m. broadcast of the film *Striptease*,

¹⁶⁸ Canadian Radio-Television and Telecommunications Commission, *Canadian Radio-Television and Telecommunications Commission Act*, R.S.C., 1985, c. C-22 (1985), available at <http://www.laws.justice.gc.ca/eng/acts/C-22/page-1.html#docCont>; Canadian Radio-Television and Telecommunications Commission, *Broadcasting Act*, S.C. 1991, c. 11 (1991), available at <http://www.laws.justice.gc.ca/eng/acts/B%2D9.01/>.

¹⁶⁹ Canadian Broadcast Standards Council, *The Special Role of the CBSC* (last visited on Jan. 14, 2014), <http://www.cbsc.ca/english/about/role.php>; Canadian Broadcast Standards Council, *CAB Code of Ethics* (2002), <http://www.cbsc.ca/english/codes/cabethics.php>.

¹⁷⁰ *The Special Role of the CBSC*, *supra* note 169.

¹⁷¹ *Code of Ethics*, *supra* note 169, at Clause 10(a).

¹⁷² *Id.*

¹⁷³ *Id.* at Clause 10(d), Clause 11.

¹⁷⁴ Canadian Broadcast Standards Council, *WTN re the movie Wildcats, CBSC Decision 00/01-0964* (Jan. 16, 2002), <http://www.cbsc.ca/english/decisions/2002/020314a.php>.

¹⁷⁵ *Id.*

containing scenes that showed bare female breasts (the actress in the scene was changing her clothes).¹⁷⁶

Given the leniency with which the CBSC regulates indecent content, it seems as though its concern is akin to that of the United Kingdom: regulation is not about protecting children from learning the inevitable, but rather about not needlessly offending someone. Sexually explicit material, vulgar language, and graphic violence are not pleasant viewing for some people and, understandably, these people may take offense to such material pervasively invading their homes via their television sets. The CBSC, therefore, serves only to protect the rights of people to be left alone, not to indirectly control what people watch.

B. New Proposal

The proposal calls for a general change in the contemporary community standards to which the courts refer in their holdings, more specifically, a change in viewing contemporary community standards as they are. A general cultural perspective usually takes years to shift or even slightly alter, but perhaps this process will move more quickly if there is legislation in place to encourage the change. Contemporary community standards mean nothing, as a rubric, if there does not exist a uniform consensus regarding those standards and the standards change every few years, as opposed to the more natural progression over several generations. Since it may take years before the values and principles of a society change, if they change at all, the more efficient approach is to change the laws first. As discussed, the broadcast television industry will likely suffer negative economic and cultural (stifling of creativity) effects if the FCC does not loosen its regulations in the near future. Neither the FCC nor the networks can stop people from filing complaints, but perhaps the influence of those complaints can decrease.

The following proposal does not apply to programming designed for or targeted at children, ages 2 to 13, including shows on exclusively kid-friendly networks that may air at 8 or 9 p.m. Typically, though, these programs are not likely to conflict with any FCC regulations on indecency since they are by their very nature deemed acceptable. Additionally, this proposal does not apply to the regulations on or approach to violence on television, as such a discussion would be beyond the scope of this Note.

The fine for a violation of any provision is \$100,000 per occurrence. For example, if a show including a violation airs at 10 p.m. on the East Coast and at 9 p.m. in the Central Time Zone, therefore airing simultaneously, it is a \$200,000-fine (\$100,000 per violation per time zone

¹⁷⁶ Canadian Broadcast Standards Council, *TQS re the movie Strip Tease*, CBSC Decision 98/99-0441 (Feb. 21, 2000), <http://www.cbsc.ca/english/decisions/2000/000531.php>.

per owned-and-operated local station and per affiliate¹⁷⁷). The \$100,000 fine is likely costly enough to deter future violations but not so detrimental as to seriously devastate a network or affiliate after one violation.

The first step should be a general adoption by the FCC, Congress, and the current executive administration of the British and Canadian approaches to potentially indecent content: a focus on the discriminatory and incendiary effects of language instead of the possible, yet unlikely, deleterious effects on impressionable young minds. This adoption will ensure that, before any regulations or legislation go into effect, there is a sole consistent motivation for the new indecency standards, thereby eliminating the need for the government to decide what children should or should not be seeing or hearing. Such an underlying motivation will also provide a more objective lens through which to judge incoming indecency determinations or viewer complaints because the only question is whether a particular race, ethnicity, gender, sexual orientation, religion, or similar group is a target or would otherwise be indirectly offended.

Second, any program that will show sexual visual content, like a love scene,¹⁷⁸ should air a 30-second disclaimer (similar to those already aired before certain network programs in the United States,¹⁷⁹ as well as in Canada, discussed *supra*) prior to the start of the program that states that the program will contain such content. The disclaimer will also have to appear before the program resumes after each commercial break, but these subsequent reminders can be 5 seconds in duration. Sexual content of this nature includes anything depicting simulated intercourse and activities clearly leading to intercourse, including but not limited to disrobing of the

¹⁷⁷ Owned-and-operated refers to local stations that a given network owns while affiliates are owned by third parties and are licensed to air network programming. If the former is fined, the network suffers because it has to cover its subsidiary's costs. If the latter is fined, however, it suffers by itself (it has to pay its own fine) and the network can suffer indirectly because the affiliate may choose not to air that network's risky programming anymore.

Certain shows air after the watershed hour in one time zone but before it in another time zone, thus running the risk of still airing indecent content somewhere in the country and getting penalized as a result. The rule addressing this conflict is as follows: when a network knows its program includes potentially indecent content (based on the time of day) and that it might air before the safe harbor period begins, it has a responsibility to advise local stations and third-party affiliates of this content. Those parties must then remedy the conflict using their own censoring equipment. If a warned affiliate does not bleep out offensive language or blur nudity that should not be broadcast, it will be fined like a local station. If it is not warned, however, the network must pay its fine.

¹⁷⁸ Sexual visual content would technically involve a sexual assault scene as well, but that is beyond the scope of this note, as televised violence is not discussed here; therefore it is not mentioned in these new rules. Such content would also theoretically have to be addressed in a 30-second disclaimer.

¹⁷⁹ *American Horror Story* (FX television broadcast 2011); *Law and Order: SVU* (NBC television broadcast 1999).

actors. Kissing while fully-clothed should never fall into this category. This provision will ensure that broadcasters do not stifle their shows if certain sexual content is part of the story of a certain program. Simultaneously, viewers will know what to expect before the content appears on their television sets.

Third, broadcasters must exclude the words “motherf**ker,” “co**su**er,” and “c**t” from broadcast television during the hours of 6 a.m. and 10 p.m. After 10 p.m., broadcast networks may air programs that contain those words without censorship. During the 6 to 10 window, there are rare exceptions for the occurrence of such language. Should an isolated incident occur during a pre-taped broadcast prior to 10 p.m., the network, all local and regional affiliates airing the program, and the actor responsible will be liable (see fines discussed *supra*). If the incident occurs during a live broadcast where the network’s time-delay technology fails, assuming there is no evidence of pure negligence, the responsible actor will still be liable, at the discretion of the FCC. Only if the violation could have been avoided does the incident become subject to the same standards as those applied to a pre-taped broadcast as it concerns the network and local stations and affiliates involved.¹⁸⁰

These three words are the coarsest of the traditionally prohibited language.¹⁸¹ This provision ensures that there are no exceptions, other than for objectively reasonable human error, for the use of these words during the safe harbor period. Should human error occasionally lead to an on-air expletive of this type, the network and its affiliates could apologize publicly, either on-air or through the media, for their mistake. Further, the FCC could be given discretion to decide whether a violation leads to a mandated apology or a fine.

Fourth, networks may air the word “f**k,” or any variation thereof, as any part of an emotive expression and not with a sexual connotation only once during a prerecorded program airing before 10 p.m. but after 6 p.m.¹⁸² The network must air a disclaimer before the start of the program to notify audiences of the impending language. If a program uses the word more than once, or if it uses “f**k” to connote sexual activity, that violation is

¹⁸⁰ The FCC could theoretically say that every error can be avoided, but that is why pure negligence is the standard. Reasonable avoidance is the only concern.

¹⁸¹ *Celebrity Juice, Series 6, Episode 1, Part 1 of 3 with Keith Lemon, 1/9/11* (Sept. 1, 2011), <http://www.youtube.com/watch?v=IAzkkOCWu4>. This show, on any given episode, shows nudity (barely blurred) and uses all of Carlin’s filthy words, with the sole exception being “c**t.” The other two of the three remaining taboo words are still considered vulgar in the United States but are used and not bleeped on *Celebrity Juice* episodes.

¹⁸² This is akin to and influenced by the movie ratings system in the United States, which automatically gives a film an “R” rating if it employs the word “f**k” more than once. MPAA, *What Each Rating Means* (2012), <http://www.mpa.org/ratings/what-each-rating-means>.

punishable by a fine. After 10 p.m., and until 6 a.m., programs may use the word more than once in any context and with any connotation. Violations of this provision occurring during live broadcasts, with or without time-delay technology in place, will be exempt from any sanctions if the word does not connote sexual activity.¹⁸³

As this word often appears as a fleeting expletive, there should be exceptions for its accidental use that protect networks from constant fines. As such, this provision ensures that there is some leniency for traditionally adult programming to air realistic dialogue, within limits. It also ensures that a 2003 Golden Globes-like incident, see *supra*, will no longer prove problematic.

Fifth, any word not specifically spelled out here and not already allowed on broadcast television (including but not limited to “bitch,” “damn,” “bastard,” and “ass”) may appear in any context any number of times, like “sh*t,” “piss,” “tits,” or any slang for reproductive organs, minus “c**t”. Similar to the allowances for the use of “f**k,” this provision protects networks and provides leniency for broadcasters who want to air realistic adult conversations.

Finally, wardrobe mishaps of the Halftime Show-variety that were not predictable by the networks or their affiliates (i.e. live) will be exempt from sanctions. No full nudity (shots of the breasts, posterior, or genitalia) should appear on broadcast television prior to 8 p.m. If such nudity does appear prior to 8 p.m., the network and its affiliates *may* face a fine (\$100,000 per shot etc., discussed *supra*). The FCC may exercise discretion and determine whether the images in fact constitute actionable indecency based on the duration of the image, the body part depicted, and the context in which it appeared.

This last provision ensures that medical shows can air certain scenes, in which shots of the posterior or breasts appear, without facing fines. Networks will also be exempt from fines resulting from wardrobe mishaps. This last provision is the only subjective measure in the test, but it involves a straightforward gauge that should be easy to apply given the nature of the rest of the standard.

C. Success Rate Analysis – Test Cases

Such a proposal will only be valuable if it can successfully be applied to some of the situations that led to the development of the current stringent standards. The following are example cases, some based on factual scenarios discussed *supra*, that test the proposed solution and demonstrate that it cannot only mitigate future conflicts, but also it would have been quite helpful if the solution existed ten years ago as well.

¹⁸³ The actor may still be held liable, though, at the FCC's discretion.

During a live broadcast of an awards show, a performer says “F**k yes” while accepting an award.¹⁸⁴ The incident occurs at 9:15 p.m. This is not an actionable incident under the proposal because it is an expressive statement using the word “f**k” that aired at 9:15 p.m. The incident would also not be actionable because of the live nature of the broadcast.

During a live broadcast of the Super Bowl Halftime Show, a singer’s breast pops out of her corseted top toward the end of the performance.¹⁸⁵ The actual image is on the screen for just over half a second, before the camera cuts away to an aerial shot of the stadium. Under the proposal, this is a fleeting image of nudity during a live broadcast (no predictability) and would be exempt from any fine.

A medical show, airing at 8 p.m., shows a surgery scene where a woman’s posterior is exposed for almost one second. Under the proposal, this is likely exempt from a fine because there is no sexual or titillating aspect to the scene and there is a clear medical context and purpose for the use of the shot.

During a broadcast of the Academy Awards on ABC, with a 3-second audio delay employed, a clip of one film shown during a montage includes an actor saying “c**t.” Other expletives were present in the montage, evident because of silenced bits of dialogue, but this word got past the censors. The incident occurred at 8:30 p.m. If the FCC determines that the censors should reasonably have been able to catch that word as well, the FCC will fine ABC and all local and regional affiliates airing the awards show, at \$100,000 per occurrence. Thus, if 30 local stations across the United States aired the Academy Awards, the total fine will be roughly \$3.1 million (\$100,000 for each station and the network itself).¹⁸⁶ If the FCC determines that there was no reasonable way for the censors to have caught every expletive because of the frequency of expletives throughout the given montage, ABC and its affiliates will likely not face any fines. In either case, the actor responsible will not face a fine because it was not a live occurrence during the show.

¹⁸⁴ This fact pattern is based on the 2003 Golden Globes, *supra* note 52.

¹⁸⁵ This fact pattern is based on the Super Bowl Halftime Show from 2004, *supra* note 1.

¹⁸⁶ This does not include affiliates because they would be responsible for their own fines per the advanced-warning system discussed *supra*. If there was no warning, the networks would be responsible for the affiliates’ fines, too.

D. Why Other Solutions Have Not Worked and Will Not Work

i. Deregulation

There is some scholarship on the matter of deregulation of broadcast television, or treating it like cable.¹⁸⁷ The FCC has no application to cable television, only to broadcast and public access television (those channels that the television can theoretically pick up just by being plugged into the wall). Broadcast television, however, is better as a regulated medium. Regardless of whether cable or the Internet is available to most people, broadcast television is now more easily available to a greater majority of the population. More people can afford television sets now than they could in 1978, when the Court decided *Pacifica*, and thus, many more people can now watch broadcast television just by pressing the “On” button. It is not just about protecting a child’s innocence; there are adults who do not want certain content in their homes. Additionally, regulating this one medium, in a less constraining manner, could rid the courts of a considerable number of related First Amendment cases regarding chilled speech, as those are a more recent phenomenon. As the FCC’s standards do not apply to anything but basic broadcast television and radio, moderately regulating one small segment of television would satisfy most everyone – the families, the FCC and Congress, and the courts.

ii. Staying with the Current Policy

The current stringent and unpredictable indecency standards already cause many problems, like those outlined above, and will likely continue to do so for Congress, the FCC, and the broadcast television industry. As shown *supra*, most individuals in the broadcast industry often misunderstand or misconstrue the indecency standards of the FCC; even if a network understands the indecency standards, they seem poised to change in an instant.

Consider the problem in the following light: a college student just turned in a major term paper. Mere minutes after the deadline, he gets an email that anyone who wrote more than 20 pages will not pass. The directions explicitly said “at least eight pages,” but there was no page limit. Technically, even if he wrote more than 20 pages, he followed the instructions; he even went above and beyond, which is usually commendable. His paper should be acceptable, though, because this change just occurred and he had no way of expecting it or making a change to his paper. The school board decides, however, that he should fail the project

¹⁸⁷See Elizabeth H. Steele, *Examining the FCC’s Indecency Regulations in Light of Today’s Technology*, 63 FED. COMM. L. J. 289 (2010); Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 3 MICH. ST. L. REV. 911 (2005).

anyway. As implausible as this story sounds, this is exactly what happened in the Golden Globes case in 2003 and the subsequent FOX and CBS cases discussed *supra*. This analogy demonstrates an important point regarding change: if a policy is subjective and subject to a substantial change on a whim, then the policy is unsound.

iii. FCC's Traditional *Pacifica* Regime

While the old, relaxed regime is incorporated into the proposal, it is admittedly a relic of a different time and needs updating. Four of the “seven dirty words”¹⁸⁸ are not as coarse as they were in 1978 (“motherf**ker,” “co**su**er,” and “c**t” are still generally cringe-worthy and should still be avoided). Keeping these other four words on the forbidden list parallels the network stifling currently occurring under the FCC’s inconsistent standards. As much as parents might hate to admit it, it is in the public interest to treat the television audience as different from the audience of 1978. Importantly, it is the prerogative of parents to exercise discretion in deciding what their children watch. Networks should not be liable for every traumatizing or uncomfortable moment which occurs in a household. Furthermore, viewers also have the option of using the remote control to change the channel, turn down the volume, or even block particular channels or programs.

The *Pacifica* regime allowed fleeting expletives during live broadcasts to go unpunished because of their unpredictable nature. This approach is still sound, even with the advent of bleeping technology. Bleeping technology is not cheap – the longer the delay, the more likely it is to cost the networks more money. Nor is the technology perfect – there will always be human error that could result in a sizeable fine. Delays also take away the excitement of live television. While bleeping technology should generally be encouraged, the *Pacifica* Court taught people to be forgiving of human error on both sides of the camera.

CONCLUSION

Whatever the motivation behind the current FCC indecency standards and enforcement policy, the fact is that a shift away from the laissez-faire attitude towards broadcast indecency has occurred and is and will continue to remain problematic. Networks self-censor to the point of stifling creativity and entertainment and are constantly anxious about an impending FCC sanction. This tense situation is the result of an ill-considered policy shift resulting in substantial confusion within the broadcast industry (primarily television). Right now, the worst punishment

¹⁸⁸ FCC v. *Pacifica Found.*, 438 U.S. 726, (1978).

a major broadcast network could suffer is a multi-million dollar fine. These fines may seem inconsequential for billion-dollar networks, but such fines are still an inconvenience and repeated violations could be detrimental. For smaller networks, even a single FCC sanction could cripple that network or destroy it altogether. Such severe consequences underscore the danger in perpetuating the FCC's current standards, which is both highly ambiguous and subjective.

As these policies remain in effect and the problems persist, networks will throw away money on either very expensive equipment and manpower or lawsuits. Again, billion-dollar companies, like major networks, may survive and not be substantially impacted by a \$3 million fine, but those costs eventually add up. Networks may stop green-lighting seemingly "risky" programs, advertisers may stop buying commercial time because there are no worthwhile programs with which to associate, and money circulation in the broadcast television industry may stall. While these problems seem like mere inconveniences now, they can ultimately significantly debilitate the economy at large.

The current problems that exist can also serve to ultimately significantly debilitate the broadcast television industry at large. Therefore, it is necessary to enact new broadcast indecency standards. The ideal set of standards is a hybrid of European and Canadian standards, a reminiscent homage to the *Pacifica* holding, and a proposed change in lawmakers' acceptance of contemporary community standards. If there were genuinely a contemporary-community-standards problem, millions of people would not tune in every week to watch sexual escapades on *Game of Thrones*, *Masters of Sex*, or *Orange is the New Black*. Nevertheless, even a few hundred viewer complaints are enough to scare the FCC into creating and maintaining unnecessary and troublesome indecency standards. This new legislation, to override all prior rulings, holdings, and policy shifts, is necessary for salvaging the broadcast television industry.

**DAVID V. GOLIATH – IN THE FASHION ERA: ANALYZING THE
LANHAM ACT TO PROTECT INDIVIDUAL DESIGNERS AND SMALL
BUSINESS OWNERS**

*Jacqueline Nguyen**

INTRODUCTION

For people of all generations and ages, owning a status worthy purse or piece of jewelry gives a feeling of prestige that causes owners to add a little strut to their walk. Of course this may seem materialistic, but magazines, reality shows, and websites put these desirable items at the forefront of people's minds.¹ Even though the extravagant lifestyles of the rich and famous may be something to covet, the average modern girl may not be able to afford all the J.Crew, Michael Kors, and Tory Burch designs that she desires.² When the reality of one's bank account sets in, many women desperately search for and buy knockoffs or counterfeits of the real deal.³

Walking down the streets of Manhattan's Chinatown, tourists, men and women alike, are lured into the world of designer look-a-like bags, jewelry, sunglasses, and accessories.⁴ Beautiful Prada, Chanel, Louis Vuitton, Coach, and Tory Burch bags line the sidewalks and market stalls.⁵ Items labeled "Prada" or "Louis Vuitton" may sell for a measly \$20, while the real deal goes for \$2,000.⁶ But for those true deal spotters and bargain

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¹ See Russell W. Belk & Richard W. Pollay, *Materialism and Magazine Advertising During the Twentieth Century*, ADVANCES IN CONSUMER RESEARCH, available at <http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=6422> (claiming that U.S. magazine advertisements appealing to luxury and status have increased during the first eight decades of this century); James E. Burroughs, et al., *Does Television Viewing Promote Materialism? Cultivating American Perceptions of the Good Life*, ADVANCES IN CONSUMER RESEARCH, available at <http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=8695> (stating that television has helped to usher in a consumer culture and that there is a linkage between television viewing and materialism).

² Charlie Thomas, *Counterfeit Fashion Goods Are On The Rise, Thanks To Pressured Wallets And Fast Fashion*, THE HUFFINGTON POST (Feb. 14, 2013), http://www.huffingtonpost.co.uk/2013/02/13/counterfeit-fashion-goods_n_2678560.html.

³ See *In Quest to get the 'Designer' Look, U.S. Women Admit Buying Knockoffs*, THE HUFFINGTON POST (Jan. 8, 2013), http://www.huffingtonpost.com/2013/01/08/designer-knockoff-statistics_n_2434228.html.

⁴ Verena Dobnik & Bethan McKernan, *NYC Debates Crackdown on Counterfeit Luxury Goods*, THE BIG STORY (June 13, 2013), <http://bigstory.ap.org/article/new-york-considers-crackdown-counterfeit-luxury>.

⁵ *Id.*

⁶ *Id.*

shoppers, there exists an even larger world of hidden showrooms, apartments, and vans.⁷ These sellers hustle day and night to seduce customers into their stands or stores, where they showcase photos of the goods.⁸ People can buy these items right off the streets.⁹ However, if they do not see anything that catches their eye, the seller can pull up images of beautiful bags on a laptop.¹⁰ After the buyer chooses an item, a signal is given and the item is delivered within minutes.¹¹

While open markets were prevalent for many years in Chinatown, city raids have forced vendors to use stealth techniques to keep their sales coming in.¹² Sellers can bring their shoppers into apartments and hidden showrooms packed with counterfeit goods.¹³ Customers must be quiet, look quickly, pick out their desired items, pay up, and exit the building as soon as possible.¹⁴ These bubbling shoppers excitedly gripping their purchases may not be aware that police officers could be right around the corner.¹⁵ Until now, enforcement has been focused on catching sellers, but the New York City Council is bringing forth legislation that would punish customers caught buying counterfeit items.¹⁶ If this legislation passed, it would be the first act in the United States to criminalize the purchase of counterfeits.¹⁷

While New York City's Canal Street is infamous for its designer deals,¹⁸ the business of selling counterfeit items has matured into the world of websites and online vendors.¹⁹ While some sites openly market and sell fake goods, other sites, such as eBay, can serve as a facilitator in the selling of these counterfeit items.²⁰ Due to accessibility on the Internet and technological advances, the business of selling counterfeits has taken off.²¹

⁷ Dobnik & McKernan, *supra* note 4; Jeff Pohlman & Andrea Day, *Behind the Billion-Dollar Counterfeit Bag Market*, INVESTIGATIONS INC. (Aug. 1, 2013), <http://www.cnn.com/id/100931854>.

⁸ Dobnik & McKernan, *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Pohlman & Day, *supra* note 7.

¹⁴ *Id.*

¹⁵ See Dobnik & McKernan, *supra* note 4; Pohlman & Day, *supra* note 7.

¹⁶ Dobnik & McKernan, *supra* note 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Counterfeiting*, INTERNATIONAL TRADEMARK ASSOCIATION, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/Counterfeiting.aspx> (last visited July 20, 2014).

²⁰ *Id.*; Andrew Lehrer, *Tiffany v. Ebay: Its Impact and Implications on The Doctrines of Secondary Trademark and Copyright Infringement*, 18 B.U. J. SCI. & TECH. L. 373, 373-78 (2012).

²¹ See Lehrer, *supra* note 20, at 377-78.

In 2010, counterfeit sales on the Internet were estimated at \$135 billion.²² From a global perspective, counterfeit goods account for 2 percent of the market, and items in East Asia and the Pacific account for \$24.4 billion in sales alone.²³ Sites similar to eBay are starting to catch on to the concept of setting up channels for individual users to advertise and sell their items for a minimal fee.²⁴

This is where venues and sites such as Etsy.com (“Etsy”) come into play.²⁵ eBay and Etsy appear to create a forum for the sale of counterfeit goods that seems to be easier and more appealing than walking by all the vendors on Canal Street.²⁶ Etsy allows individuals to set up online “shops” where they can sell their items for a minimal transaction fee.²⁷ Once a seller agrees to the terms of use, they may process transactions and post and sell their items.²⁸ Etsy differs from eBay because the site has small entities, usually home businesses or individuals that retail handmade items, such as jewelry and clothing.²⁹ There are many sellers on Etsy who offer one-of-a-kind pieces, including bracelets and necklaces in various colors and designs.³⁰ Like eBay, Etsy facilitates international business by allowing exchanges between citizens in the United States and various other countries, such as China.³¹ In September 2012, Etsy had 1.42 billion page views and sold \$76.8 million worth of goods, which amounts to

²² *Id.*

²³ Christine Fellingham, *Counterfeit Handbags Fabricate the Fabulous*, USA TODAY (Oct. 14, 2013), <http://www.usatoday.com/story/money/business/2013/10/14/fashion-counterfeit-handbags/2984293/>.

²⁴ Lehrer, *supra* note 20, at 375-76.

²⁵ While there are various sites that facilitate the sale of handmade items, such as eBay and iCraft, this comment will focus on Etsy.com because it is a growing site that advertises on major social media sites, such as Facebook.

²⁶ See Ellie Mercadoi, *As Long as “It” is Not Counterfeit: Holding eBay Liable for Secondary Trademark Infringement in the Wake of LVMH and Tiffany Inc.*, 28 CARDOZO ARTS & ENT. L.J. 115, 117 (2010).

²⁷ *Terms of Use*, ETSY, http://www.etsy.com/help/article/479?ref=hc_policy (last visited July 20, 2014).

²⁸ *Id.*

²⁹ *Dos and Don'ts*, ETSY, http://www.etsy.com/help/article/483?ref=hc_policy (last visited July 20, 2014).

³⁰ ETSY, <http://www.etsy.com> (last visited July 20, 2014).

³¹ *E.g.*, *CustomizeEra*, ETSY, <https://www.etsy.com/shop/CustomizeEra?ref=l2-shopheader-name> (last visited July 21, 2014).

3,988,852 items.³² Etsy had 1.67 billion views and \$97.6 million worth of goods sold in January 2013.³³

However, issues arise, when items sold on Etsy are strikingly familiar to well-known and famous designs.³⁴ A further issue arises when sellers use, arguably, the same recognizable designs as famous designers.³⁵ Moreover, buyers can search for items by the designer's name, e.g., "Tory Burch Inspired Jewelry" and pull up multiple pages of items such as bracelets, necklaces, earrings, and bags, using the famous "T-logo" that Tory Burch designs are known for.³⁶ Trademark and trade dress issues such as these can cause problems for both the famous high-end designers and the individual attempting to knock off the designer's items.³⁷

What appears to attract buyers to sites such as Etsy is the prestige of owning something with a famous symbol and design at a fraction of the cost. So, how does this relationship between the small business owners on Etsy and the fashion powerhouses that they are, arguably, copying, play out?

When looking for nonfunctional product designs, meaning the overall look of a product, there are three primary sources of protection that a designer can claim: trade dress, copyright, and design patents.³⁸ While petitioners can choose their own path depending on their specific situation and product, this comment will focus on trade dress infringement claims.

This comment will argue that the Lanham Act³⁹ offers minimal coverage to artists on Etsy and suggest that legislation and analytical standards should be developed to protect Etsy shop owners and small business owners and to place limits on the litigation rights of large designers. Part I provides background information on the Lanham Act,

³² *Etsy has Nearly 1.5 Billion Pageviews in September (And People Are Buying More Stuff)*, WEB PRONews (Oct. 12, 2012), <http://www.webpronews.com/etsy-had-nearly-1-5-billion-pageviews-in-september-and-people-are-buying-more-stuff-2012-10>.

³³ Chris Crum, *Etsy Had Even More Page Views in January Than in December*, BUSINESS (Mar. 15, 2013), <http://www.webpronews.com/etsy-had-even-more-page-views-in-january-than-in-december-2013-03>.

³⁴ See *Tory Burch Inspired*, ETSY, http://www.etsy.com/search/handmade?q=tory%20burch%20inspired&order=most_relevant&view_type=gallery&ship_to=US&ref=auto1 (last visited July 20, 2014); *Tory Burch*, VOGUEPEDIA, http://www.vogue.com/voguepedia/Tory_Burch (last visited July 20, 2014).

³⁵ See *Tory Burch Inspired*, *supra* note 34; *Tory Burch*, *supra* note 34.

³⁶ *Id.*

³⁷ Alexandra Steigrad, *Tory Burch Sues Bluebell Accessories*, BUSINESS (Mar. 25, 2013), <http://www.wwd.com/business-news/legal/tory-burch-sues-bluebell-accessories-6867146?src=rss/recentstories/20130325>.

³⁸ Carla B. Oakley & Brett A. Lovejoy, *Trade Dress, Copyright or Design Patent?*, THE RECORDER (Oct. 19, 2012), <http://www.morganlewis.com/index.cfm/publicationID/5f4c58de-b51c-4434-b08e-3f008fee85ca/fuseaction/publication.detail>.

³⁹ 15 U.S.C. §§ 1051-1127 (2012).

Trade Dress law, an array of infringement issues that may arise in the fashion business, and the factors that form a claim of trade dress infringement. The background section will also summarize prominent trade dress case law, show what is currently happening between fashion designers and small business owners, and describe what issues may arise for Etsy and their shop owners. Part II will analyze how and why the Lanham Act should be adjusted to protect Etsy shop owners and limit designers' legal actions. Finally, Part III will provide a brief conclusion describing the components of an adjustment to the Lanham Act and how these components will serve to create some balance between the fashion powerhouses and small business owners.

I. BACKGROUND

A. THE LAW

The Lanham Act,⁴⁰ codified in 15 U.S.C. §§ 1051-1127, governs the registration and protection of trademarks.⁴¹ The Lanham Act defines a trademark as a word, name, or symbol used by a person to identify and distinguish her goods from those manufactured or sold by others.⁴² Words, numbers, slogans, pictures, symbols, graphic designs, and color, are all eligible for trademark protection.⁴³ As to designs and nonfunctional works, as mentioned *supra*, fashion designers rely on copyright, design patent and trade dress.⁴⁴ The Lanham Act differs from the Copyright Act⁴⁵ and the Patent Act⁴⁶ by offering designers more protection in the form of trade dress.⁴⁷

⁴⁰ 15 U.S.C. §§ 1051-1127.

⁴¹ Kerrie A. Laba, *Have Trade Dress Infringement Claims Gone Too Far Under The Lanham Act?*, 42 WAYNE L. REV. 1649, 1651 (1996).

⁴² 15 U.S.C. § 1127.

⁴³ Annette Lesieutre Honan, *The Skyscraping Reach of the Lanham Act: How Far Should the Protection of Famous Building Design be Extended?*, 94 NW. U. L. REV. 1509, 1511 (2000).

⁴⁴ N. Elizabeth Mills, *Intellectual Property Protection for Fashion Design: An Overview of Existing Law and a Look Toward Proposed Legislative Changes*, 5 SHIDLER J.L. COM. & TECH. 24, 24 (2009).

⁴⁵ 17 U.S.C. §§ 101-1332 (2013).

⁴⁶ 35 U.S.C. §§ 1-390 (2012).

⁴⁷ Honan, *supra* note 43, at 1512.

1. TRADE DRESS UNDER THE LANHAM ACT

Section 43(a) describes “trade dress” as encompassing the labeling or packaging of a product, including the product’s overall image and design.⁴⁸ In more detail, Section 43 states that:

Any person who uses in commerce any word, term, name, symbol, device, or combination thereof in a good, which (A) is likely to cause confusion or mistake as to the association of such person with another person, or (B) misrepresents the nature, characteristics, or qualities of such person’s goods, shall be liable in a civil action by any person who believes he or she is likely to be damaged by such actions.⁴⁹

While Section 43(a) does not explicitly set forth trade dress law, it is embodied within the broad area of trademark law.⁵⁰ Once an owner registers a mark under the Lanham Act, the owner is able to sue infringers under 15 U.S.C. § 1114.⁵¹ However, federally registered trademarks are not the only protected marks.⁵² A product trade dress may be so distinct that it is eligible for protection as an unregistered trademark.⁵³ The Second Circuit has recognized that while trade dress has attributes of trademark, it is concerned with overall product presentation, meaning its “total image.”⁵⁴ The “total image” includes the design, appearance of a product, and size, shape, color or graphics used.⁵⁵ Trade dress is viewed as the overall combination and use of designs into a total image in which the product, as viewed by consumers, is distinct from other products,⁵⁶ and provides protection for the entire fashion work.⁵⁷

⁴⁸ Laba, *supra* note 41.

⁴⁹ 15 U.S.C §1125(a)(1) (2012).

⁵⁰ Karina K. Terakura, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 U. HAW. L. REV. 569, 578 (2000).

⁵¹ Wal-Mart Stores v. Samara Bros., Inc., 529 U.S. 205, 209 (2000).

⁵² Laba, *supra* note 41, at 1652.

⁵³ *Id.*

⁵⁴ L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1129 (Fed. Cir. 1993).

⁵⁵ Cosmos Jewelry Ltd. v. Po Sun Hon Co., 470 F. Supp. 2d 1072, 1085 (C.D. Cal. 2006).

⁵⁶ L.A. Gear, 988 F.2d at 1129.

⁵⁷ S. Priva Bharati, *There is More Than One Way to Skin a Copycat: The Emergency of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH. L. REV. 1667, 1668 (1996).

Since the use of trademarks and trade dress serve a common purpose of preventing unfair competition and deception, the same analysis is used to determine whether or not a mark or trade dress qualifies for protection under the Lanham Act.⁵⁸ Under the Lanham Act, the burden of proof is placed on the party that asserts trade dress protection.⁵⁹ Therefore, to raise a valid and strong trade dress claim, fashion designers must show: (1) the trade dress's distinctiveness, either through inherent distinctiveness or secondary meaning; (2) the non-functional and famous nature of the trade dress; and (3) a likelihood of confusion in the market and among consumers between the petitioner's good and the alleged infringer's good.⁶⁰

a. DISTINCTIVENESS

When considering the first factor of distinctiveness, a mark must either: (1) be inherently distinct or (2) have acquired distinctiveness through secondary meaning.⁶¹

Inherently distinct means the product's intrinsic nature identifies a particular source.⁶² The traditional test, set out in *Abercrombie & Fitch Co. v. Hunting World Inc.*, categorizes marks across a spectrum, where they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary or fanciful.⁶³ Following this spectrum, inherently distinct marks are suggestive, or arbitrary or fanciful, meaning they require varying degrees of imagination and thought to reach a conclusion as to the nature of the goods.⁶⁴

If a product's trade dress is not inherently distinctive, i.e., categorized as generic or descriptive, applicants may look to its secondary meaning.⁶⁵ Secondary meaning, or acquired distinctiveness, is developed when the descriptive mark identifies the source of the product, rather than

⁵⁸ Laba, *supra* note 41, at 1660.

⁵⁹ 15 U.S.C. § 1125(c)(4) (2012).

⁶⁰ See 15 U.S.C. § 1125(a) (2012); *Wal-Mart Stores*, 529 U.S. at 210.

⁶¹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992). Taco Cabana operates a Mexican restaurant with a festive atmosphere decorated with artifacts, bright colors, and murals. *Id.* at 765. Two Pesos opened years after Taco Cabana and adopted a very similar motif for the restaurant. *Id.* The Supreme Court agreed with the Court of Appeals and found for the respondents, Taco Cabana, holding that "proof of secondary meaning is not required to prevail on a claim under § 43(a) of the Lanham Act where the trade dress at issue is inherently distinctive." *Id.* at 761.

⁶² See *Wal-Mart Stores*, 529 U.S. at 210; Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress Protection*, 84 CORNELL L. REV. 1116, 1131 (1997).

⁶³ See *Abercrombie & Fitch Co. v. Hunting World, Inc.* 537 F.2d 4, 9 (2d. Cir. 1976).

⁶⁴ See *id.*

⁶⁵ *Terakura*, *supra* note 50, at 586.

just the product itself.⁶⁶ Evidence of secondary meaning shows the trade dress has been exclusively and continuously used in commerce.⁶⁷ Secondary meaning is recognized when consumers associate the trade dress of an item with the designer and the designer's quality and work.⁶⁸

A fashion designer cannot establish secondary meaning simply by creating the item or presenting the item in a fashion show.⁶⁹ Since the product and its features must become established in the commercial market to the point that consumers are able to identify the product's origin, meaning the designer level of quality and prestige, secondary meaning of a mark or logo takes time to develop.⁷⁰ For example, consumers easily recognize the "MK" symbol associated with designer Michael Kors⁷¹ and the blue jewelry box with Tiffany & Co.,⁷² but only after their respective years in the fashion and jewelry markets.⁷³

b. NON-FUNCTIONALITY

As to functionality, a feature is functional "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article."⁷⁴ For a feature to be non-functional, which allows the feature to be protected under trade-dress law, it must be a purely decorative and ornamental feature.⁷⁵ These components may include size, shape, color(s), texture, or graphics.⁷⁶ Since the Supreme Court has not set a clear standard of non-functionality, courts look to the overall impression of the

⁶⁶ See *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850-51 (1982) (holding that use of a design similar to another product confuses purchasers as to the product's source).

⁶⁷ Jeff Resnick, *Trade Dress Law: The Conflicts Between Product Design and Product Packaging*, 24 WHITTIER L. REV. 253, 260-61 (2002).

⁶⁸ See Mills, *supra* note 44.

⁶⁹ *Id.*

⁷⁰ Laba, *supra* note 41, at 1660-61.

⁷¹ Jane Singer, *Michael Kors – A Tale of Two Brands*, THE ROBIN REPORT (Feb. 12, 2013), <http://therobinreport.com/michael-kors-a-tale-of-two-brands/>.

⁷² *About Tiffany & Co.*, TIFFANY & CO., <http://press.tiffany.com/ViewBackgrounder.aspx?backgrounderId=6> (last visited July 20, 2014).

⁷³ See *id.*; Singer, *supra* note 71.

⁷⁴ Wong, *supra* note 62, at 1131 (quoting *Qualitex*, 514 U.S. at 165).

⁷⁵ See LOIS F. HERZECA & HOWARD S. HOGAN, *FASHION LAW AND BUSINESS* 69 (Practising Law Institute 2013).

⁷⁶ *Id.*

product,⁷⁷ which encompasses the aforementioned components. For example, when a consumer sees “T”-like symbols on an item, they may have the overall impression that the product is a Tory Burch design.⁷⁸ A general look at non-functionality requires the element(s) at issue to serve no other purpose than to identify the designer and quality of the product.⁷⁹

C. LIKELIHOOD OF CONFUSION

Finally, the court looks to whether the trade dress of the competing good was likely to cause confusion among consumers.⁸⁰ Consumers often recognize and purchase products based on a product’s packaging and design because they associate the specific package or design with a certain brand or company.⁸¹ To ensure consumers are not deceived, the Lanham Act⁸² forbids any misleading or false representation of goods that is likely to cause confusion as to who designed the product or to the quality of the product.⁸³ If a trade dress of a product is distinct from another product’s trade dress, it will not cause confusion as to the origin of the goods.⁸⁴ As a result, evidence of a likelihood of confusion also flows from a showing of distinctiveness.

To aid in this analysis, courts in the Second and Seventh Circuits have formulated a balancing test comprised of various factors to determine whether or not there is a likelihood of confusion between the protected trade dress and the alleged infringing mark.⁸⁵ These factors include: (1) the similarity between the marks in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree and care likely to be exercised by consumers; (5) the strength of the plaintiff’s mark; (6) any actual confusion; (7) the defendant’s good or bad faith in adopting the mark; and (8) the sophistication of the buyers.⁸⁶

⁷⁷ See Melissa R. Gleiberman, *From Fast Cars to Fast Food: Overbroad Protection of Product Trade Dress Under Section 43(a) of The Lanham Act*, 45 STAN. L. REV. 2037, 2044-45 (1993).

⁷⁸ See *Tory Burch*, *supra* note 34.

⁷⁹ Gleiberman, *supra* note 77, at 2045.

⁸⁰ See 15 U.S.C. § 1125(a) (2000); *Wal-Mart Stores*, 529 U.S. at 210.

⁸¹ *Terakura*, *supra* note 50, at 589.

⁸² 15 U.S.C. 1125(a)(1).

⁸³ *Terakura*, *supra* note 50, at 589.

⁸⁴ *Wal-Mart Stores*, 529 U.S. at 210.

⁸⁵ See *Autozone, Inc. v. Strick*, 543 F.3d 923, 930 (7th Cir. 2008) (holding that consumers would believe “Oil Zone” and “Wash Zone” trade names and service marks were connected to the same source); *Polaroid Corp. v. Polaroid Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

⁸⁶ See *Autozone*, 543 F.3d at 930; *Polaroid*, 287 F.2d at 495.

2. WHO ELSE CAN BE BLAMED? CONTRIBUTORY AND VICARIOUS LIABILITY

The Lanham Act incorporates a concept known as secondary liability, divided into contributory liability and vicarious liability, which may hold a party responsible for another party's direct infringement.⁸⁷ The Supreme Court has established that contributory trademark liability may come about "if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement."⁸⁸ The Supreme Court has held that if a distributor intentionally induces another to infringe a trademark, the distributor is "contributorially" responsible for any harm done.⁸⁹

While this test applies to manufacturers and distributors of goods, courts have extended it to providers of services, such as eBay.⁹⁰ For example, the Ninth Circuit held that this test applies to service providers if they "[exercise] sufficient control over the infringing conduct."⁹¹ As to vicarious liability, federal courts have developed a two-part test, wherein the provider must: (1) have the right and ability to supervise, and (2) have a direct financial interest in the profits of the infringing sales and activities.⁹² Generally, petitioners appear to claim contributory liability rather than vicarious liability.⁹³

B. THE STATE OF FASHION IN THE COURTS – WHAT HAS HAPPENED SO FAR?

While the courts have set up various factors and tests to further the analysis of trade dress infringement and protection under the Lanham Act, these assessments are mainly geared towards the petitioner's claims and the evidence they must show to have a sufficient claim of infringement.⁹⁴ This

⁸⁷ Deborah F. Buckman, *Liability as Vicarious or Contributory Infringer Under Lanham Act – Modern Cases*, 152 A.L.R. FED. 573 (1999).

⁸⁸ *Id.*

⁸⁹ *Inwood Labs.*, 456 U.S. at 847-54.

⁹⁰ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 104 (2d. Cir. 2010).

⁹¹ *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999).

⁹² *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1107 (S.D.N.Y. 1994).

⁹³ *See Coach, Inc. v. Farmers Market & Auction*, 881 F. Supp. 2d 695, 702 (S.D.M.D. 2012) (stating that petitioner's allegations were sufficient to state a claim of contributory trade dress infringement against market owners, arising out of violations by their vendors).

⁹⁴ *See generally Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116 (2d. Cir. 2001) (holding that "a plaintiff seeking to protect its trade dress in a line of products must articulate the design elements that compose the trade dress"); *Cosmos Jewelry*, 470 F. Supp. 2d at 1086, *aff'd*, 06-56338, 2009 WL 766517 (9th Cir. Mar. 24, 2009) (holding that copiers were liable to

section will highlight cases that have dealt with trade dress infringement, contributory infringers, and online facilitators, specifically eBay.⁹⁵

1. SMALL FISH AGAINST SMALL FISH: THE FIGHT AGAINST TRADE DRESS INFRINGEMENT

Cosmos, a family owned-business in Hawaii which had been in operation since 1980 and had won several design awards, brought a claim against Alan Hon, a jewelry designer who started selling pieces in Hawaii in 1981.⁹⁶ Under the claim of trade dress infringement, the District Court held that Cosmos' trade dress of "a line of gold plumeria jewelry that depicts the plumeria flower in yellow gold in a specific size and shape with a sand-blasted matte finish on the petals and high-polished shiny edges" was non-functional.⁹⁷ The District Court also concluded that Cosmos' trade dress had secondary meaning since the jewelry had been in the market for eleven years and is featured in many stores throughout the islands of Hawaii.⁹⁸

The plaintiffs provided evidence that showed jewelry store owners and customers associated the Plumeria Lei series and particular signature designs with both Cosmos and Hon.⁹⁹ A likelihood of confusion existed since: (1) the mark had strength given its years of use and promotion; (2) the parties goods are highly related and were sold in the same market; (3) distributors were actually confused between Cosmos' and Hon's designs; (4) advertisements were almost identical; (5) the goods were priced similarly, and (6) the creation of additional pieces would create more and not less confusion.¹⁰⁰

Based on these facts, the Court held Hon liable to Cosmos for trade dress infringement.¹⁰¹ This case exemplifies how two relatively small companies can come to blows over trade dress issues. Cosmos, a family-run business, was able to make a successful claim and case against another individual jewelry designer and importer.

petitioners for trade dress infringement because in a balancing of the factors, there was a substantial likelihood of consumer confusion, the design was non-functional, and the product had acquired secondary meaning).

⁹⁵ EBAY, http://www.ebayinc.com/who_we_are/one_company (last visited July 20, 2014).

⁹⁶ *Cosmos Jewelry*, 470 F. Supp. 2d at 1075.

⁹⁷ *Id.* at 1085.

⁹⁸ *Id.* at 1086.

⁹⁹ *Id.*

¹⁰⁰ *Cosmos Jewelry*, 470 F. Supp. 2d at 1087.

¹⁰¹ *Id.*

2. JEWELRY DESIGNERS' FIGHT AGAINST ONLINE AUCTIONEER

Jewelry Design Company Tiffany Inc. ("Tiffany & Co.") brought actions under trademark infringement against the online site eBay, where a number of sellers sold counterfeit Tiffany & Co. jewelry.¹⁰² Similar to Etsy, eBay allows sellers to place items up on the site for purchase¹⁰³ and expects to handle \$300 billion in transactions per year.¹⁰⁴ Since eBay does not inspect each item with their own eyes before it is put up for auction, they have numerous measures in place to prevent the sale of counterfeit goods, such as buyer protection programs and fraud engines to pick out counterfeit listings.¹⁰⁵ With regards to counterfeit Tiffany & Co. jewelry items, eBay had sent warning messages to sellers who they thought were attempting to list a Tiffany & Co. item.¹⁰⁶ eBay has also cancelled suspicious transactions and suspended many sellers they suspected of selling counterfeit items.¹⁰⁷ Also, eBay implemented various anti-fraud measures, including delaying the ability of users to view listings of certain brand names, including Tiffany & Co., in order to give companies more time to review those listings before the items went up for sale.¹⁰⁸

Tiffany & Co. claimed that eBay continued to supply their services to sellers of counterfeit Tiffany & Co. goods, even though they knew or should have known that the sellers were engaging in infringing conduct.¹⁰⁹ The District Court disagreed.¹¹⁰ The District Court ruled that eBay did not possess sufficient information to know or have reason to know that the listings at issue were for counterfeit goods.¹¹¹ In addition, eBay consistently and diligently took actions to prevent the sale of counterfeit items, as described above.¹¹² Therefore, the eBay site proprietors were not liable for contributory trademark infringement.¹¹³

¹⁰² *Tiffany*, 600 F.3d at 93.

¹⁰³ *See id.* at 97.

¹⁰⁴ Dara Kerr, *eBay Sets Ambitious Goal for 2015: \$300B in Transactions*, INTERNET & MEDIA (Mar. 28, 2013), [http://news.cnet.com/8301-1023_3-57576925-93/eBay-sets-ambitious-goal-for-2015-\\$300b-in-transactions/](http://news.cnet.com/8301-1023_3-57576925-93/eBay-sets-ambitious-goal-for-2015-$300b-in-transactions/).

¹⁰⁵ *Tiffany*, 600 F.3d at 99.

¹⁰⁶ *Id.* at 100.

¹⁰⁷ *Id.*

¹⁰⁸ *Tiffany*, 600 F.3d at 102.

¹⁰⁹ *Id.* at 106.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 93.

3. TRADE DRESS INFRINGEMENT AND CONTRIBUTORY LIABILITY AT THE FARMER’S MARKET

Petitioner, Coach, Inc. (“Coach”), is a famous and well-known maker of handbags, watches, and jewelry.¹¹⁴ Coach is recognized by their trade dress design, a curved “C-symbol,” usually in a repetitive pattern, which can be seen on various purse and jewelry items.¹¹⁵ Defendants included the Farmers Market & Auction (“Market Defendants”), the corporation that set up the market, and the vendors (“Vendor Defendants”) that sold goods at the market.¹¹⁶ Numerous articles were seized from vendors at the market, including bags, sunglasses, key chains, and jewelry, which all bore the distinguished Coach mark.¹¹⁷

As to the Vendor Defendants, the Court concluded that Coach satisfied the elements of a cause of action under trade dress infringement because they showed (1) that they had legitimate ownership in their trade dress, which included non-functional logos, and design elements; (2) that the Vendors had designed, manufactured, advertised, and sold products bearing the distinctive logo of Coach designs, thereby creating reasonable confusion among the market, and (3) that the marks were recognized by consumers as coming from the high quality and well-known brand of Coach, which satisfied a showing of secondary meaning.¹¹⁸ Therefore, Coach had sufficient evidence to state a claim of trade dress infringement.¹¹⁹

Coach also had sufficient facts to bring a claim of contributory trademark infringement against the Market Defendants.¹²⁰ The District Court’s analysis regarding contributory trademark infringement also lends some insight into possible contributory trade dress infringement claims. Coach alleged that the market Defendants were liable for contributory trade dress infringement because they knew or had reason to know of the alleged trade dress infringement that occurred on their premises and in their markets.¹²¹ The Court agreed and ruled that the market Defendants had adequate notice and evidence of the violations from the police raids, on-site investigation, and cease and desist letters they received.¹²²

¹¹⁴ Coach, Inc. v. Farmers Market & Auction, 881 F. Supp. 2d 695, 698 (S.D.M.D. 2012).

¹¹⁵ See *id.* at 698; COACH, <http://www.coach.com/online/handbags/Home-10551-10051-en/?LOC=LG> (last visited July 21, 2014).

¹¹⁶ *Coach, Inc.*, 881 F. Supp. 2d at 698.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 702.

¹¹⁹ *Id.* at 695.

¹²⁰ *Id.* at 702.

¹²¹ *Id.*

¹²² *Coach, Inc.*, 881 F. Supp. 2d at 706.

C. WHAT THE LANHAM ACT AND CASE LAW MEAN FOR ETSY AND THEIR SHOP OWNERS

While there have not been notable cases involving Etsy, a similar analysis can be developed from the cases described *supra* and other trade dress infringement cases. Because of Etsy's success, the actions and products of Etsy shop owners, and how case law has evolved in regards to online facilitators, there are legitimate and reasonable concerns that fashion companies can and will go after Etsy and Etsy shop owners.

1. THE IMPENDING BURDEN ON ETSY

Etsy is a growing business and is changing the way people shop.¹²³ Sooner or later, if they haven't already, fashion designers will catch on to what Etsy and its sellers are providing to the mass market. Tory Burch, one of the prevalently imitated designs on Etsy, is aggressively cracking down on counterfeiters.¹²⁴ Her company has filed numerous suits against both United States and international companies that manufacture and sell counterfeit items on websites and online marketplaces.¹²⁵ Also, designers and companies have brought claims against online providers, specifically eBay,¹²⁶ which Etsy resembles by utilizing a similar flea-market feel through a computer screen that produces numerous transactions.¹²⁷

Etsy is definitely changing the way people shop by giving consumers a world with person-to-person commerce of handmade goods that you could find at your local farmer's market.¹²⁸ Buyers can shop in the comfort of their home and hunt for great deals and steals on jewelry, bags, household items, and more.¹²⁹ However, the site is a feeding ground for infringement cases.¹³⁰ Etsy's business model gives artists and small businesses, such as designers who hand sew items in their home, an

¹²³ See generally Kathleen Davis, *The 'Etsy Economy' and Changing the Way We Shop*, ENTREPRENEUR (Mar. 22, 2013), <http://www.entrepreneur.com/article/226180>.

¹²⁴ *David v. Goliath: Tory Burch Countersued by Alleged Counterfeiter*, THE NEW YORK OBSERVER (July 26, 2013, 1:20 PM), <http://observer.com/2013/07/david-vs-goliath-tory-burch-countersued-by-alleged-counterfeiter/>.

¹²⁵ See *Tory Burch LLC v. Partnerships and Unincorporated Associations Identified on Schedule "A,"* No. 13 C 2059, 2013 WL 1283824, at *1, *1 (N. D. Ill. Mar. 27, 2013) (defendants resided in the People's Republic of China, but operated commercial websites targeting Illinois residents); *Tory Burch LLC v. Does 1-100*, no. 12 C 7163, 2013 WL 4581409, at *1, *1 (N.D. Ill. Oct. 2, 2012).

¹²⁶ See *Tiffany*, 600 F.3d at 93.

¹²⁷ See Davis, *supra* note 123; Mercadoi, *supra* note 26, at 116.

¹²⁸ See Davis, *supra* note 123.

¹²⁹ See *id.*

¹³⁰ Steven Schlackman, *Etsy: a Home for Copyright Infringers*, ART LAW JOURNAL (May 26, 2013), <http://artlawjournal.com/etsy-and-copyright/>.

opportunity to sell their designs and consumers a chance to buy unique and inspired products.¹³¹ Accordingly, Etsy must take action to prevent intellectual property infringements on their part.¹³²

As mentioned *supra*, Etsy allows users from all over the world to sell their items through the e-commerce site.¹³³ Some developing countries, such as China, are notoriously home to factories that produce counterfeit luxury goods.¹³⁴ This fact not only furthers the possibility of infringing activity on Etsy, but a lack of copyright enforcement by foreign countries like China gives minimal reason for an infringer to comply with U.S. intellectual property rules.¹³⁵

In their terms and agreements, Etsy claims they will take action against sellers by removing posts that offer sales of infringing products or disabling accounts of repeat offenders.¹³⁶ Since Etsy does not own or distribute goods themselves, they are considered a media distributor and are protected under the Digital Millennium Copyright Act (“DMCA”).¹³⁷ If Etsy complies with the rules set out by the DMCA, they cannot be sued themselves for copyright infringement.¹³⁸ On the other hand, the DMCA does not protect against trademark and trade dress claims, so Etsy cannot fully cover itself from liability by merely complying with the DMCA.

Etsy shops have been shut down for copyright infringement, but the use of copyrighted terms such as “Roll Tide,” “Go Bulldogs,” and “Go Tigers,” will prove to be a minor issue once companies, such as Tory Burch or J.Crew, form a contributory trade dress infringement claim against the site.¹³⁹ Some Etsy shops have been shut down, but only for alleged infringement issues among Etsy sellers themselves.¹⁴⁰ But as discussed above, the pattern of fashion designers going after online providers, such as eBay,¹⁴¹ shows that designers are not ignorant to what is happening in the counterfeit market and who is selling products utilizing their trade dress.

¹³¹ *Copyright and Intellectual Property Policy*, ETSY, http://www.etsy.com/help/article/482?ref=hc_policy (last visited July 20, 2014).

¹³² *Id.*

¹³³ *Terms of Use*, *supra* note 27.

¹³⁴ See *Counterfeit Fashion Goods Are on the Rise, Thanks To Pressured Wallets and Fast Fashion*, *supra* note 3; Schlackman, *supra* note 130.

¹³⁵ Schlackman, *supra* note 130.

¹³⁶ *Terms of Use*, *supra* note 27.

¹³⁷ Schlackman, *supra* note 130.

¹³⁸ *Id.*

¹³⁹ See *Copyright Infringement*, <http://www.bethpicard.com/featured/copyright-infringement/> (last visited July 20, 2014).

¹⁴⁰ See *id.*

¹⁴¹ See Mercadoi, *supra* note 26.

2. HOW ETSY SHOP OWNERS GET THEMSELVES INTO TROUBLE

Home-based artists and designers should be given a venue to showcase their products. There are various sites and forums that try to offer advice to Etsy shop owners regarding potential copyright and trademark infringements,¹⁴² but based on the lack of disclaimer language on the Etsy website,¹⁴³ many Etsy users might not understand exactly what trade dress means and how they can infringe on another designer's trade dress.

The possibility of trade dress claims against Etsy shop owners becomes even more dooming since trade dress does not require registration with the United States Patent and Trademark Office ("USPTO").¹⁴⁴ Therefore, petitioners only have to state a valid claim under the Lanham Act.¹⁴⁵ As described above, for a fashion company to invoke trade dress protection they must simply show that their design or feature is non-functional and distinct.¹⁴⁶ For a cause of action, petitioners only need to show a likelihood of confusion in the market between their goods and products sold by Etsy shop owners.¹⁴⁷ For companies such as Tory Burch or Chanel, who have a long-standing and infamous reputation in the fashion market,¹⁴⁸ they have numerous legal resources at their disposal¹⁴⁹ that can help them form a strong case against Etsy artists.

While a lot of case law and precedent looks to the petitioner's claims and remedies, entrepreneurs should also be given protection under the Lanham Act.¹⁵⁰ As described above, a civil action for trade dress requires very little from the petitioner.¹⁵¹ It appears as if any and all sellers on Etsy are just sitting ducks waiting for a costly trade dress claim against them. While shop owners have some rights in their works, including rights

¹⁴² See generally *Copyright Infringement*, *supra* note 139; *How to Protect Your Work From Etsy's Copyright Infringers*, ART LAW JOURNAL (May 26, 2013), <http://artlawjournal.com/how-to-protect-your-work-from-etsys-copyright-infringers/>.

¹⁴³ *Terms of Use*, *supra* note 27.

¹⁴⁴ *Laba*, *supra* note 41.

¹⁴⁵ 15 U.S.C. §§ 1051-1127 (2012).

¹⁴⁶ *Two Pesos*, 505 U.S. at 769.

¹⁴⁷ See 15 U.S.C. § 1125(a) (2000); *Wal-Mart Stores*, 529 U.S. at 210.

¹⁴⁸ See Chanel, THE CUT, <http://nymag.com/thecut/fashion/designers/chanel/> (last visited July 20, 2014); Clare O'Connor, *Fashion Tycoon Tory Burch Becomes a Billionaire (Thanks in Part, to \$200 Ballet Flats)*, FORBES (Jan. 3, 2013), <http://www.forbes.com/sites/clareoconnor/2013/01/03/fashion-tycoon-tory-burch-becomes-a-billionaire-thanks-in-part-to-200-ballet-flats/>.

¹⁴⁹ See Susan Scafidi, *In Fashion Circles, Lawyers Becoming Sought-After Accessories* (Sept. 12, 2012), <http://law.fordham.edu/faculty/27851.htm>.

¹⁵⁰ See generally *Tiffany*, 600 F.3d 93 at 93; *Yurman*, 262 F.3d at 116.

¹⁵¹ See 15 U.S.C. § 1125(a) (2000); *Wal-Mart Stores*, 529 U.S. at 210.

against other Etsy shops using their designs,¹⁵² they need some protection from these large fashion companies. The Lanham Act¹⁵³ does not mention what types of sellers, alleged counterfeiters, or designers can be liable for trade dress infringement. The power appears to rest in the petitioner's hands.

While the easiest way to combat trade dress infringement issues is to prevent Etsy shop owners from making, marketing, and selling jewelry and purses utilizing protected trade dresses, this is easier said than done. Nevertheless, Etsy shop owners must see a fine line between producing work that is “inspired by” another designer versus work that is blatantly infringing upon a protected trade dress.¹⁵⁴

3. THE LAW AS APPLIED TO ETSY

Under the Lanham Act,¹⁵⁵ fashion designers only need to show: (1) the trade dress's distinctiveness and non-functional nature and (2) a likelihood of confusion in the market and among consumers.¹⁵⁶ Fashion designers can easily satisfy these factors. For example, Tory Burch's “T-mark” and her shoe designs are easily viewed as distinctive and non-functional because of its famous nature, commercial recognition, and aesthetic use.¹⁵⁷ Under the *Abercrombie* test of distinctiveness (where an inherently distinct mark is suggestive, arbitrary or fanciful),¹⁵⁸ the “T-mark” can be described as suggestive of the Tory Burch brand,¹⁵⁹ arbitrary as to its use, for example, on a shoe or earrings, or even fanciful in design. One of these examples would be sufficient to show the mark's inherently distinct nature.¹⁶⁰ As to a showing of a likelihood of confusion, a simple glance at items “inspired by” Tory Burch on Etsy¹⁶¹ may be enough evidence. As a result, one can see how easily a claim of trade dress infringement can be formed against an Etsy shop owner.

Relevant cases of trademark and trade dress infringement issues show that strong claims can be made against not only Etsy shop owners, but also against Etsy itself. Designers have already gone after online

¹⁵² *Terms of Use*, *supra* note 27.

¹⁵³ 15 U.S.C. §§ 1051-1127 (2012).

¹⁵⁴ 21 DCBARR 10.

¹⁵⁵ 15 U.S.C. §§ 1051-1127 (2012).

¹⁵⁶ *See* 15 U.S.C. § 1125(a) (2012); *Wal-Mart Stores*, 529 U.S. at 210.

¹⁵⁷ *See Tory Burch*, *supra* note 34.

¹⁵⁸ *See Abercrombie & Fitch Co.*, 537 F.2d at 9.

¹⁵⁹ *See Tory Burch*, *supra* note 34.

¹⁶⁰ *See Abercrombie & Fitch Co.*, 537 F.2d at 9.

¹⁶¹ *See Tory Burch Inspired*, *supra* note 34.

facilitators including eBay and Amazon.¹⁶² While online providers have some protection, as will be discussed *infra*, they also need to: (1) prevent the sale of infringing goods through their sites and (2) protect themselves from publicized and costly lawsuits.

II. ANALYSIS

Since the Lanham Act is a lengthy and established doctrine,¹⁶³ merely adding provisions to the code may not be enough to protect small business owners because courts would also need to form more explicit standards to enforce such provisions. A different method of analyzing trade dress infringement claims and cases should be adopted by the courts to not only preserve the rights of mark holders, but to allow small business owners, including Etsy shop owners, to have a sustainable business, even if it is out of their basement.¹⁶⁴ Additionally, Etsy must set up channels and provisions to review the product listings on their site and to educate their sellers and buyers. Finally, limitations should be placed on the fashion companies' ability to easily bring and prove claims against small businesses.

A. ANALYZING THE LANHAM ACT TO PROTECT ETSY SHOP OWNERS

The Lanham Act¹⁶⁵ and its analysis should be analyzed to provide more standards for small business owners and to protect them from large and unnecessary lawsuits. Etsy shop owners and small business owners would benefit from a stronger consideration of actual and potential profits under the Lanham Act¹⁶⁶ and a two-pronged analysis of the owner's bad faith and the buyer's sophistication.

¹⁶² See *Tiffany*, 600 F.3d at 97; Mike Masnick, *Amazon Sued for Copyright, Design Patent, Trademark & Trade Dress Infringement Due To Marketplace Seller*, TECHDIRT.COM (Jan. 11, 2011),

<http://www.techdirt.com/articles/20110111/01373312602/amazon-sued-copyright-design-patent-trademark-trade-dress-infringement-due-to-marketplace-seller.shtml>.

¹⁶³ See generally Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 59, 59 (1996).

¹⁶⁴ See Mindy Lilyquist, *What is Etsy*, HOME BUSINESS, <http://homebusiness.about.com/od/homebusinessglossar1/g/What-Is-Etsy.htm> (last visited July 20, 2014).

¹⁶⁵ 15 U.S.C. §§ 1051-1127 (2012).

¹⁶⁶ *Id.*

1. CONSIDERATION OF ACTUAL AND POTENTIAL PROFITS

One possibility is to give greater consideration to profits a small business owner, such as an Etsy shop owner, actually and could potentially receive. As discussed *supra*, acquired distinctiveness, or secondary meaning, means that a product is recognized by its trade dress and affiliated with a specific designer.¹⁶⁷ Since consumers are swayed by the reputation and prestige of certain designers,¹⁶⁸ they would likely buy an item off of Etsy that bears a mark or design representative of a fashion powerhouse.

In 2012, sixty-five percent of sellers on Etsy made less than \$100.¹⁶⁹ While trademark and trade dress law gives the big designers protection of their products and the ability to enforce their marks, forming a lawsuit against such a small business, that arguably is not gravely impacting the market of \$200 Tory Burch flats,¹⁷⁰ may be frivolous and unnecessary. Of course, an owner of a trade dress deserves to prevent every occurrence of infringement. However, if an Etsy shop owner receives minimal orders for their items, the low actual and potential profits may lessen a claim that they are infringing upon a designer's trade dress. Therefore, the amount of actual and potential profits should not be a hard limit, but a factor that could aid in deciding whether or not the Etsy shop owner has actually infringed upon the protected trade dress and how much they have profited from the acquired distinctiveness of the trade dress and if applicable, how much in damages the is claimant entitled to.

2. TWO-PRONG ANALYSIS: INFRINGER'S BAD FAITH AND BUYER'S SOPHISTICATION

Two other factors should be more dispositive in a showing of trade dress infringement: (1) the defendant's bad faith in adopting the mark and (2) the sophistication of the buyers.¹⁷¹ Courts do consider these two factors in a balancing test to decide whether or not there is a likelihood of confusion among the products.¹⁷² However, these factors can also apply to situations where shop owners intentionally entered into a utilized market with an already recognizable trade dress.

¹⁶⁷ Mills, *supra* note 44.

¹⁶⁸ See Laba, *supra* note 41, at 1660-61.

¹⁶⁹ Amanda Hess, *Etsy Touts the Economic Power of Its Small Business Owners-Even If They Make \$100 a Year*, SLATE (Nov. 8, 2013), http://www.slate.com/blogs/xx_factor/2013/11/08/etsy_economic_impact_report_etsy_crafters_generate_895_million_in_annual.html.

¹⁷⁰ O'Connor, *supra* note 148.

¹⁷¹ See *Autozone*, 543 F.3d at 930; *Polaroid*, 287 F.2d at 495.

¹⁷² See *id.*

Some Etsy shop owners may feel that they are not entering into the same high fashion market as Tory Burch and Michael Kors. However, these owners should not use a similar design to a famous designer's if it would reasonably mislead a customer. If they intend to mislead customers into believing they are part of a fashion empower and intend to profit off of this belief, they are acting in bad faith. On the other hand, Etsy buyers should reasonably know they are not buying items affiliated with or made by high-end designers. The demographics of Etsy shoppers¹⁷³ show that these women know the correct price and value of authentic designer items, so they should be able to recognize that Tory Burch flats do not sell for \$20 on a site known for handmade and unique items.¹⁷⁴ If the factors of bad faith and buyer sophistication are focused on, courts may see how some small Etsy shop owners should not be so harshly punished for their products.

B. WHAT ETSY MUST DO TO COMBAT CONTRIBUTORY INFRINGEMENT

To protect themselves, Etsy must perform due diligence of their sellers and shop owners, educate their sellers and buyers on what constitutes trade dress infringement and illegitimate activity, and set up channels so that buyers and sellers can help police each other's actions.

1. PERFORM DUE DILIGENCE OF ETSY SELLERS AND SHOPS

To protect themselves, Etsy, like eBay, must be proactive in their due diligence of examining and reviewing users and items sold on the site. Etsy should have a team behind the scenes to go examine the items and listings put up on the site. Similar to eBay, Etsy cannot physically inspect each item for sale on their site, so they must utilize other methods. For example, Etsy can develop a system where each time a designer name, such as Tory Burch or Michael Kors is used, the item and seller is flagged. Etsy workers can go view the post and see if it complies with Etsy's standards against infringing work.¹⁷⁵ Etsy should also send messages to sellers they think are making and selling works that are infringing on a designer's trade

¹⁷³ Etsy shoppers tend to be young, college-educated, Caucasian females. Joshua Johnson, *10 Expert Tips for Selling Your Designs on Etsy*, DESIGN SHACK (Feb. 25, 2011), <http://designshack.net/articles/business-articles/10-expert-tips-for-selling-your-designs-on-etsy/>. Customers are not rich, but have sophisticated taste and an evolved sense of classic style.

¹⁷⁴ O'Connor, *supra* note 148.

¹⁷⁵ *Terms of Use*, *supra* note 27.

dress. Currently, there are reports of infringement issues between Etsy sellers and some shops have been shutdown because of these issues. Etsy must continue this work and diligently review the site, products, and sellers, to prevent issues between Etsy, Etsy shop owners, and fashion designers.

2. EDUCATE ETSY SELLERS AND BUYERS

Etsy should provide information and forums to educate their users, both sellers and buyers. Etsy has a brief section on their website regarding prohibited, questionable and infringing items and activities.¹⁷⁶ The section states that a person's content and use of Etsy shall not "infringe upon any third-party's copyright, patent, trademark, trade secret or other proprietary or intellectual property rights."¹⁷⁷ It goes on to prohibit any seller to "list any item on Etsy...that, by paying to Etsy the listing fee or the final value fee, could cause Etsy to violate any applicable law, statute, ordinance or regulation, or that violates the Terms of Use."¹⁷⁸ These few sentences do not appear to be sufficient enough for the average seller on Etsy.

Since Etsy, which sells mainly handmade items,¹⁷⁹ differs from sites like eBay, they should go into more depth as to when a seller's handmade item is infringing on another party's rights. For example, Etsy could show specific examples of how using a designer's emblem would violate the designer's trade dress. More specifically, a picture of the Tory Burch "T-logo"¹⁸⁰ could be shown next to an allegedly handmade item bearing the same mark. While sellers on Etsy should be diligent enough to research their products and designs, this is one way Etsy can attempt to counteract claims of liability.

Etsy should educate buyers on signs of counterfeit items and Etsy shops that may be selling these counterfeit items. As mentioned *supra*, the sophistication of Etsy buyers does provide some assurance that they would know the difference between products with a similar name-brand logo and products using the logo as a misleading selling point. However, this is made more difficult because of the vast amount of users on Etsy,¹⁸¹ both domestic and international.¹⁸² Etsy can list some factors and tips buyers should look for, such as reputation of the Etsy shop, how the products are described, whether the shop owner claims affiliation to a name-brand

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ ETSY, *supra* note 30.

¹⁸⁰ Tory Burch, *supra* note 34.

¹⁸¹ See *Etsy has Nearly 1.5 Billion Pageviews in September (And People Are Buying More Stuff)*, *supra* note 32.

¹⁸² *E.g., CustomizeEra*, *supra* note 31.

designer, and if the products look handmade or manufactured. Showing buyers the difference between a legitimate product and an infringing product will allow them to educate themselves on what they are buying. As a result, Etsy can set up a way for buyers to notify them of alleged-infringing sellers and shops.

3. FACILITATE CHANNELS FOR SELF-REGULATION OF THE SITE

Like eBay,¹⁸³ Etsy has provided ways for buyers to report sellers they suspect are producing and selling counterfeit or knockoff goods. For example, buyers can report a shop or a specific item.¹⁸⁴ However, the links are not easy to find and may appear at the very bottom of the webpage.¹⁸⁵ These links do not appear to be for infringement issues. Under the Copyright and Intellectual Property Policy page, if a buyer believes an item sold through Etsy infringes on an intellectual property right, the buyer must send a written notice to a designated agent with an extensive list of information.¹⁸⁶

Etsy should place easier channels for buyers to report observations of possible infringement. The links for reporting a listing and reporting a shop could have an option that the item or the owner “may be infringing on another’s design” or the item “appears to be affiliated with a designer brand name.” Whatever tagline is used, this would give buyers an easy option and way to notify Etsy of any concerns.

By implementing such systems, Etsy can show the reasonable measures they took to find, stop, and prevent any infringing shops and transactions. As was the case in *Tiffany (NJ) Inc. v. eBay, Inc.*, Etsy could present this evidence to refute a claim of contributory infringement.¹⁸⁷

C. LIMITATIONS FOR THE BIG, BAD, SCARY FASHION HOUSES

While owners of protected marks are given and entitled to protection under the Lanham Act,¹⁸⁸ principles of fairness dictate that there should be limitations set on why, when, and how large companies can go after small shop owners. Yes, a small designer infringes on a protected trade dress claim if the protected work’s trade dress is distinctive, non-functional, and

¹⁸³ *Tiffany*, 600 F.3d at 100.

¹⁸⁴ *How Can We Help You?*, ETSY, <https://www.etsy.com/help/article/112> (last visited July 21, 2014).

¹⁸⁵ *Id.*

¹⁸⁶ *Copyright and Intellectual Property Policy*, *supra* note 131.

¹⁸⁷ *See Tiffany*, 600 F.3d at 93.

¹⁸⁸ 15 U.S.C. §§ 1051-1127 (2012).

there exists a likelihood of confusion between both products.¹⁸⁹ However, certain standards need to be in place so that (1) courts are not burdened by frivolous lawsuits and (2) fashion designers cannot bring every single Etsy shop into litigation. These decisions have to be left up to the courts.

1. SHOWING OF POTENTIALLY LOST PROFITS AND MARKET SHARE

A possible showing, under 15 U.S.C § 1125(c)(4), would require presentation of potential lost profits on the part of the petitioner, which would reveal evidence of the monetary gain the small business owners receive from selling their items. Since a showing of secondary meaning is not required but simply an option when the petitioner cannot show inherent distinctiveness,¹⁹⁰ petitioners catch a break because a showing of secondary meaning requires evidence of exclusive and continuous use.¹⁹¹ A required showing of a certain amount of profits lost due to the alleged infringing product could limit not only the number of claims and cases that might arise, but also the monetary costs of hiring lawyers and entering litigation to individual artists and shop owners.

In addition to evidence of lost profits, designers should be required to show a loss of the market share. If a designer can show that an Etsy shop owner's products are taking away a substantial portion of their acquired market, specifically due to the use of their protected trade dress, their claim of infringement is strengthened. A single Etsy "Tory Burch" bracelet sold for \$17.41¹⁹² may not take up the market for a \$125 authentic Tory Burch bracelet.¹⁹³ However, Tory Burch could still make a valid claim if they can show many bracelets were sold at such a low price that it took away from their potential profits and stake in the market.

To be fair, fashion designers should also be allowed to show how various infringing works can impact their profits and market value. Evidence of one Etsy shop may not show enough lost profits, but evidence of five, ten, or even fifteen different shops may show the vast effects from the infringement. This determination of whether or not a petitioner has shown adequate evidence of lost profits and market share could be left up to the courts, since they could make an objective assessment of the claims.

¹⁸⁹ See 15 U.S.C § 1125(a) (2012); *Wal-Mart Stores*, 529 U.S. at 210.

¹⁹⁰ *Two Pesos*, 505 U.S. at 769.

¹⁹¹ See *Inwood Labs.*, 456 U.S. at 850-51.

¹⁹² *How Can We Help You?*, *supra* note 184.

¹⁹³ *Tory Burch Leather Logo Buckle*, NORDSTROM, <http://shop.nordstrom.com/s/tory-burch-leather-logo-buckle-bracelet/3211108?origin=PredictiveSearch>- (last visited July 20, 2014).

2. EVIDENCE OF BAD FAITH AND LACK OF BUYER SOPHISTICATION

Additionally, increased consideration to the factors of bad faith and buyer sophistication, as described *supra*, would help prevent unnecessary and unwarranted allegations. Yes, designers are justified in wanting to stop the use of their trade dress in the fashion market. However, courts must consider if under an analysis of bad faith in the shop owners' actions and customer sophistication there is a strong claim for damages and injunction. If buyers know the item is completely unconnected to the designer, there is weak evidence of a seller's malicious intent. If the buyer is unsophisticated and does not care about designer labels and may not even know or recognize a designer's trade dress and symbol, this would show that the Etsy product is not in the same market as the high-end piece it may resemble. Also, an Etsy shop owner should be able to sell a genuinely homemade item. Whether or not the trade dress is similar enough to a famous design and whether or not the shop owner had bad faith in designing the piece is also a question for the courts.

III. CONCLUSION

The Lanham Act and relevant case law have developed many standards in regards to trade dress infringement cases. However, many of these cases and regulations are geared towards protecting the big fashion powerhouses that dominate the fashion industry in New York City and around the world. While these fashion designers deserve protection under the Lanham Act, limitations must be set up to prevent them from going beyond what is reasonable under the law and attacking every small designer, like the "shop owners" on Etsy. Artists and "shop owners" on Etsy need to be aware of what they are doing, which precautions they must take, and the changes they may need to make to their business model in order to protect themselves from expensive trade dress infringement suits. By setting limits on profits received from such potentially infringing products, Etsy shop owners will know when to limit their business to protect themselves from infringement claims. Etsy can perform their due diligence by reviewing the products and sellers on their site. Etsy should also provide more channels so that sellers and buyers on the site can help regulate the activity. As to the fashion designers, they should be required to show potential or actual lost profits and market value directly related to the infringing work. Fashion designers must also consider whether or not the small companies acted in bad faith and how the sophistication of the buyers in the market impacts product sales. Yes, these additional limitations and standards will require more work from shop owners, Etsy, and fashion companies, but these restrictions could prevent costly and unnecessary

lawsuits against small businesses, such as an Etsy shop owner hand-making jewelry in their home.¹⁹⁴

¹⁹⁴ See Davis, *supra* note 123.