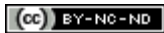


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UNIFIED LAW IN A FRAGMENTED WORLD: CISG AND CONFORMITY IN GLOBAL PRODUCTION

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Nevena Jevremović*

I. INTRODUCTION

The UN Vienna Convention on Contracts for the International Sale of Goods (CISG or Convention) is among the most successful uniform instruments in international trade. Scholars often praise the CISG for creating a common language in international sales law—*lingua franca*—as the foundation of a more “*secure, safer, and less expensive world*.”¹ However, the socio-economic and political structures changed since its adoption: the number and diversity of member states steadily increased over time,² while the text of the Convention remained the same, with almost no possibility of amendments or changes.³ The global economy evolved to a disintegrated and interconnected model: “The goods we buy are the end result of an elaborately choreographed transnational odyssey. These objects are part of an economy whose tendrils reach over further outward, linking, integrating, and transforming both far-flung and nearby places.”⁴

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¹ János Martonyi, *Introduction*, in UNCITRAL, THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 1, 5 (2015); see also Christopher Kee & Edgardo Munoz, *In Defence of the CISG*, 14 DEAKIN L. REV. 99 (2009) (Austl.).

² OLAF MEYER, CISG METHODOLOGY 323–24 (André Janssen & Olaf Meyer eds., 2009). CISG currently has 96 member states; see UNCITRAL, <https://uncitral.un.org> (last visited Feb. 29, 2024). See Ana Elizabeth Villalta Vizcarra, *United Nations Convention on Contracts for the International Sale of Goods*, in UNCITRAL, THIRTY-FIVE YEARS OF UNIFORM SALES LAW: TRENDS AND PERSPECTIVES 29–38 (2015) and Angelo Chianale, *The “CISG” as a Model Law: A Comparative Law Approach*, 29 SING. J. LEGAL STUD. (2016) (examples of how CISG served as “sign-post” for national and international legislative projects).

³ MEYER, *supra* note 2, at 322.

⁴ MARTIN KENNEY, LOCATING GLOBAL ADVANTAGE: INDUSTRY DYNAMICS IN THE INTERNATIONAL ECONOMY 1–2 (Martin Kenney & Richard L. Florida eds., 2004).

The rapid technological developments, the structure and dynamics of modern production networks, and the growing recognition of a nexus between sustainable development, trade, and broader social, environmental, and human rights impacts challenge the application of the CISG.⁵ While the CISG scholarship has agreed that a progressive interpretation is necessary to “*keep abreast of commercial developments*,” especially considering that a conservative application would “*petrify legal development and threaten the future application of the Convention*,”⁶ it did not consider the role of the CISG in global production.⁷

While there are different conceptual approaches to the global production, for the purpose of the present discussion, I will focus on global value chains.⁸ The law plays a central role in the design, local and global implications of global value chains.⁹ The interest of law in the global production has its roots in the negative externalities of the production, i.e., the adverse environmental, social, and human rights impacts of the production processes. The need for regulation responds to the expansion of firm activity worldwide which in turn implies a new division of labour at the international level and expansion of global value chains, leading to increased calls for higher transparency, ethics, and accountability in production processes.¹⁰ The recognition of the adverse environmental, social, and human rights impacts of global production frameworks brought to the forefront the need for law to proactively engage in regulating Sustainable Consumption and Production (SCP) processes. SCP conceptually frames the discourse by

⁵ See, e.g., LEANDRO TRIPODI, TOWARDS A NEW CISG: THE PROSPECTIVE CONVENTION ON THE INTERNATIONAL SALE OF GOODS AND SERVICES 154–57 (Brill | Nijhoff eds., 2015) (discussing the interplay between CISG and sustainable development).

⁶ MEYER, *supra* note 2, at 321.

⁷ The IGLP L. & Glob. Prod. Working Grp., *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT’L L. (2016) (the question “How does law shape the structure and organization of production globally and how is law impacted through this process?” is vital in emerging area of Law and Global Production).

⁸ NEIL M. COE & HENRY WAI-CHUNG YEUNG, GLOBAL PRODUCTION NETWORKS: THEORIZING ECONOMIC DEVELOPMENT IN AN INTERCONNECTED WORLD 3–16 (Oxford Univ. Press eds. 2015).

⁹ The IGLP L. & Glob. Prod. Working Grp., *supra* note 7.

¹⁰ Lewis Akenji et al., *Sustainable Consumption and Production in Asia—Aligning Human Development and Environmental Protection in International Development Cooperation*, in SUSTAINABLE ASIA: SUPPORTING THE TRANSITION TO SUSTAINABLE CONSUMPTION AND PRODUCTION IN ASIAN DEVELOPING COUNTRIES 17, 26 (Patrick Schroder et al. eds., World Scientific 2017).

outlining the constitutive elements of environmental, social, and human rights aspects of production.

The production externalities, and particularly sustainability standards in Global Value Chains (GVC), emerged under the umbrella of cleaner production in the 1980s alongside sustainable production and consumption standards in the product lifecycle.¹¹ The increased understanding of lifecycle perspective to impacts of products and services led to more systemic approaches in defining sustainable consumption and production policies.¹² In the 1990s, the development of the sustainability agenda became more closely related to the private sector aiming for a balanced process amidst the effects of globalization, the emergence of middle-income countries, and the drivers of maintaining competitiveness in the global economy.¹³ The link between sustainability and the private sector further intertwined in the 2000s, with the private sector being more involved in the international agenda in this context. This culminated with the recognition of the private sector and the inclusion of a sustainable consumption and production sustainable development goal in the 2030 Agenda as SDG 12.¹⁴

The CISG literature at times does not fully engage with the transnational perspectives in the global production structures and the extent of negative externalities arising out of and in relation to production practices.¹⁵ Discussion concerning the conformity of goods under Article 35 CISG in relation to harmful production practices offer interesting insights and demonstrate, in general, an openness to expanding the concept of conformity. However, they do not deeply engage with the SCP concept, nor with the governance structures of captive global value chains. In doing so they miss

¹¹ *Id.* at 19.

¹² *Id.* at 20.

¹³ J.A. Pérez-Pineda, *Corporate Social Responsibility: The Interface Between the Private Sector and Sustainability Standards*, in SUSTAINABILITY STANDARDS AND GLOBAL GOVERNANCE—EXPERIENCES OF EMERGING ECONOMIES 85 (A. Negi et al. eds., Springer 2020).

¹⁴ For recognition of the private sector as relevant stakeholder in achieving Sustainable Development Goals, see *Transforming our World: The UN Agenda for Sustainable Development*, ¶¶ 39, 41, and 52. For recognition of private sector in relation to Sustainable Development Goal 12: Responsible Consumption and Production, see ¶ 12.6: Encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle.

¹⁵ Jan Hendrik Dalhuisen, *What Does the Transnationalisation of the Commercial Contract Mean? Is There a New Model and Are There Minimum Standards? Is There a Law and Economics Perspective?*, in THE FUTURE OF THE COMMERCIAL CONTRACT IN SCHOLARSHIP AND LAW REFORM 27, 37–38 (Maren Heidemann & Joesph Lee eds., Springer 2018).

the opportunity to conceptualize quality as product-production quality and, accordingly, conformity. They further miss the link to engage in exploration of what contractual governance in captive global value chains would mean for the risk allocation, and conformity liability between the parties in the CISG.

I will argue that interpretation of the CISG in the global production requires a reframed notion of equality and equal treatment. Specifically, I will argue that the principle of equality and of equal treatment must consider the region-specific and development inequalities between the parties to sales agreements. A closer read of the Preamble shows that CISG aimed to create a global community with shared values, interests, and responsibilities. Equality between the member states and the parties from those member states is at the heart of the community. However, a strict reading of the equality and equal treatment had a counter effect in disregarding the diversity of socio-economic backgrounds, and the discrepancies in inequalities between the members states and their respective commercial parties. In sum, a blind interpretation of equality reinforces the inequalities present in international trade, and as such, runs contrary to the very goals of the CISG community. I will illustrate on Article 35 CISG the impact of reframed principles of equality in the interpretation of parties' rights and obligations, the risk allocation, and the circumstances that inform the interpretation of parties' intent. In both sections, I will consider global value chains to conceptualise the organization of production. I will focus on the governance models of global value chains to illustrate the type of relationship between different actors, and on upgrading to illustrate the development aspect of global value chains. I will further consider the SCP, as reflected in Sustainable Development Goal 12 (SDG 12), in response to adverse social, environmental, and human rights impacts of global production. Lastly, in conclusion, I will offer some remarks and explore areas of further research.

II. CONFORMITY OBLIGATIONS IN ARTICLE 35 CISG

The uniform concept of quality in Article 35 CISG evolved to encompass non-physical goods in response to changing regulatory-driven and market-driven influences. The regulatory-driven influence encompassed health and safety regulation and may include public law requirements and industry standards and usages. The market-driven approaches developed the concept of ethical values as an element of quality of goods, based on the

generally and universally practiced principles, such as the prohibition of child labor and the right to sustainable development.¹⁶ In this regard, the interpretation of the CISG adopts the horizontal reference to general principles outside the CISG discussed in the previous section.

In relation to regulatory-driven features, the prevailing view in academic commentaries follows the reasoning the German Supreme Court in *New Zealand Mussels* case.¹⁷ The case concerned the question of allocation of risk in the production of goods in relation to regulations and standards in the place of goods' destination. In determining the scope of the seller's obligation under Article 35(2)(b) CISG, the essential question is whether the seller can legitimately be expected to know of the relevant provisions applicable in the buyer's place of business or at the place where the goods will be used. The Court reasoned that, absent other considerations, the relevant standards are those in the seller's place of business as it is unreasonable for the seller to know the public law requirements in the buyer's place of business.¹⁸ The buyer can make the public law regulation of his place of business or the intended use of the goods binding on the seller either through contract terms (Article 35(1) CISG) or through negotiations by emphasizing goods fitness for particular purpose (Article 35(2)(b) CISG). Subject to the relevant circumstances, and unless the buyer specifically indicates that the goods should comply with specific public law requirements at its place of business or the place where the goods will be used, it is reasonable for the seller to rely on the standards applicable at its place of business.¹⁹ Without intention to criticize the decision in *New Zealand Mussels* case, Flechtner cautioned, before announcing the rule "*as an elaborate rule that appears to have been intended to be exhaustive,*" that the

¹⁶ See generally Petra Butler, *The CISG—A Secret Weapon in the Fight for a Fairer World*, in 35 YEARS CISG AND BEYOND 300–11 (Ingeborg Schwenzer ed., 2016).

¹⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, 123 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 129 (75) (Ger.).

¹⁸ STEFAN KRÖLL ET AL., UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 512 (Beck ed., 2018); SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 605 (Ingeborg Schwenzer & Ulrich Schroeter eds., 2016); Villy de Luca, *The Conformity of the Goods to the Contract in International Sales*, 27 PACE INT'L L. REV. 163, 205 (2015); Franco Ferrari, *Divergences in the Application of the CISG's Rules on Non-Conformity of Goods*, RABEL J. COMPAR. & INT'L PRIV. L. 473, 476–77 (2004).

¹⁹ FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 143 (Oceana Publications 1992).

Court failed to consider the perspective of developing countries in the interpretation of Article 35 CISG:

[f]or the Convention's purposes, it is extremely important that interpretation be informed by diverse perspectives, in order that uniform international sales law indeed be acceptable (and uniformly interpreted) in the great variety of legal and economic systems around the globe. For example, from the **perspective of developing countries it may well be important that considerations of the parties' relative sophistication and bargaining power play a role in determining whether when a seller should be held responsible for complying with standards imposed in the buyer's jurisdiction.** [emphasis added]²⁰

Decisions in comparable scenarios signal that the outcomes of considering cultural and region-specific factual circumstances will lead to inconsistent results. As an example, in the *Chemical Substance* case,²¹ when deciding whether a Moroccan buyer notified her German seller of the non-conformity concerning sophisticated chemical substance, the Appellate Court of Koblenz failed to consider whether a typical buyer in a developing country is competent to inspect sophisticated products and serve the notice required in case of defects.²² Thus, while there is a theoretical consideration for the sales law “to continue to develop and be dynamic and ‘open-minded’ by embracing and adapting the peculiarities of the new technological and commercial developments,”²³ practical examples show a reluctance to do so.

In relation to market-driven features, the majority of CISG scholars agreed with a broad interpretation of the quality in Article 35 CISG that encompasses the physical features of the goods and their factual and legal

²⁰ Harry M. Flechtner, *Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice Thereof Under the United Nations Sales Convention*, 26 B.U. INT'L L.J. 1, 11 (2008).

²¹ See, e.g., Germany, 11 September 1998, Appellate Court of Koblenz, <https://iicl.law.pace.edu/cisg/cisg>.

²² See, e.g., Abdullah S. Alaoudh, *The Notice Requirement of Article 39 and Islamic Law: Developed vs. Developing Countries*, 26 ARAB L. Q. 481, 490–91 (2012); Fatima Akaddaf, *Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?*, 11 PACE INT'L L. REV. 1, 13–14 (2001); Hossam A. El-Saghir, *The Interpretation of the CISG in the Arab World*, in CISG METHODOLOGY (André Janssen & Olaf Meyer eds., Sellier 2009).

²³ Djakhongir Saidov, *Introduction: Unity and Diversity in the Law of Sale of Goods*, in RESEARCH HANDBOOK ON INTERNATIONAL AND COMPARATIVE SALE OF GOODS LAW 26 (Djakhongir Saidov ed., 2019).

relationship to their surroundings.²⁴ The latter, subject to the specific circumstances, can include public law regulations, technical standards or compliance with certain standards in production, such as good manufacturing practices or the absences of child labor.²⁵ In response to the adverse social and human rights impacts of production, the leading commentaries and authorities on CISG developed the concept of ethical values as an element of the quality of the goods under Article 35 CISG.²⁶ Scholars focused on whether private parties can address ethical and social values in their contracts and value chains by analyzing contract terms and available remedies.²⁷ Consideration of ethical values in CISG contracts falls within one of the following groups: sale of emotions alongside physical goods under Article 3 CISG,²⁸ emotions and ethical values as elements of quality of goods under Article 35 CISG,²⁹ and emotions as an element of non-material damages under Article 74 CISG.³⁰

The discussion on ethical values is still in its early stages, and the term is not yet well defined. However, there are two notable tensions in the overall discussion concerning ethical values as quality in the CISG. The first is concerned with labor rights violations throughout value chains. It did not account for the overall production process in the global value chains, and it

²⁴ KRÖLL ET AL., *supra* note 18, at 491–92; C. Brunner & M. Schifferli, *Article 35*, in *COMMERCIAL LAW, ARTICLE BY ARTICLE COMMENTARY* 110 (Peter Mankowski ed., 2019); Butler, *supra* note 16, at 302.

²⁵ KRÖLL ET AL., *supra* note 18, at 495.

²⁶ de Luca, *supra* note 18, at 163, 191.

²⁷ See also Christina Ramberg, *Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct*, in *BOUNDARIES AND INTERSECTIONS: 5TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE* 71, 76 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2014); Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 *RUTGERS J.L. & PUB. POL'Y* 334 (2009); Louise Vytöpil, *Contractual Control and Labor Related CSR Norms in the Supply Chain: Dutch Best Practices*, 8 *UTRECHT L. REV.* 155, 160 (2012); Brian-Vincent Ikejiaku, *Consideration of Ethical and Legal Aspects of Corporate Social Responsibility: The Issue of Multi-National Corporations and Sustainable Development*, 1 *NORDIC J. COM. L.* 1 (2012).

²⁸ Ramberg, *supra* note 27, at 71, 93 (considering contract law's ability to protect investments in emotions, the task of protecting investment in sales of emotions, and whether contract law should increase or decrease investments in brand names).

²⁹ See, e.g., Petra Butler, *The CISG—A Secret Weapon in the Fight for a Fairer World*, 7 *VIC. UNIV. WELLINGTON LEGAL RSCH. PAPERS* 295, 302–07 (John Prebble ed., 2017).

³⁰ Peter Schlechtriem, *Non-Material Damages—Recovery Under the CISG?*, 19 *PACE INT'L. L. REV.* 89, 94–95, 97–102 (2007) (Asserting “[r]eputation is a commercial asset, and the real problem is the evaluation of its pecuniary value in a given case,” discussing the need to compensate non-pecuniary damages for an infringement of goodwill, and exploring recovery for ethically tainted goods).

did not define a conceptual framework of production to analyze the impact of the production processes on product quality. The second is the focus on the seller's liability for adverse social impact, which does not account for the buyer's impact, especially in global value chains structures where the buyer has more bargaining power in relation to their suppliers. It placed liability on the sellers through the *caveat venditor* principle without acknowledging other circumstances in the production process, such as the governance structures in global value chains and the development impacts on international trade.

In sum, the interpretation of Article 35 CISG in relation to both regulatory-driven and market-driven analysis of quality of goods reinforced the inequalities between the parties in developed and developing economies. In contrast, Maley argued that, to promote good faith in international trade per Article 7 CISG, commercial efficiency, and party autonomy, conformity in Article 35 CISG should be an amorphous concept dependent on the specific facts, parties' intent and general economic division of duties in the CISG.³¹

Building on that suggestion, the principle of equality that considers the capabilities of parties in developed and developing economies, their region-specific circumstances, and the governance structures would reframe the concept of quality of goods and the risk allocation in relation to quality of goods in three ways. First, it would bring the relation between product conformity and production conformity under the conformity obligations under Article 35 CISG. Second, it would recognize that market-oriented and regulatory-oriented features of production conformity include SCP obligations. Third, and consequently, it will consider the difference in capabilities and power relations between the buyers as the chain leaders and the sellers as suppliers in ensuring SCP production obligations to adjust the risk allocation between *caveat venditor* and *caveat emptor* based on the governance type of GVC. Finally, in relation to all of the above, all relevant circumstances would encompass region-specific circumstances.

³¹ Kristian Maley, *The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 1 INT'L. TRADE & BUS. L. REV. 82, 84 (2009).

III. SUSTAINABLE CONSUMPTION AND PRODUCTION

The SCP origins trace back to the concerns around volume of consumption and production processes that deplete the earth's resources, adversely affecting the ecosystems and the earth's ability to act as a pollution sink, further bringing into question the consequences such practices will have on the future generations' ability to fulfil their needs.³² The willingness to address these concerns underlies the evolution of the SCP from the first conference on the Human Environment in 1972 in Sweden (the Stockholm Conference) to introduction of SCP as a standalone Sustainable Development Goal 12 (Ensure Sustainable Consumption and Production Patterns) in the UN 2030 Agenda in 2015.

A. From Stockholm Conference to UN 2030 Agenda

The Stockholm Conference did not adopt the arguments for constraint in consumption of resources; however, it considered the link between economic and social development as essential, further proclaimed that the environmental policies should safeguard the environment and achieve a rational management of natural resources while supporting the development of emerging economies.³³

The subsequent work resulted in the release of the United Nations World Commission on Environment and Development Commission—the Brundtland Commission—*Our Common Future Report* (the Brundtland Report or the Report) in 1987.³⁴ The Brundtland Report introduced the term *sustainable development*. In the context of SCP, the Report focused more explicitly on the connection between the industry—the production patterns—and the consequences to the environment:

The world manufactures seven times more goods today than it did as recently as 1950. Given population growth rates, a five- to tenfold increase in manufacturing output will be needed just to raise developing world consumption of manufactured

³² Des Gasper et al., *The Framing of Sustainable Consumption and Production*, in *SDG 12*, 10 GLOB. POL'Y 83, 83 for example, discuss the closed-systems principles that framed the Stockholm Conference and their alignment with today's principle of planetary boundaries.

³³ Stockholm Conference Report, Principles 8, 11, 12–13.

³⁴ World Comm'n on Env't and Dev., *Our Common Future: Report of the World Commission on Environment and Development*, U.N. Doc. A/42/427 (1987) [hereinafter Brundtland Report].

goods to industrialized world levels by the time population growth rates level off in the next century.³⁵

The Report aptly pointed out the setbacks of reactive approach in environmental management practices that focus on “after-the-fact repair of damage”³⁶ with the regulatory approach targeting “symptoms of harmful growth.”³⁷ Instead, the focus should be on the “ability to anticipate and prevent environmental damage,” which requires holistic consideration of ecological dimensions, alongside other dimensions, such as trade and energy. The Report called for “a new approach in which all nations aim at a type of development that integrates production with resource conservation and enhancement, and that links to the provision for all of an adequate livelihood base and equitable access to resources.”³⁸ In summary, the unsustainable consumption patterns, the inter and intragenerational equity relative to growth, were among the main drivers in the production of the Report. However, these aspects did not advance to the mainstream discussion and understanding of SCP, although the term sustainable development and SCP as such dominated the discussions and various efforts at the UN.³⁹

As an example, the Rio Declaration in 1994, discussed the connection between consumption patterns, adverse environmental impact, and the gap in meeting people’s basic needs (e.g., food, health care, shelter, and education) relative to geographic location and the level of economic development.⁴⁰ The Rio Declaration called to states to adopt national policies and strategies to encourage changes in unsustainable consumption patterns and lifestyles.⁴¹ Additionally, it focused on the promotion and better understanding of sustainable consumption and production patterns.⁴² There is a noticeable move toward efficiency of consumption and production, with emphasis on the management-related activities (such as adopting an international approach to achieving sustainable consumption patterns), data and information activities focused on undertaking research on consumption and

³⁵ *Id.* ¶ 66.

³⁶ *Id.* Chapter 1, ¶ 46.

³⁷ *Id.* Chapter 1, ¶ 46.

³⁸ *Id.* Chapter 1, ¶ 47.

³⁹ Gasper et al., *supra* note 32, at 85.

⁴⁰ *Id.* Chapter 4, ¶ 4.5.

⁴¹ *Id.* Chapter 4, ¶ 4.27.

⁴² *Id.* Chapter 4, ¶ 4.7, ¶¶ 4.12–4.14.

developing new concepts of sustainable economic growth and prosperity, and international cooperation and coordination, including financing and cost evaluation. This shift toward consuming differently was finalized in the first definition of SCP at the Oslo Symposium two years after: “the use of goods and services that respond to basic needs and bring a better quality of life while minimizing the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so as not to jeopardize the needs of future generations.”⁴³

The symposium papers show that their target was to reconcile the economic growth with sustainable use of resources and decreasing pollution levels without jeopardizing employment and welfare. National economic policies should require “goods and services to reflect the environmental costs and so stimulate sustainable production and consumption patterns.”⁴⁴ Governments should transition to SCP patterns, i.e., substitute the existing consumption models with more efficient but less polluting goods and services.⁴⁵ Determining consumption and production levels is essential in that process.⁴⁶

Over the next decade, various UN bodies and agencies built upon the Oslo Symposium to define the framework of SCP patterns. The 2002 Johannesburg Declaration on Sustainable Development placed SCP at the core of the initiatives, stating that “poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, Sustainable Development.”⁴⁷ Three years after adopting the 10 Year Framework of Programmes (10YFP) at Rio, the First Global Meeting of the 10YFP took place at the UN Headquarters in May 2015. The event consisted of a Global Stakeholder Meeting of the 10YFP and the Implementation and Inter-linking 10YFP Programmes. The same year, the UN adopted the 2030 Agenda—a comprehensive framework that builds upon the previous work of the UN

⁴³ See Oslo Roundtable on Sustainable Production and Consumption.

⁴⁴ *Id.* Part 1, Section 1.2: The Imperative of Sustainable Production and Consumption.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Johannesburg Declaration on Sustainable Development, ¶ 11.

while at the same time framing the relevant issues as seventeen Sustainable Development Goals (SDGs), accompanied with 169 specific targets.⁴⁸

SDG 12 aims at ensuring SCP patterns. It encompasses eight specific targets and three sub-targets. In more detail, SDG 12 targets focus on implementing the 10YFP (target 12.1), sustainable management and efficient use of natural resources (target 12.2) and halving per capita global food waste (target 12.3). Target 12.1 proclaims achieving the ten-year framework program, considering the development and capabilities of developing countries. This further entails supporting developing countries to strengthen their scientific and technological capabilities as they transition to more SCP patterns. SDG 12 targets further encourage companies, especially large and transnational companies, to adopt sustainable practices and integrate sustainability information into their reporting cycle, monitor sustainable development impacts, and rationalize inefficient fossil-fuel subsidies. An indicator of performance is the number of companies that publish such reports. On the side of production, target 12.4 deals with responsible management of chemicals and waste, while target 12.5 deals with waste reduction. Responsible management of chemicals encompasses environmentally sound management of chemicals and all waste throughout their lifecycle. The process should align with the agreed international frameworks to significantly reduce the release of harmful elements to the air, water, and soil to minimize their adverse impacts on human health and the environment—substantial reduction of waste generation substantial waste reduction through prevention, reduction, recycling, and reuse.

A critical reflection on SDG 12 reveals first, an understanding of industry-oriented concept of clean production embedded in its targets and indicators, and second, lack of coherent regulatory framework of enforcement mechanism.

B. Critical Reflection on SDG 12

The concept of clean production is present in the SDG 12 and the mainstream definition of SCP. For example, the United Nations Environment Programme identified main SCP tenants: “[i]mproving the quality of life without increasing environmental degradation and without compromising the

⁴⁸ UN, Transforming Our World: The 2030 Agenda for Sustainable Development, A/Res/70/1, 2015 [2030 Agenda].

resource needs of future generations,” “[d]ecoupling economic growth from environmental degradation,” and “applying lifecycle thinking.” The SCP has three dimensions of the lifecycle approach: the total use of resources and the resulting emissions, minimization of adverse environmental impacts, and promotion of inclusive well-being.⁴⁹ The lifecycle approach in its three dimensions covers the entire production value chain: the design and production of a product; selection, procurement, and supply of raw materials; manufacturing, packaging, and distribution; impacts throughout retails, purchases, usages, and services; impacts of products when recycled, reused, or disposed of.⁵⁰ Therefore, the focus is on the management of production phases and consuming differently rather than to reduce the volume of consumption.

The indicators of achieving SDG 12 specific targets are vague and focused on voluntary activities, consequently failing to lead to radical transformative changes necessary to address the inherent inequality and contrasts of global production patterns.

The language of SDG 12, including “encourage sustainable practices,” “promote sustainable public procurement,” or provide “people with relevant information and awareness,” all demonstrate the vague and voluntary nature of SDG 12 as such. Moreover, there is a mismatch between the monitoring criteria and the set targets for SDG 12. For example, target 12.6 calls for the encouragement of “companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle.” The performance indicator is the number of such companies that publish their sustainability reports.⁵¹ Another example is target 12.7, focused on promoting sustainable public procurement practices. The focus is on the public sector to transform the procurement guidelines, selection criteria, and appropriate tender documents to reflect SDG 12. A performance indicator is the number of countries implementing sustainable public procurement policies and action plans.⁵²

⁴⁹ *Id.* at 19.

⁵⁰ *Id.* at 19–20.

⁵¹ See UNGA, Resolution Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, A/RES/71/313, 6 July 2017, 12–13.

⁵² Evidence that governments in North America, Europe, and APAC region have begun to reform their procurement policies precisely to include sustainable development goals. For further discussions on SDGs in these regions, *see, e.g.*, SUSTAINABLE DEVELOPMENT GOALS IN THE ASIAN CONTEXT (J. Servaes

The vague targets and inadequate targets reflect the emphasis on voluntarism and, consequently, a more significant problem: SDG 12 focuses on the efficiency approach and consequently distracts from considering a system approach “overall volumes of consumption, distributional issues, and related social and institutional challenges.”⁵³ The policy reasons behind such an approach lie in the human-centric economic development without a complete account of the social and environmental approaches.⁵⁴

Beyond the SDG 12 vague and voluntary targets, achieving SDG 12 has been reserved for business decisions, either internally through corporate codes of conduct or externally through contracts. The private sector engages in private rulemaking by adopting corporate or industry codes of conduct or introducing clauses related to environmental and social standards in supply chains.⁵⁵ These efforts are far from achieving the desired results in practice; quite the contrary, the monitoring reports on SDGs show far from the desired benchmark.⁵⁶

Consequently, while SDG 12 aims to tackle and revert environmental breakdowns and social injustice, it remains rooted in the same foundations of

ed., Springer Singapore 2017); M. Shinn, *No Wheels, No Driver, Can't Travel. The EU Sustainable Consumption and Production Action Plan, a Framework of Policies towards Eco-Design of Products for Material Efficiency*, 6 J. FOR EUR. ENV'L & PLAN. L. 301 (2009); Sustainable Development in the European Union: A Statistical Glance from the Viewpoint of the UN Sustainable Development Goals (Statistical Office of the European Communities ed., 2016).

⁵³ M. Bengtsson et al., *Transforming Systems of Consumption and Production for Achieving the Sustainable Development Goals: Moving Beyond Efficiency*, SUSTAINABILITY SCIENCE, 13/2018, 1543–1544.

⁵⁴ See L.J. Kotzé, *The Sustainable Development Goals: An existential critique alongside three new millennial analytical paradigms*, in SUSTAINABLE DEVELOPMENT GOALS LAW, THEORY AND IMPLEMENTATION, CHELTENHAM: EDWARD ELGAR 41–65 (D. French & L.J. Kotzé eds., 2018); R. Gordon, *Unsustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 50, 68 (S. Alam et al. eds., New York: Cambridge Univ. Press 2015); H. WASHINGTON, DEMYSTIFYING SUSTAINABILITY: TOWARDS REAL SOLUTIONS 36 (New York: Routledge 2015).

⁵⁵ George Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L L. 417, 432–33 (2015). Growing social and moral values associated with CSR policies have contributed to corporate internationalization of sustainable development policies. Although not without failure, the private sector has become a driving force behind sustainability initiatives, and today, corporations are more willing to embrace the concept of sustainable development as a strategic goal. Some firms perceive sustainability efforts as a source of competitive advantage, cost savings, waste reduction, and reputation improvement. These firms believe that sustainability efforts improve their financial, social and natural capitals, through eco-efficiency, socio-efficiency, eco-and socio-effectiveness, sufficiency, and ecological equity.

⁵⁶ According to Berger-Walliser/Shrivastava, future Gross Domestic Product will rely on products and services that are increasingly carbon-intensive. See *id.* at 427.

a system that enables such environmental degradation and social injustice.⁵⁷ As critics of SDG 12 point out, the environmental and human rights instruments are bleak compared to the international economic framework that protects the flow of capital, capitalist societies that thrive on extractivism, and inequalities.⁵⁸ The structure and wording of SDG 12 also raise concerns about its effectiveness in tackling the root causes of unsustainable production and consumption patterns.⁵⁹ For example, SDG 12 refers only to international treaties dealing with chemicals and hazardous waste, and yet, the recent Report of the Special Rapporteur shows troubling patterns of transboundary treatment of chemicals and hazardous waste.

In conclusion, commentators, such as Des Gasper, criticize SDG 12 as being an extremely broad goal, which:

adheres closely to ideas developed and popularized by business-oriented norm entrepreneurs since the 1990s, whose main audiences were, first, government officials to whom the message was to downplay regulation as a tool for promoting sustainability and, second, corporate leaders for whom the message was that sustainability should be embraced as a profitable way of thinking about their business.⁶⁰

Notwithstanding the criticism of SCP and SDG 12, the lifecycle production approach is helpful in delineating the full scope of production activities and mapping the related negative externalities. This, in turn, informs the contractual governance of negative externalities in global value chains.

⁵⁷ Alessandra Arcuri & Enrico Partiti, SDG 12: Ensure Sustainable Consumption and Production Patterns, TILEC Discussion Paper, DP2021-007/2021, <https://ssrn.com/abstract=3814765>.

⁵⁸ *Id.* at 3. The disbalance between the framework of human rights and environment protection and the economic and investment protection exists in WTO and ISDS system.

⁵⁹ “... SDG 12 can be seen as dodging key issues for transformative changes of global patterns of production and consumptions. This is because it orients action in some areas, but remains elusive on the central problem, i.e. that the existing socio-economic system is the major cause of the unsustainable patterns of consumption and production.” *Id.* at 2.

⁶⁰ Gasper et al., *supra* note 32, at 86.

IV. GLOBAL VALUE CHAIN GOVERNANCE

The GVC structures orient towards the vertical integration of production.⁶¹ The chain leaders further organize such vertical production structures through corporate or contractual mechanisms.⁶² The latter encompasses a disintegrated supply chain management system through a service of commercial contracts with suppliers, contractors, or sub-contractors.⁶³

Governance is a key concept of the top-down approach, which Gereffi defined as “authority and power relationships that determine how financial, material and human resources are allocated and flow within a chain.”⁶⁴ Governance “examines the concrete practices, power dynamics, and organizational forms that give character and structure to cross-border business networks,”⁶⁵ and consequently, “allows one to understand how a chain is controlled and coordinated when certain actors in the chain have more power than others.”⁶⁶ In their seminal work, Gereffi, Humphrey and Sturgeon developed a theory of five types of GVC governance: hierarchy, captive, relational, modular, and market.⁶⁷ These types of governance range from high to low levels of explicit coordination and power asymmetry. They identify three variables that play a large role in determining how GVC are

⁶¹ David Cabrelli, *Liability for the Violation of Human Rights and Labor Standards in Global Supply Chains: A Common Law Perspective*, 10(2) J. EURO. TORT L. 110 (2019).

⁶² *Id.* at 111.

⁶³ *Id.*; see also Fabrizio Cafaggi, *Sales in Global Supply Chains: A New Architecture of the International Sales Law*, in RESEARCH HANDBOOK ON INTERNATIONAL AND COMPARATIVE SALE OF GOODS LAW 336 (D. Saidov ed., Edward Elgar Publishing 2019). See also (“A contractual relationship is not merely a single contract between two parties. It includes the legal and social environment within which contracts arise and are performed. Within chains, contractual relationships constitute the organizational skeleton. They may be established between legal entities belonging to the same organization (for example, subsidiaries) or between independent entities (suppliers, distributors).”).

⁶⁴ Gary Gereffi, *The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks*, in GARY GEREFFI, GLOBAL VALUE CHAINS AND DEVELOPMENT: REDEFINING THE CONTOURS OF 21ST CENTURY CAPITALISM 44–45 (2018).

⁶⁵ Stefano Ponte & Timothy Sturgeon, *Explaining Governance in GVC a Modular Theory Building Effort*, 21 REV. INT’L POL. ECON. 200 (2014).

⁶⁶ Gary Gereffi & Karina Fernandez-Stark, *Global Value Chain Analysis: A Primer* (Second Edition), in GLOBAL VALUE CHAINS AND DEVELOPMENT: REDEFINING THE CONTOURS OF 21ST CENTURY CAPITALISM 306, 310 (Gary Gereffi ed., 2018).

⁶⁷ Gary Gereffi, John Humphrey & Timothy Sturgeon, *The Governance of Global Value Chains*, 12 REV. INT’L POL. ECON. 78 (2005).

governed and change: (i) the complexity of transactions, (ii) the ability to codify transactions, and (iii) the capabilities in the supply-base.

The very notion of governance indicates that the production networks require explicit coordination, and, as such, are not a result of spontaneous market changes,⁶⁸ which makes law and GVC governance a fertile ground for a critique of law's role in the explicit coordination of the production activities. In captive value chains, small suppliers are transactionally dependent on much larger suppliers—the power asymmetry in captive GVCs forces suppliers to link to their buyers under buyer-specific conditions. Thus, switching from one buyer to another is costly for suppliers but not buyers. Suppliers face significant switching costs and are “captive,” while large buyers, as lead firms, exercise high monitoring and control.⁶⁹ The type of power asymmetry and control in captive GVCs is akin to the direct administrative control that headquarters might exert on an offshore subsidiary or affiliate in a vertically integrated firm (ownership structures). The relationship in captive models of GVCs is contract-based. The terms buyers set are in the contract terms or codes of conduct with the integration of relevant rules or industry standards and codes. Typical examples of captive GVCs (buyer-driven ones) are the fashion and food industries. Beyond these types of GVCs, regulating through GVCs increasingly encompasses environmental, climate change, and human rights to data protection, consumer quality and safety. Lead firms, concerned with risk and exposure to liabilities, extend the regulation and governance to noncompliance with the relevant standards (environmental or safety) concerning their suppliers.

First, parties and their respective transactions in GVCs are interdependent. Consequently, they need to coordinate and cooperate in the contract performance and handling of the change in circumstances or contract breaches. The chain leader is the actor within the value chain that defines and incorporates the regulatory purpose through contracts, making governance “of and by contracts” a starting point in GVC governance.⁷⁰ Cafaggi, for example, argued that in vertically integrated production models,

⁶⁸ Stefano Ponte, Jennifer Bair & Mark Dallas, *Power and Inequality in Global Value Chains: Advancing the Research Agenda*, 23 GLOB. NETWORKS 679, 681 (2023).

⁶⁹ Gereffi & Fernandez-Stark, *supra* note 66.

⁷⁰ Anna Beckers, *The Invisible Networks of Global Production: Re-Imagining the Global Value Chain in Legal Research*, 16 EUR. REV. CONT. L. 95, 100 (2020).

interdependent contracts govern the multitude of interactions in the production and distribution in the totality of their social and legal environment—put differently, contracts are nodes to connect actors and activities throughout the chain.⁷¹

Beyond their coordination function, contractual governance of global value chains have a regulatory function—a regulatory purpose binds the contracts thereby transforming them into a regulatory governance tool.⁷² The regulatory function is prominent in relation to managing the negative externalities. Contracts include noncommercial or “extracontractual” clauses “to contractually commit their suppliers in emerging market economies and developing countries with ineffective public regulations to conform to fundamental labour and environmental protection norms.” The chain leads dictate codes, standards, and terms that other actors must incorporate in the contracts. They rely extensively on transnational codes and standards of industry bodies, associations, or inter-governmental or non-governmental organizations. As Beckers shows, such a regulatory function is typically associated with public authorities, while in the context of global value chains is primarily a private law function.⁷³ To perform this function, the chain leader controls and coordinates the production activities in the chain.

Second, the control over the participants in the supply chain stems from commercial contracts with lead companies exercising higher bargaining power and subjecting suppliers, contractors, and subcontractors to their will.⁷⁴ The power of the decision-making is in the chain leader’s hands. Due to the fragmented nature of production, power and control are key concepts for examining how actors in GVCs control and coordinate interactions and create value within the chain.

Drawing on the dominant theories and models contracts emerge to “resolve complex coordination problems” but do it in a way to minimize costs by assigning contractual relations (which differ in their attributes) to particular types of value chain governance structures (which differ in their

⁷¹ Cafaggi, *supra* note 63. Cabrelli, *supra* note 61. Mark Geistfeld, *The Law and Economics of Tort Liability for Human Rights Violations in Global Supply Chains*, 10 J. EUR. TORT L. 131 (2019).

⁷² Beckers, *supra* note 70, at 99–100.

⁷³ A. CLAIR CUTLER & THOMAS DIETZ, *Introduction and Analytical Framework*, in *THE POLITICS OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT* 1, 4–5 (2017).

⁷⁴ “This control is referred to sometimes as ‘governance’ and other times as ‘coordination.’” Geistfeld, *supra* note 71, at 131–32. *See also* Cabrelli, *supra* note 61, at 111.

adaptive capacities and associated costs) in a discriminating way.”⁷⁵ Relatedly, Cafaggi and Iamiceli argue that decentralization of regulatory power in the chain is essential for effective governance of interdependent but diverse actors, processes, and locations.⁷⁶ Delegation of regulatory power, i.e., the power to set a term for actors in the chain, is less seen in relation to noncommercial or regulatory aspects of the production process, such as matters related to sustainability, environment, and climate change.⁷⁷ However, reduced delegation does not entail concentrating power under chain leader, but rather sharing various forms of power, since compliance with sustainability requirements requires coordination and implementation of multiple actors along the chain.⁷⁸ Such power sharing further concerns monitoring and enforcement: in the absence of direct policing power, the chain leader delegates to key suppliers and intermediaries, tasks of monitoring and enforcing contractual standards in the local context.⁷⁹

Third, the governance studies are, in majority of cases, focused on governance of internalities, and do not account for the negative externalities, i.e., the cost of adverse impacts of the production process on the environment, climate, communities, and people. The chain leader and other actors in the chain can directly or indirectly cause, contribute, or link to adverse social and environmental impacts in their operations, products, services through the coordinated production activities along the chain.⁸⁰

The negative externalities are closely related to the conceptualisation of SCP. Examples of adverse impacts concerning the environment include (a) ecosystem degradation through land degradation, water resource depletion, or destruction of pristine forests and biodiversity; (b) unsafe levels of biological, chemical, or physical hazards in products or services; (c) water pollution (e.g., through discharging wastewater without regard to adequate wastewater infrastructure); (d) failure to replace hazardous substances with

⁷⁵ CUTLER & DIETZ, *supra* note 73, at 15.

⁷⁶ Fabrizio Cafaggi & Paula Iamiceli, *Regulating Contracting in GVC. Institutional Alternatives and Their Implications for Transnational Contract Law*, 16 EUR. CONT. L. 44, 71 (2020).

⁷⁷ *Id.* at 63.

⁷⁸ *Id.*

⁷⁹ *Id.* at 72.

⁸⁰ Org. of Econ. Coop. and Dev. [OECD], OECD Due Diligence Guidance for Responsible Business Conduct, at 72 (2018), <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

harmless or less hazardous substances whenever possible adversely affects employment and industrial relations.⁸¹ As Geistfeld explains, “these costs impose negative externalities on others and created identifiable inefficiencies—in this instance, the global supply chain would produce more pollution than is socially efficient.”⁸²

At the same time, contract law theory has yet to capture the complexity of the decentralized and fragmented nature of GVCs; the challenges, as scholars such as Cutler, Eller, and Zumbansen argue, is in the inability of the contract law theory to grasp the complexity of material realities of GVC. Cutler highlights “the lack of fit or disjuncture between the contractual structure of GVC production and contract theory;”⁸³ Eller argues that “(neo)formalist contract theory . . . ‘private governance as a “natural order” driven by an efficient institutional design,’ and focuses on the bilateral contract.”⁸⁴ These challenges are particularly present in relation to contractual governance concerning risk allocation for environmental, social and human rights impacts of the production processes, especially on third parties. Despite the scale of the adverse impact of production processes, the third parties, as Parella, argues,

are not hidden because they disguise themselves, but because we choose not to see them. And this oversight has real consequences in our legal system. Contracts do not engage signatories only: they also pose risk of harm to third parties through a variety of externalities. These externalities are particularly evident in global supply chain contracts. . . . In the supply chain context, a variety of externalities arise implicating environmental, labour and human rights harms.⁸⁵

As production activities within GVC are outsourced, effective governance is focused on outsourcing work efficiently within the constraints of production’s internal efficiency.⁸⁶ Thus, the research highlights that GVC outsource the negative consequences of production to actors and places that

⁸¹ *Id.* at 39.

⁸² Geistfeld, *supra* note 71.

⁸³ A.C. Cutler, *Blind spots in IPE: Contract Law and The Structural Embedding of Transnational Capitalism*, 31(3) REV. INT’L POLITICAL ECON. 831–53 (2023).

⁸⁴ K. H. Eller, *Is “Global Value Chain” a Legal Concept?: Situating Contract Law in Discourses Around Global Production*, 16(1) EUR. REV. CONT. L. 3, 10 (2020).

⁸⁵ K. Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 329 (2021).

⁸⁶ Jaakko Salminen, *Towards a Genealogy and Typology of Governance through Contract Beyond Privity*, 16 EUR. CONT. L. 25 (2020).

are “less well equipped to deal with them.”⁸⁷ In this context, the legal scholarship that focuses on corporate and contractual governance in GVCs show the way in which the lead firms can use these tools to govern the activities in ways to outsource the production activities, to outsource externalities of production, and in case of negative externalities, to escape liability for the negative externalities.⁸⁸

The need to regulate multinational corporations and the production process corresponds to the expansion of firm activity worldwide, giving companies political power through lobbying.⁸⁹ The expansion implies a new division of labour at the international level and expansion of GVC, leading to increased calls for higher transparency, ethics, and accountability in GVCs.⁹⁰ However, such a governance approach easily neglects the production externalities and fails to extend value chain-wide governance to social, environmental, cultural, or other impacts of outsourced production activities. Consequently, GVCs outsource the “negative consequences of production to actors and jurisdictions that are less equipped to deal with them.”⁹¹ While the lead firms are in the position to effectively govern the chain-wide internal and external production externalities, the contractual, tort and corporate law structures might enable them to avoid liability for lack of effective external chain governance.⁹²

V. REFRAMING CONFORMITY IN GLOBAL PRODUCTION UNDER CISG

A. Reframing the Role of the CISG Through the Principle of Equality

Article 7 CISG incorporates the rule to “observe good faith in international trade” to bridge the public and the private in the CISG, enabling an interpretative path that allows achievement of public policy goals through private means.⁹³ It is precisely that the balance between the public purpose

⁸⁷ *Id.* at 29.

⁸⁸ *Id.* at 31–32.

⁸⁹ Arcuri & Partiti, *supra* note 57, at 322.

⁹⁰ *Id.* at 322.

⁹¹ Salminen, *supra* note 86, at 29.

⁹² *Id.* at 31–32 n.17.

⁹³ Maren Heidemann, *Object and Purpose as Interpretation Tool in International Commercial Law Conventions: How to Make the ‘Top Down Approach’ Work*, THE FUTURE OF THE COMMERCIAL

and the private object of the CISG is central in the discussion about the impact of global value chains and SDGs to CISG and *vice versa*. Interpretation of the CISG requires an inquiry in its Preamble.⁹⁴ The CISG scholarship is unclear whether and to what extent the Preamble can and should influence the interpretation rules set out in Article 7 CISG.

The first view focuses on the legislative history and the technical nature of the Preamble.⁹⁵ As is customary in the UN treaty making, the drafters approached the Preamble as a standard practice, with short discussion focused on technical details, and only a few days before closing the Diplomatic Conference.⁹⁶ In contrast, they focused extensively on crafting the rules of interpretation in Article 7 CISG. The proponents of this approach emphasized that the drafters did not introduce the Preamble to support or guide the interpretation of the CISG per Article 7 CISG.⁹⁷ In their view, the Preamble does not have any role beyond technically being part of the Convention.

Even among the proponents of the first view, some, such as Felemegas, agreed that Preamble is not entirely devoid of any influence or meaning.⁹⁸ It

CONTRACT IN SCHOLARSHIP AND LAW REFORM 419 (Springer 2018). *See also* Dalhuisen, *supra* note 15, at 28.

⁹⁴ *Id.* at 413.

⁹⁵ PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 37 n.111 (Manz 1986); M. Evans, pmbl. in *COMMENTARY ON THE INTERNATIONAL SALES LAW—THE 1980 CISG* 23–25 (C.M. Bianca & M.J. Bonell eds., Giuffrè 1987); JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 541 (Kluwer Law International 3d ed. 1987).

⁹⁶ Evans, *supra* note 95, at 23; *see also* STEFAN KRÖLL, LUKAS MISTELIS & PILLAR P. VISCASILLAS, *UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 19–20 (Beck • Hart • Nomos eds., 2d ed. 2018).

⁹⁷ *See, e.g.*, John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2000–2001* (Pace Int'l L. Rev. ed., 2002); *see also* Evans, *supra* note 95, at 22–23.

⁹⁸ *See, e.g.*, KRÖLL ET AL., *supra* note 18, at 19–20 (“Despite the character of the Preamble as an expression of political declaration of the Contracting States [. . .] it may be used for the compliance of possible interpretations with the spirit of the Convention, especially in legal cultures where the Preamble is looked at customarily”). *Compare* Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (“treaty shall be interpreted in good faith under the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”), with Marko Jovanović, *Forever Young: The Gap-Filling Mechanism of the CISG As a Factor of Its Modernization*, in 2 *BALKAN YEARBOOK OF EUROPEAN AND INTERNATIONAL LAW* 2020 (Zlatan Meškić et al. eds, Springer 2020).

provides the outer framework of the direction in CISG's interpretation.⁹⁹ It proclaims the general principles on which the CISG stands (e.g., "good faith" and "reasonable"), and as such, informs the interpretation of the CISG per Article 7.¹⁰⁰ The values expressed in the Preamble are set out in Article 7 CISG, providing a bridge between the rules of interpretation of the CISG and the goals it serves.¹⁰¹ Therefore, at the very minimum, the Preamble is a tool that informs the context in which CISG originated and in which specific provisions of the CISG, including Article 7 CISG, should be applied.¹⁰²

The purpose of the CISG is visible in its Preamble, referring "*sweepingly to visionary and long-term goals and objectives decidedly of a public policy nature.*"¹⁰³ The Preamble referred to the New International Economic Order (NIEO) which outlined political and economic principles to eliminate the discrepancies in development between the developed economies, economies in transition, and developing economies.¹⁰⁴ The

⁹⁹ See, e.g., excerpts from the available court practice. CLOUT case No. 433 U.S. District Court, Northern District of California, United States, 27 July 2001, [the court cited language from the second main clause of the Preamble ("the development of international trade on the basis of equality and mutual benefit") and the third main clause of the Preamble ("the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade") as revealing an intent that the CISG supersede internal domestic law on matters within its scope]; CLOUT case No. 579 [U.S. District Court, Southern District of New York, United States, May 10, 2002], [the court cited language from the third main clause of the Preamble ("the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade") in support of its holding that the CISG pre-empted contract claims based on internal domestic law]]; see also U.S. District Court, Northern District of Illinois, United States, 3 September 2008 (*CAN Int'l, Inc. v. Guangdong Kelon Electronical Holdings*) ["[T]he CISG drafters' goal was to remove legal barriers to international trade."].

¹⁰⁰ Ingeborg Schwenzer & Pascal Hachem, *Preamble*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 14–15 (Ingeborg H. Schwenzer & Ulrich G. Schroeter eds., 4th ed. 2016).

¹⁰¹ See ENDERLEIN & MASKOW, *supra* note 19 (arguing that, if exercised with caution, the Preamble can restrain the immense liberty parties have to dispose of the Convention, mainly to avoid referral to the national law).

¹⁰² Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONTRACTS 18 (Jacques Herbots & Roger Blanpain eds., 2000).

¹⁰³ Heidemann, *supra* note 93, at 415–16.

¹⁰⁴ ENDERLEIN & MASKOW, *supra* note 19, at 19–20; Schwenzer & Hachem, *supra* note 100, at 15 ("the objective of those resolutions was the step-by-step removal of the economic underdevelopment of developing countries"). See also Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*

Preamble further proclaimed the CISG to be an instrument to develop friendly relationships among States. Lastly, the Preamble set out that, through the adoption of uniform rules on international contracts for the sale of goods, the CISG will contribute to the removal of legal barriers and promote the development of international trade.

Kastely argued that the true underlying goal of the Convention is to achieve an international community as a direct consequence or a prerequisite of the unification of substantive rules.¹⁰⁵ The text of the CISG created a community, defined its fundamental values, its common language, and the process by which the community can develop. Felemegas supported Kastely's view that the CISG created a community: on one side, it aimed to subject people from different legal cultures to its sets of rules and principles, while at the same time, those cultures needed to comprehend and conform to those rules.¹⁰⁶ The rhetorical coherence directly results from the political environment in which CISG originated. The drafters aimed to create a community with a sense of shared interest, responsibility, and participation by reconciling the differences in the socio-economic and legal backgrounds.¹⁰⁷ The relationship between the member states exists beyond the Convention's text as an actual political and economic community where the CISG promotes economic and political cooperation on an international scale.¹⁰⁸ There is also an emphasis on the "*mutual benefit*" of the States, which further translates into the commercial relations on the business-to-business level—equal and mutually beneficial relations between States are reflected in respective sales contracts.¹⁰⁹ The CISG, therefore, is not just an instrument of substantive unification, but it is also profoundly political in its

Symposium: Reflections on the International Unification of Sales Law, 8 NW. J.L. & BUS. 625, 626 (1988) (seeing an altruism as a goal embedded in the Convention).

¹⁰⁵ Amy H. Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention Symposium: Reflections on the International Unification of Sales Law*, 8 NW. J. INT'L L. & BUS. 574, 577 (1988).

¹⁰⁶ Felemegas, *supra* note 97, at 38 ("establishing an "international community," a kind of international legal consensus, that is regarded by some as the true underlying purpose of CISG and as the key to its eventual triumph or demise. This is also the focus of the most forceful criticism of CISG, as it has been argued that international consensus on significant legal issues is impossible.").

¹⁰⁷ *Id.* at 39.

¹⁰⁸ Kastely, *supra* note 105, at 577.

¹⁰⁹ ENDERLEIN & MASKOW, *supra* note 19, at 21.

aspiration.¹¹⁰ To achieve uniform application of the CISG among its Member States, correct interpretation and uniform application of the text are vital to ensure that the CISG safeguards the benefits for developing and developed states through its principles of equality and fairness.¹¹¹

Inequality framed a line of compromise in the final text of the Convention. Eorsi characterized the North-South debate as harsh in reference to the New International Economic Order and the Asian-African Legal Consultative Committee.¹¹² Three characteristics marked these debates: (i) the developing countries mainly export raw materials and agricultural products, i.e., mass products and import technology and finished goods; (ii) the awareness of their market's underdeveloped technological and legal condition; and (iii) their frequent and justified mistrust of developed industrial states.¹¹³ The New International Economic Order reference was an effort to protect the weaker parties in international trade—"a definite trend of compassion for those who, through no fault of their own, are weaker than others."¹¹⁴

Enderlein and Maskow cautioned against a broad understanding of CISG's role in this context, as the CISG itself can make only a moderate contribution to these efforts.¹¹⁵ Schwenzer and Hachem argued that the Convention was designed as a strictly neutral set of rules that do not grant preferred treatment to one side based on the country of their location, thus one must strictly regard the equality between the seller and the buyer's rights and obligations.¹¹⁶

Inequality is present in international trade. Strict adherence to the principle of equality and equal treatment only reinforces the inequality of the parties to the sales contracts with a direct influence on the allocation of their rights and obligations. To remedy this and to enable the CISG to establish and maintain equality in treatment, Kastely suggested a more complex notion of equality:

¹¹⁰ Kastely, *supra* note 105, at 576.

¹¹¹ *Id.* at 601.

¹¹² Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 THE AM. J. COMPAR. L. 333, 349, 350 (1983).

¹¹³ *Id.* at 350.

¹¹⁴ *Id.* at 333–35.

¹¹⁵ ENDERLEIN & MASKOW, *supra* note 19.

¹¹⁶ Schwenzer & Hachem, *supra* note 100.

In interpreting these provisions and reconciling them with the general principle of equal treatment, decision makers will be able to develop a notion of international equality that goes beyond the simple refusal to acknowledge difference. In a case involving a sophisticated French manufacturing company and an illiterate Argentinean farmer, for example, a court might decide that the French company cannot expect the same promptness and precision of communication that it would expect of a more sophisticated trader. Such an approach is consistent with the Convention's commitment to respect legal, social, and economic differences. **Debate over true equality thus may become a way of speaking about the significance of difference and the appropriate response of individuals in a world that is acutely aware of inequality.**¹¹⁷ [emphasis added]

The object of the CISG is international contracts for the sale of goods between private parties with their place of business in different member states.¹¹⁸ The object is equally international as is the CISG. Specifically, as Dalhuisen suggested, international contracts are connected, i.e., “part of a much bigger picture, now increased transnationalism in the international flows of goods, services, money, information, and technology, often still ignored in academic writing.”¹¹⁹ It is precisely that feature that affects their nature and must be considered.

As international contracts for the sale of goods may be infused with the CISG's purpose. Heidemann argues that Article 7(1) CISG reinforces the purposes mentioned in the Preamble and further clarifies the aspiration expressed in the Preamble to conduct international trade based on equality and mutual benefit by emphasizing the requirement to observe goods faith.¹²⁰ In doing so, Article 7(1) CISG bridges the public and the private by showing a path to achieve public policy goals through private means.¹²¹ Considering provisions of the Vienna Convention on the Law of Treaties (VCLT) and CISG together, they may allow “a horizontal reference to **general principles outside the CISG . . .** to appropriately consider the international character of

¹¹⁷ Kastely, *supra* note 105, at 620.

¹¹⁸ Heidemann, *supra* note 93, at 417; Dalhuisen, *supra* note 15, at 28.

¹¹⁹ Dalhuisen, *supra* note 15, at 37–38.

¹²⁰ Heidemann, *supra* note 93, at 419; Dalhuisen, *supra* note 15, at 28 (suggesting it is more appropriate to consider good faith “primarily as an interpretation technique through which *all* sources of law [. . .] resurface. They are fundamental and general principles, custom and practices, and a more autonomous notion of party autonomy which operate besides and in appropriate cases beyond the legislative texts. Public order considerations may also surface and even the demands of justice, social peace and efficiency as autonomous extra legal considerations [. . .]”).

¹²¹ See generally Heidemann, *supra* note 93, at 419.

the object.”¹²² (emphasis added). Concerning general principles in the international sphere, Dalhuisen argued that they have the potential to mark the next stage of the development by becoming “a self-executing autonomous and independent source of law transnationally to supplement the modern *lex mercatoria* and correct it in sufficiently pressing cases.”¹²³ Such development would further allow for incorporating the type of private parties and the nature of their relationship in denoting the transnational minimum protection standards.¹²⁴ The equal treatment as an underlying principle of the Convention must be understood as establishing and maintaining fair and equal treatment for traders considering the inequalities in development, resource and information access, and relationship dynamic that underpin their sales contracts.

The horizontal reference to general principles outside of the CISG, the bridge between the public and the private, and the inequality perspectives between the developed and developing economies, all played out in the negotiation and interpretation of Article 35 CISG. It is apt to use Article 35 to demonstrate the influence of the reframed principle of equality in the context of global value chains and sustainable development goals on the parties’ rights and obligations.

B. SCP as Framework for Production Conformity Obligations

As Cafaggi explained, “conformity is the result of a cooperative endeavor among different contracting parties.”¹²⁵ The production process comprises interdependent, embedded sales contracts covering production and distribution. Consequently, the production process encompasses both the multitude of interactions in the chain and the totality of the social and legal environment in which they occur. A unique feature of the production process is the sharing and distribution of information and knowledge through the value chains. The chain leaders define the conformity obligations through the

¹²² *Id.* at 423–24; *See also* further Dalhuisen, *supra* note 15, at 50 (“In contract, fundamental legal principle may then also be the conduit for the introduction of newer pre-contractual, contractual, and post-contractual rights and duties, helped by the other sources of law of the modern *lex mercatoria* and generally a liberal interpretation technique, whether or not under the good faith label in contract. So may be notions of justice, social peace and efficiency if sufficiently pressing and there could be overlap.”).

¹²³ Dalhuisen, *supra* note 15, at 41.

¹²⁴ *Id.*

¹²⁵ Cafaggi, *supra* note 63.

applicable codes or standard terms. In such a structure, every participant in the value chains contributes to the design, production, and distribution of the final product and compliance with the regulatory requirements interdependently with other producers in the chain. The latter includes regulatory process requirements, such as environment and labour protection, as set out in production and the place of the goods' destination. As an example, a reduction of greenhouse gas emissions along the value chain requires coordination among contracts and contractual performance along the chain. Breach by any of the suppliers in any of the contracts affects the overall conformity of the product.

Conformity includes both the production process's conformity and the final product's conformity due to their functional and contractual links. The content of the production-related obligations stems from the public and private standards the chain leader embeds and implements along the chain. It would be artificial to separate production from the product. Such proposal is not in line with the CISG scholarship, which accepts the relationship between the regulatory-driven features that impact the production conformity and the product conformity. I argue to reframe the conformity from the exclusive lens of the product conformity and to recognize that market-driven features and regulatory-driven features of the product are production conformity obligations. In that regard, Sustainable Consumption and Production is a suitable conceptual framework of production conformity.

SCP production conformity corresponds to the product lifecycle in the GVCs and captures the social, environmental, and human rights aspects of production which may be subject to regulation or market response. As such, it conceptually reframes the concept of ethical values in Article 35 CISG to a concept of SCP production conformity, and consequently, captures the market-driven and regulatory-driven features under one framework. More importantly, the production processes that lead to devastating consequences for the workers, environment, and climate, are rooted in the possibility to take advantage of the differences in economic development and construct the production process in low- and middle-income countries without bearing the costs of the adverse impacts. SDG 12 offers a blueprint to restore balance to the benefit of the global community, based on the same fundamental principles as CISG: Equality and fairness.

C. Allocation of Risk for Production Conformity Obligations per the Power Relations in GVCs

Interpretation of Article 35 CISG focused on the *caveat venditor* principle that places the risk for defective goods on the seller. The basis for such approach is the two-fold assumption about the seller's relative position to the buyer. First, the seller has more information about the production process that determines the quality of the goods, and as such has superior bargaining position than the buyer which it can use to set higher prices for lower quality goods—thus, *caveat venditor* protects the buyer from the information gap.¹²⁶ Second, if the seller wishes to increase the profit, it must invest to increase efficiency and innovation of the production process and, conversely, it must reduce the production costs.¹²⁷ The relevant scholarship presented the *caveat venditor* principle as essential to mitigate the opportunistic behaviour, reduce the information gap, foster trust and incentivize innovation. However, by disregarding the power asymmetry in global production and the dominant position of some governance structures, such an approach to risk allocation reinforces the inequalities in traders from developed and developing economies. Instead, an interpretation of risk allocation should consider the governance structures, and accordingly allocate the risk for a production process that determines the price and quality terms.

GVCs, apart from describing the patterns of global production, offers a methodology to analyse such patterns through a holistic view of global industries, i.e., from top-down and from bottom-up. The main concept of the former is governance structures that seeks to explain how the firms control the value chains. The main concept of the latter is upgrading, which describes the dynamic movement within the value chains by examining how producers move in different stages of the value chain. Thus, the access to information, development capabilities, investment capabilities in the production process, and the like, are a direct consequence of the governance and upgrading in global value chains, and must inform the risk allocation, including within the international sales contracts. The binary view of governance—ownership versus contract-based governance—does not fully account for the complexities of actors, institutional contexts, and the social norms that

¹²⁶ de Luca, *supra* note 18, at 207.

¹²⁷ *Id.* at 209.

impact the governance approaches. As a response to the binary structures, Gereffi and others in *The Governance of Global Value Chains* suggest five types of governance: market, modular, relational, captive, and hierarchy model. The captive value chains best demonstrate the inadequacy of the *caveat venditor* principle.

In captive value chains, small suppliers are transactionally dependent on much larger suppliers—the power asymmetry in captive GVCs forces suppliers to link to their buyers under buyer-specific conditions. Thus, switching from one buyer to another is costly for suppliers but not buyers. Suppliers face significant switching costs and are “captive,” while large buyers, as lead firms, exercise high monitoring and control. The type of power asymmetry and control in captive GVCs is akin to the direct administrative control that headquarters might exert on an offshore subsidiary or affiliate in a vertically integrated firm (ownership structures).

The relationship in captive models of GVCs is contract-based. The terms buyers set are in the contract terms or codes of conduct with the integration of relevant rules or industry standards and codes. Typical examples of captive GVCs are the apparel and food industries. Beyond these types of GVCs, regulating through GVCs increasingly encompasses environmental, climate change, and human rights to data protection, consumer quality and safety. Lead firms, concerned with risk and exposure to liabilities, extend the regulation and governance to noncompliance with the relevant standards (environmental or safety) concerning their suppliers. Without a legal regime that captures the full breadth and depth of GVC activities, contracts emerge as a tool to incorporate, monitor implementation and compliance with these standards. Danielsen and Bair explained:

The legal techniques and business practices through which buyer firms exercise their governance power in GVCs are myriad, and include supply contracts, corporate codes of conduct, policies regarding subcontracting by suppliers or intermediaries, punitive commercial measures that punish non-compliant firms, multi-sourcing practices that leverage competitive pressure, strategic use of antitrust concerns to limit calls for transparency into chain operations by suppliers and workers, limitations on supplier sourcing of production inputs, and many others.

In addition, buyer firms shape the policy autonomy and bargaining power of developing states, firms and workers using techniques such as complex ownership and licensing structures to maintain proprietary control over innovation, intellectual property, and brand assets; inventory control and production management systems that minimize technology transfers to suppliers; and complex corporate structuring to distribute business functions and the recognition

of revenues and profits geographically for the purpose of minimizing global tax liability.¹²⁸

The structure and organization of GVC reflect an asymmetry of contractual power between the chain leader and the suppliers. The GVC dynamic, structures, and production models require a shift in the conventional balance between the *caveat venditor* and *caveat emptor*—instead the risk allocation and liability for production non-conformity should be with the party that holds the most bargaining power and, direct or indirect, influence over the production process.

The value chain can operate as an extension of the top company, meaning an extension of their workforce and community. The company can set expectations and best practices to apply throughout the value chain, including supplier selection and training, auditing, and remediation. The chain leader has a dominant role in determining policies and standards of behaviour in the GVC. The role may depend on the contractual relationship, but it can also be indirect, influencing the business conduct of downstream suppliers. Since the chain leader defines the policies and sets the standard of behaviour for the suppliers, they should bear the risk that their suppliers achieve such results.

Suppliers are often small and medium enterprises in the Global South with cultural and factual circumstances including high degrees of poverty, illiteracy, and comparatively lesser technical, operational, or other resources to fully implement SCP practices. The power asymmetry between buyers and their suppliers also affects risk allocation. Considering the social and cultural circumstances specific to the Global South, it is questionable whether their ability to assess the risks, manage the risk, and bear the consequences of the risk is balanced compared to that of buyers. Instead of taking a one-sided view that all suppliers are weak, and all buyers are strong, a more nuanced approach to parties' bargaining position and structure of their contractual relationship is more appropriate.

¹²⁸ Dan Danielsen & Jennifer Bair, *The Role of Law In Global Value Chains: A Window Into Law And Global Political Economy*, L. & POL. ECON. PROJECT (Dec. 16, 2019), <https://lpeproject.org/blog/the-role-of-law-in-global-value-chains-a-window-into-law-and-global-political-economy/>.

D. Considering Region-Specific and Development-Related Circumstances

In the interpretation of parties' intent, Article 8(3) CISG calls for a "due consideration of all relevant circumstances of the case." The purpose is to give general guidelines of elements relevant in contract formation and contract performance to interpret intent in a broader range of scenarios in international commerce. In recognizing the adverse social and economic impacts of sales contracts and considering the need to remedy the power asymmetry and ensure equality in treating parties of different socio-economic backgrounds, it is essential to consider cultural and factual circumstances in proactive contracting and contract interpretation. A holistic view of the totality of circumstances is instrumental in interpreting and applying collaborative, proactive contracting elements. Equally important is to consider region-specific cultural and factual circumstances, as they frame the context of contract negotiation, drafting, and performance between the parties of different socio-economic and cultural backgrounds.

The economic environment of emerging economies plays a vital role in the interpretation of CISG's rules on inspection and notice of non-conformity set out in Articles 38–40 and 44.¹²⁹ Schroeter argued that region-specific cultural factors should affect the interpretation of intent as relevant circumstances in Article 8(3) in relation to provisions that refer to circumstances, such as Article 35(2)(b) CISG.¹³⁰ Examples of regional circumstances include (i) "the high level of illiteracy, the importance of an informal economy, the weakness of legal culture and the prevalence of corruption" in Africa, (ii) "the concept of "face," due to which "some Asian societies [are] less litigious" in commercial matters and "less likely to have recourse to the courts" in Asia, (iii) a "relational approach to contracts rather than a transactional approach wherein merchants consider the ongoing relationship as more important than the letter of the individual contract" in Indonesia and other Asian countries, and (iv) specificities of Islamic law and trading relationships in that context.¹³¹

¹²⁹ Eorsi, *supra* note 112.

¹³⁰ Ulrich G. Schroeter, *Does the 1980 Vienna Sales Convention Reflect Universal Values: The Use of the CISG as a Model for Law Reform and Regional Specificities*, 41 LOY. L.A. INT'L & COMP. L. REV. 5–6 (2017).

¹³¹ *Id.*

The focus is on region-specific factual and cultural circumstances that frame the context of contractual asymmetry between the chain leaders of the Global North and their suppliers of the Global South. Recognizing inequality that fosters adverse environmental impacts in sales contracts requires understanding region-specific factual and cultural circumstances in contract interpretation.

VI. CONCLUSION

The CISG created uniform substantive rules, and as a direct result of that, a community with its fundamental values, common language, and the process by which the community develops was created. The community includes states and the individual traders. The former with their international relations beyond the text of the Convention, so CISG is part of the broader international context of political and social cooperation among the states aligned with the shared common understanding of what are the guiding principles of such political and social cooperation. The individual traders whose sales contracts are the object of the CISG's governance, and such, should reflect the shared views of the principles of the community. The uniformity of the CISG, as set out in the Article 7 CISG, cannot be separated from the political aspirations of the CISG and its rhetorical coherence. Instead, the uniform interpretation should reflect the goals of the drafters who aimed to create community by reconciling the differences in the socio-economic and legal backgrounds and fostering a sense of shared interest, responsibility, and participation.

One of the main fundamental principles of CISG is the principle of equality. And while the principle plays out in the interpretation of the CISG in a manner that ensures an equal treatment in the rights and the obligations of the buyers and the sellers irrespective of their backgrounds, it can go a step beyond that. It should reflect CISG's place in the international political and social community. To achieve uniform application of the CISG among its member states, correct interpretation and uniform application of the text are vital to ensure that the CISG safeguards the benefits for developing and developed states alike through its principles of equality and fairness.

