Chapter 5

Fostering the Effectiveness of TCL

What fosters the effectiveness of Transnational Commodity Law (TCL) is to render the sustainable use principle as effective as possible. For that purpose, we shall first turn to some reflections on how the normative potential of sustainable development (SD) as a legal concept can be unfolded (Sect. 5.1). Secondly, we will turn to International Commodity Agreements (ICAs) as potential instruments codifying what sustainable commodity use requires (Sect. 5.2).

5.1 Unfolding the Normative Potential of SD

To my mind, there are two ways to unfold the normative potential of SD: By defining it as the object and purpose of TCL (Sect. 5.1.1) and by employing the technique of full integration in order to more concretely delineate what ‘sustainable use’ means (Sect. 5.1.2). Both will lead to a more coherent—and thus more effective—TCL framework.

5.1.1 *Defining SD as the Object and Purpose of TCL*

This section is ultimately dedicated to displaying the ramifications of defining sustainable development (SD) as the object and purpose of TCL (Sect. 5.1.1.3). In order to arrive at these observations, I, shall first, however, exhibit the origins, core conceptual contents, and general legal effects of SD (Sect. 5.1.1.1). Moreover, I will provide an *aperçu* of the discussion on the legal nature of SD as well as a series of

arguments to support my claim that it constitutes a regulatory objective (Sect. 5.1.1.2).¹

5.1.1.1 Conceptual and Normative Characteristics of SD

Subsequently, we shall revisit the origins (Sect. 5.1.1.1.1), core conceptual contents (Sect. 5.1.1.1.2) as well as general legal effects (Sect. 5.1.1.1.3) of SD.

5.1.1.1.1 The Origins of SD as a Political Objective

The concept of SD has evolved remarkably over the past decades. While the origins of the notion of sustainability lie in theories on sustainable forest management from the eighteenth century, it had increasingly been referenced in the context of whole-some economic growth since the 1970s.²

SD as a concept made its appearance on the stage of international politics in 1980 through the publication of the International Union for Conservation of Nature (IUCN) World Conservation Strategy, which carried the subtitle Living Resource Conservation for Sustainable Development.³ When the Brundtland report was released in 1987, the SD gained significant popularity. According to the report, SD was defined as a ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs.’⁴

In the following, ‘SD featured prominently in the 1992 Rio Declaration on Environment and Development, which in its Principle #1 puts human beings at the centre of concerns for SD.’⁵ As another result of the Rio conference, a far-reaching process regarding a ‘new global partnership for sustainable development’ was set in

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¹The following section essentially summarises the core arguments I have put forward in Oehl (2019).

²Proelß (2017), para. 50; Gehne (2011), pp. 11, 21 with reference to the UN GA (1970) International development strategy for the second United Nations development decade, 24 October 1970, UN Doc. A/RES/2626(XXV), <http://www.un-documents.net/a25r2626.htm> (last accessed 14 May 2021); cf. Oehl (2019), p. 7.

³Cf. Oehl (2019), p. 7 pointing also to the prior UN GA International Development Strategy for the Third United Nations Development Decade, 5 December 1980, UN Doc. A/RES/35/56; cf. Beyerlin (2013), para. 3.

⁴World Commission on Environment and Development (1987) Report: our common future, 4 August 1987, UN Doc. A/42/427, <http://www.un-documents.net/our-common-future.pdf> (last accessed 14 May 2021), chapter 1, para. 49; Oehl (2019), p. 7.

⁵Oehl (2019), p. 7. Moreover, it is expressly referred to in principles 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27 of the 1992 Rio Declaration on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last accessed 14 May 2021); cf. *ibid.*

motion by the so-called Agenda 21⁶—a process, which eventually led to the central status of SD within international relations today.

The 2000 Millennium Development Goals featured environmental sustainability as Goal #7. In 2002, the Johannesburg World Summit was dedicated entirely to SD. The World Summit on Sustainable Development (WSSD) Plan of Implementation, which resulted from it, ‘explicitly built on the achievements since the 1992 Rio conference and covered a broad range of SD-related issues from poverty eradication, consumption and production patterns, natural resource management as base of economic and social development, health and SD to the institutional framework for SD.’⁷ In 2005, the UN General Assembly in its World Summit Outcome Resolution reaffirmed SD as a ‘key element of the overarching framework of United Nations activities.’⁸

The international community reiterated its commitment to SD at the so-called Rio + 20 conference in 2012. Henceforth, SD was particularly being summarised by referring to ‘three constituent elements’: economic as well as social development and environmental protection.⁹ As a means to concentrate the common efforts on concrete objectives, the outcome document demanded the compilation of sustainable development goals (SDGs).¹⁰

The 2030 Agenda for Sustainable Development, which carries the title Transforming Our World, spells out these SDGs. The UN General Assembly, in its 2015 Resolution, describes the introduction of this agenda as an ‘historic decision on a comprehensive, far-reaching and people-centred set of universal and transformative Goals and targets.’¹¹ As I have put it elsewhere,

[t]he *SD Agenda* marks the end point of the evolution of SD from a notion originating in forest management and later gaining relevance in environmental protection policy to *the* universal political agenda of our time. Mindful of the great weight this agenda carries, the UN General Assembly describes it as: “...an Agenda of unprecedented scope and significance. It is accepted by all countries and is applicable to all, taking into account different national realities, capacities and levels of development and respecting national policies and

⁶Cf. Beyerlin (2013), para. 5; Oehl (2019), p. 8.

⁷Oehl (2019), p. 8 referring to the Plan of implementation of the world summit on sustainable development, 4 September 2002, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 14 May 2021).

⁸UN GA (2005) World summit outcome, 24 October 2005, UN Doc. A/RES/60/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1 (last accessed 14 May 2021), para. 10; cf. Oehl (2019), p. 8.

⁹UN GA (2012) The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 14 May 2021), para. 1; Oehl (2019), p. 8.

¹⁰UN GA (2012) The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 14 May 2021), para. 246; Oehl (2019), p. 8.

¹¹UN GA (2015) Transforming our world: the 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, 25 September 2015, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed 14 May 2021), para. 2; Oehl (2019), p. 8.

priorities. These are universal goals and targets which involve the entire world, developed and developing countries alike. They are integrated and indivisible and balance the three dimensions of sustainable development.”¹²

5.1.1.1.2 The Core Conceptual Contents of SD

Over the past decade, the core conceptual contents of SD have emerged quite clearly. While the Brundtland report was initially based on especially an *intergenerational* understanding of SD, thus emphasising planetary conservation for the sake of future generations, SD gradually evolved ‘to a concept that puts human beings and their need for sufficient socio-economic development at the centre’, therefore integrating *intragenerational* elements, ‘yet without fully abandoning the intergenerational perspective.’¹³

When it comes to legal terms, principle 4 of the non-binding 1992 Rio Declaration first put the concept of SD into the operational language of what resembles a legal norm by stating that

[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.¹⁴

As Barral points out, the synthesis of the various international documents featuring SD exhibits a remarkable degree of consistency with regard to the core concept of SD.¹⁵ Since the adoption of the 1997 Programme for the Further Implementation of Agenda 21, SD is generally being referred to as requiring ‘the integration of its economic, environmental and social components.’¹⁶ The 2002 WSSD Plan of Implementation describes SD as consisting of the ‘interdependent and mutually reinforcing pillars’ of ‘economic development, social development and environmental protection.’¹⁷ This definition of SD has, worded only slightly differently, been used repetitively in numerous international documents, including the 2005 World

¹²UN GA (2015) Transforming our world: the 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, 25 September 2015, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed 14 May 2021), para. 5; Oehl (2019), pp. 8–9.

¹³Oehl (2019), pp. 9–10, referring to Barral (2012), pp. 380–381 who ‘defines the element of socio-economic growth as a matter of the *intragenerational*, the element of environmental protection as the *intergenerational* equity that SD postulates’.

¹⁴Oehl (2019), p. 10.

¹⁵Barral (2012), p. 380; cf. Oehl (2019), pp. 10–11 with an overview of relevant documents.

¹⁶UN GA (1997) Programme for the further implementation of agenda 21, 28 June 1997, UN Doc. A/RES/S-19/2, <https://digitallibrary.un.org/record/244113> (last accessed 14 May 2021), annex, para. 3; Oehl (2019), p. 12.

¹⁷UN (2002) Plan of implementation of the world summit on sustainable development, 4 September 2002, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 14 May 2021), para. 2; Oehl (2019), p. 12.

Summit Outcome,¹⁸ the Rio+20 outcome document ‘The Future We Want’¹⁹ or the SD Agenda.²⁰

These definitions of SD, as well as the ones employed by international legal scholars,²¹ convey the ‘three constituent elements of SD: environmental protection, social and economic development.’²² Consequently, the core conceptual content of SD ‘can be defined as the consolidation of socio-economic development and environmental protection.’²³

Around these conceptual contents of SD, international legal scholarship has conceptualised what it defines as International SD Law—the corpus of international law, which addresses the relevant intersections of international environmental, economic and social law, towards SD.²⁴ This body of law has been further characterised by the 2002 New Delhi Principles *Relating to* SD, which have been elaborated by the International Law Association. The non-exhaustive seven principles include the duty of States to ensure sustainable use of natural resources; the principle of equity and the eradication of poverty; the principle of common but differentiated responsibilities; the principle of the precautionary approach to human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.²⁵

5.1.1.1.3 The General Legal Effects of SD

Apart from these characterisations of SD, naturally its legal effects are particularly pertinent to our further discussion. They can generally be said to be twofold.

¹⁸UN GA (2005) World summit outcome, 24 October 2015, UN Doc. A/RES/60/1, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1 (last accessed 14 May 2021), para. 10.

¹⁹UN GA (2012) The future we want, 11 September 2012, UN Doc. A/RES/66/288, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E (last accessed 14 May 2021), para. 3.

²⁰UN GA (2015) Transforming our world: the 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, 25 September 2015, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed 14 May 2021), para. 2; cf. Oehl (2019), p. 12.

²¹Oehl (2019), p. 12 pointing to the characterisation of ‘SD as the “conceptual bridge” between right to social and economic development and the imperative to protect the environment’ by Cordonier Segger and Weeramantry (2017), p. 6.

²²Oehl (2019), p. 12.

²³Oehl (2019), p. 12.

²⁴CISDL (2005) What is sustainable development law, CISDL concept paper, Montreal, 2005, <http://cisdl.org/public/docs/What%20is%20Sustainable%20Development.pdf> (last accessed 14 May 2021), p. 1; Oehl (2019), p. 13.

²⁵ILA (2002); Oehl (2019), p. 13.

For one, it constitutes a *primary norm* that obliges states to ‘act sustainably’, i.e. to carry out a balancing exercise between the social, economic and environmental pillars of SD before taking (regulatory, e.g. legislative, or other) action. This effect is for instance reflected in the cases *Gabcikovo-Nagymaros* and *Pulp Mills*.²⁶ Barral insofar describes an ‘obligation of means’, which states need to abide by. They only need to make the necessary efforts of carrying out the balancing exercise and are not required to arrive at a specific result.²⁷

For the other, SD also exhibits a *methodical dimension* in that it serves as a guideline how legal obligations shall be interpreted.²⁸ This is naturally the effect, where SD forms part of a specific treaty, such as the WTO agreement that was subject to the WTO Appellate Body’s decision in *US-Shrimp*.²⁹ Accordingly, SD has been said to add ‘colour, texture and shading’ to the challenge of interpreting the term ‘exhaustible natural resources’ according to Article XX(g) GATT, thus being employed as an interpretation guideline.³⁰

5.1.1.2 The Legal Nature of SD

To date, there has been much debate regarding the legal status of SD as for instance, a principle of international law, an ‘interstitial’ norm or a primary rule (Sect. 5.1.1.2.1). To my mind, it can best be classified as regulatory objective (Sect. 5.1.1.2.2).

5.1.1.2.1 The General Debate

There has generally for long been a wide spectrum of opinions on the legal nature of SD. While some authors have argued that SD merely constitutes a political ideal that is void of any normative force,³¹ others have categorised SD as a ‘meta principle’ or

²⁶ICJ (1997) *Gabcikovo-Nagymaros Project*, Judgment of 25 September 1997; ICJ (2010a) *Pulp Mills on the River Uruguay*, Judgment of 20 April 2010.

²⁷Barral (2012), p. 388; Oehl (2019), p. 14. However, as we will discuss in detail in Sect. 5.1.2 below, not only the SDGs and their targets and sub-targets respectively are specifying what exactly is required from states, but potentially all norms that are being *fully integrated* into the ‘sustainable use’ rule.

²⁸Oehl (2019), pp. 14–15; the operation of SD as a primary norm can be observed e.g. in ICJ (1997) *Gabcikovo-Nagymaros Project*, Judgment of 25 September 1997; ICJ (2010a) *Pulp Mills on the River Uruguay*, Judgment of 20 April 2010; as well as PCA (2005) *Iron Rhine arbitration*, Award of 24 May 2005. Its application as a methodical norm is demonstrated e.g. in WTO DSB (1998) *US – Shrimps*, Report of the Appellate Body, 12 October 1998, para. 153; Gehne (2011), p. 294.

²⁹WTO DSB (1998) *US – Shrimps*, Report of the Appellate Body, 12 October 1998, para. 153; cf. Gehne (2011), p. 294.

³⁰Cf. Barral (2012), p. 392; Oehl (2019), p. 15.

³¹Beyerlin (2007), pp. 444–445; cf. Proelß (2017) para. 53; also Beyerlin (2013), para. 19; cf. Oehl (2019), p. 16.

‘constitutional guiding concept’.³² These meta principles have been said to ‘set the bounds for the types of proposals and arguments that can be made’ during international negotiations. They thus ‘establish the context’ for codifications of concrete norms, for instance in international treaties.³³ Insofar, Lowe described SD as forming part of the category of ‘modifying’ or ‘interstitial’ norms that ‘are pushing and pulling the boundaries of true primary norms’ where they interfere.³⁴ These norms do ‘not seek to regulate the conduct of legal persons directly.’³⁵ Instead, they particularly apply when it comes to interpreting the law.³⁶

Whereas this viewpoint was quite dominant within international legal scholarship for some time, authors appear to have increasingly abandoned it in the more recent past.³⁷ For instance, Proelß argues that categorizing SD as a ‘modifying’—and therefore *secondary*—norm of international law allows moving beyond discussions about its customary status as a *primary norm*.³⁸ Also other authors identify a clear rule, which SD is setting forth—one that obliges states to ‘act sustainably’ or, more precisely, ‘to balance social, economic and ecological interests.’³⁹

Still, what classical international law would now require from legal scholarship, would be a categorisation of SD according to the types of sources spelled out in Article 38 ICJ Statute. In fact, there has been quite some debate whether SD could be qualified as a principle of international law.⁴⁰ Koskenniemi in this context points to the *constructivist exercise*, which needs to be performed for a new principle to emerge. Yet, according to Virally ‘...the existence or non-existence of common principles is a question of fact to be solved by examination rather than *a priori* opinion.’⁴¹ This view may perhaps be the one of most international lawyers today, who perceive principles as ‘generalizing descriptions of certain regularities in State behaviour’⁴²—a view that may have been responsible for the ‘continued and genuine reluctance to formalise a distinctive legal status’ of SD that the ILA scholars witnessed.⁴³

³² Scheyli (2008), pp. 296–298, 352–353; cf. Proelß (2017), para. 53; cf. Oehl (2019), p. 16.

³³ Bodansky (2009), p. 203; cf. Proelß (2017), para. 53; cf. Oehl (2019), p. 16.

³⁴ Lowe (1999), pp. 31, 33; cf. Proelß (2017), para. 53; Beyerlin (2013), para. 17.

³⁵ Lowe (1999), p. 33; cf. Barral (2012), p. 387; cf. Oehl (2019), p. 16.

³⁶ Gehne (2011), pp. 32–322; Lowe (1999), p. 34; cf. Barral (2012), p. 387; cf. Oehl (2019), p. 16.

³⁷ Oehl (2019), p. 16.

³⁸ Proelß (2017), para. 54; cf. Oehl (2019), p. 17.

³⁹ Cf. Oehl (2019), p. 17 pointing to Barral (2012), p. 378, who ‘refers to SD as a primary norm of international law, which “purports to directly regulate conduct and has properly material and direct legal implications”’; also Barral (2012), p. 388; Gehne (2011), p. 314; Proelß (2017), paras. 54–55. Proelß (2017), para. 56 views this rule as part of customary international law.

⁴⁰ Oehl (2019), pp. 17–19.

⁴¹ Virally (1968), p. 147; cf. Koskenniemi (2000), p. 385; cf. Oehl (2019), p. 19.

⁴² Koskenniemi (2000), p. 385; cf. Oehl (2019), p. 19.

⁴³ ILA (2012), p. 36; Oehl (2019), p. 19.

Proceeding further down this path, we would now have to examine the large volume of international treaties, guidance documents and jurisprudence in order to assess whether SD can be said to constitute a principle of international law. This approach essentially limits legal analysis with regard to an emerging principle or rule to a ‘matter of relative numbers’.⁴⁴ While some would deem the results it would bring about to be sufficient for ascertaining the existence of a legal principle or rule of SD, others would presumably disagree.⁴⁵

In this context, allow me to point to the problems that rigid approaches to identifying emerging norms of international law can create for the international legal order.⁴⁶ As Jennings, referring to customary international law, wrote in 1981, the international community needs to

face squarely the fact that the orthodox tests of custom – practice and *opinio juris* – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions and it is often the focus of contention.⁴⁷

According to Jennings, we need to apply Article 38 ICJ Statute as well as the respective methodologies applicable to identifying sources of international law in a way that is mindful of the fact that they originate from the 1920s—and could thus be somewhat out-dated. He argues that ‘mould[ing]’ the more recent phenomena of emerging new law ‘into one or the other compartments [of Article 38 ICJ Statute]’ would constitute a mistake.⁴⁸ In his view, new modes of how rules of international law emerge, necessitate more flexible methodological approaches to examining them.⁴⁹ This relates to his additional observation that jurisprudence as well as international legal scholarship may be of greater significance than ever before with regard

to bring[ing] certainty and clarity in the places where the mass of material evidences is so large and confused, as to obscure the basic distinction between law and proposal.⁵⁰

⁴⁴ICJ (2012) *Jurisdictional Immunities*, dissenting opinion of Judge Yusuf, p. 297; cf. Oehl (2019), p. 21.

⁴⁵Oehl (2019), p. 20 i.a. pointing to the separate opinion of Vice-President Weeramantry to ICJ (1997) *Gabcikovo-Nagymaros Project*, Judgment of 25 September 1997, p. 104 ‘who already in 1997 saw “plentiful indications”, which justify giving “the principle of sustainable development the nature of customary law”.’ In favour also Proelß (2017), para. 56; Barral (2012), p. 386; arguably Sands (2012), p. 217 as well. Cautious Cordonier Segger (2017), p. 92. Against Beyerlin (2013), para. 18; Lowe (1999), p. 33.

⁴⁶In lieu of many Jennings (1998), p. 737 indicating the challenges in elaborating or modifying customary international law during the interwar period; cf. Oehl (2019), p. 20.

⁴⁷Jennings (1998), p. 738; cf. Oehl (2019), p. 20.

⁴⁸Jennings (1998), p. 742; cf. Oehl (2019), p. 20.

⁴⁹Cf. ILA (2012), p. 6; Oehl (2019), p. 20.

⁵⁰Jennings (1998), p. 749; Oehl (2019), p. 21.

Also with regard to SD, a substantial volume of international documents and proof of state practice exists, yet hitherto these materials have brought about rather confusion than clarity. This may well be perceived as a call for international legal scholars to contribute more clarity, be it through their respective functions as international judges or publicists.⁵¹

However, it appears unlikely that judges and publicists will be able to provide the former President of the ICJ with satisfying responses—that is if they continue to adhere to an analysis of the law that resembles a ‘matter of relative numbers.’ Koskenniemi pointed out that the idea that a judge would be *finding* a principle—or, for that matter, any other emerging rule—by carrying out some sort of empirical exercise describes an ideal, but generally not reality.⁵² Rather, judges are *constructing* principles or rules based on their perceptions of what are the fundamental goals and values of the international legal order.⁵³

Yet, what the empirical approach may entail, is the benefit of providing international law making with some sort of reliable, objective parameters, which may thus help convince many of the legitimacy and objectivity of the law itself. In contrast, the constructivist approach,

decreases the reliability of the law making exercise since the constructions of the fundamental goals and values that serve as the testing ground for new rules may differ from, particularly, judge to judge that is performing the task.⁵⁴

When it comes to SD, however, the constructivist approach does not appear to face these kinds of challenges. In view of the international community’s acceptance of SD as its universal agenda—which is even specified by respective goals, targets and sub-targets—the ‘normative testing ground’ is exposed quite concretely and unambiguously. This scenario constitutes an opportunity for international jurisprudence and international publicists respectively to elaborate norms that find vast support within the international community. Naturally, balancing the diverging interests and understandings between (state) actors becomes more intricate the more concrete the rules that are being elaborated are required to be. Yet, given the widely anticipated need to establish more specific legal guidance for SD, there may well be still sufficient room for ascertaining new norms even before one enters these challenging realms.⁵⁵

To conclude, however, I would like to point out that whether or not SD has acquired the status of a principle of international to my mind is of rather secondary importance—if not even a ‘sterile’ question as the ILA scholars expressed in 2008.⁵⁶ Whereas also the judges at the ICJ—as reflected in their decision in the *Gabcikovo-*

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⁵¹ Oehl (2019), p. 21.

⁵² Koskenniemi (2000), p. 389; Oehl (2019), p. 21.

⁵³ Cf. also Shaw (2017), p. 52. On the ‘myth of (in)determinacy’ in international law, Bianchi (2010); Oehl (2019), p. 21.

⁵⁴ Oehl (2019), p. 21; cf. Koskenniemi (2000), p. 396.

⁵⁵ Oehl (2019), p. 22.

⁵⁶ ILA (2008), p. 7; cf. ILA (2012), p. 6; Oehl (2019), p. 22.

Nagymaros case and Judge Weeramantry's separate opinion respectively—were divided on this issue, we should rather bear in mind the guidance received from President Jennings. SD indeed appears to be a 'perfect example for a legal concept that deserves to "be released from the shackles of legal formalism in order to be given operational meaning"', because in the end, what really counts are the practical, legal effects it elicits.⁵⁷ The subsequent section will display how abandoning the classical 'boxes' of the sources of international law allows to not only fittingly categorize SD, but also 'to conflate its legal effects as a *primary rule* and a *methodical norm*.'⁵⁸

5.1.1.2.2 SD as Regulatory Objective

To my mind, SD constitutes a fundamental regulatory objective of the international legal order. In the following, I shall provide a series of arguments to support this claim.

5.1.1.2.2.1 Political Objectives Typically Evolve to Regulatory Objectives

The first argument relates to the observation that political objectives typically sooner or later evolve to become regulatory objectives. They are normally being formulated as the outcome of corresponding decision-making processes within governments. As soon as a political objective has been established, the government generally moves to the *implementation phase*. Presumably all states, yet certainly their majority, take *legal* measures whenever they are pursuing an objective.⁵⁹ Therefore, on the national level, an openly articulated political objective typically evolves to a regulatory objective of those legal instruments, which are being introduced to attain it.

The situation on the international level is quite similar. Once the respective decision-making process within for instance a UN institution, such as the UN General Assembly or the Security Council, has brought about a shared political objective, members typically adopt a resolution in its pursuit. Routinely, the *political* objective is being included in a preambulatory paragraph—thus henceforth constituting the *regulatory* objective of the respective resolution, which its operative paragraphs are intended to fulfil.⁶⁰ Even in incidents, in which the international community first articulates the objective exclusively in a declaratory, non-legal manner, this is typically followed by the introduction of international or national

⁵⁷Oehl (2019), p. 22, i.a. pointing to Sands (2012), p. 217 'who states in a *nonchalant* manner that SD "is recognized as principle (or concept) of international law"'; ILA (2012), p. 6.

⁵⁸Oehl (2019), p. 22.

⁵⁹Oehl (2019), p. 23 pointing to the fact that even repressive regimes and dictatorships 'tend to carry out their actions in legal form. cf. only the disastrous example of Nazi Germany, which exhibited a rule of law that served the most unlawful purposes, including war crimes and the Holocaust.'

⁶⁰Oehl (2019), p. 23.

legal instruments later on.⁶¹ In this context, the ‘aspirational’ nature of the SDGs referenced in e.g. the Rio+20 outcome document or the SD agenda does not rebut the claim that SD is a regulatory objective: Whereas its specific *goals and targets* may be aspirational, the *measures* introduced by governments, as actors tasked with driving the implementation of the SD agenda,⁶² will generally be of a legal nature—and thus pursue SD as regulatory objective.⁶³

Furthermore, while it can naturally not be ruled out that in some exceptional cases, a political objective is never being included in any legal instrument and therefore never evolves to a regulatory objective, there are no indications that SD is one of these rare exceptions. While we have seen above that there had been substantial debate among international legal scholars about the normative nature of SD, the discussants did not examine the quality of SD as a regulatory objective and consequently also did not provide a statement to the contrary.⁶⁴ Instead, the ICJ referred to it as a ‘concept’ of international law, thereby avoiding any more explicit remark about its legal nature. In fact, the WTO Appellate Body stated in its decision in *US-Shrimps* that the WTO Agreement ‘explicitly acknowledges “the objective of sustainable development”’.⁶⁵ Therefore, by interpreting individual provisions in its light, i.e. employing the technique of *teleological interpretation*, the Appellate Body essentially applied SD as a regulatory objective.⁶⁶ As we will see subsequently, there are several further examples of international agreements, including the United Nations Framework Convention on Climate Change (UNFCCC) or the Convention on Biological Diversity (CBD), which feature SD as a regulatory objective.⁶⁷

5.1.1.2.2.2 Law Fosters the Development of Society

What moreover supports the claim that SD constitutes a regulatory objective, is its conceptual content. This argument relates to the observation that in general,

⁶¹ Oehl (2019), p. 23 referring to the example of the 2002 WSSD Plan of Implementation, UN Doc. A/CONF.199/20, http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf (last accessed 14 May 2021), para. 162(a).

⁶² UN GA (2015) Resolution A/RES/70/1, 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development. http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed 14 May 2021), paras. 39–47; Oehl (2019), p. 24.

⁶³ Oehl (2019), p. 23 pointing to ‘the catalogue of measures that states shall implement in order to foster SD in UN GA (2015), para. 41: “We recognize that these will include the mobilization of financial resources as well as capacity building and the transfer of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed. Public finance, both domestic and international, will play a vital role in providing essential services and public goods and in catalysing other sources of finance.” Naturally the implementation of such measures requires legal instruments.’

⁶⁴ Oehl (2019), p. 24; Cordonier Segger (2017), p. 72 refers to a ‘search in the wrong direction’.

⁶⁵ Oehl (2019), p. 24; WTO DSB (1998) *US – Shrimps*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 129.

⁶⁶ On the ‘teleological school of thought’ briefly Shaw (2017), p. 707; cf. Oehl (2019), p. 25.

⁶⁷ Cf. Sect. 5.1.1.2.2.3 below.

law is conceptually meant to ultimately foster the development of the respective society it applies for. Every individual instrument, in fact every rule, contributes its modest or greater part to the functioning of a greater whole, which is at least *intended to* or *portrayed as* advancing the development of its constituents.⁶⁸

With regard to the international legal order, in this connection even rather ‘remote’ fields, such as the law of consular relations can be interpreted as *ultimately* serving the objective of development: By disciplining international relations, it adds to stable diplomacy and therefore ideally peace—which constitutes a major precondition for a society’s development.⁶⁹ We can make the same claim in regard to any rule of international law, however with naturally varying lengths of the ‘causal chain’ between the norm’s individual command and the ultimate objective of development.⁷⁰

Therefore, one can quite easily argue that law, as a general concept, *ultimately* serves the objective of development of society; in spite of naturally remaining debates on the right approaches in pursuing development between the various stakeholders, the law is generally ‘at least *intended to*’ or, in states ruled by a rogue government, ‘*portrayed as*’ promoting development.⁷¹

5.1.1.2.2.3 SD as Regulatory Objective in International Treaties

The various international agreements, which reference SD, typically include it as regulatory objective.⁷² This holds true i.a. with regard to Articles 2 and 3-(4) UNFCCC; Articles 1 and 8(e) CBD; Articles 2 and 4(2)(b) of the 1994 UN Convention to Combat Desertification and Drought; Article 1(c) of the 1994 International Tropical Timber Agreement; Article 1(3) of the 2007 International Coffee Agreement; Article 1(2) of the 2015 International Agreement on Olive Oil and Table Olives; Article 1 of the 2010 International Cocoa Agreement;⁷³ Article 2 of the 1995 Straddling Stocks Convention; the preamble of the 1994 WTO agreement; as well as Article 2(1) of the 2015 Paris Agreement.⁷⁴

Moreover, SD also features in the preamble of the 1991 (Espoo) Convention on Environmental Impact Assessment in a Transboundary Context; the preamble of the

⁶⁸ Oehl (2019), p. 25.

⁶⁹ Oehl (2019), p. 25; *ibid.*, n 131 more extensively on how the international legal order regulates war as well as its characterisation by Sen (1999), pp. 3–4 as an ‘unfreedom’, which needs to be removed for societies to prosper.

⁷⁰ Oehl (2019), p. 25; *ibid.*, n 132 discussing further examples, including International Humanitarian Law and procedural rules of international courts and tribunals.

⁷¹ Oehl (2019), p. 26; *ibid.*, n 133 referring to the relationship between this observation and the important contributions of the TWAIL movement, as i.a. expressed by Mutua and Anghie (2000); cf. also Oehl (2019), pp. 26–28 on the evolution of the development objective from a purely economic understanding to the integrated model of SD.

⁷² Oehl (2019), p. 29; UN GA (2015), para. 5.

⁷³ More extensively on International Commodity Agreements, see Sect. 5.2 below.

⁷⁴ Oehl (2019), p. 29.

1992 (Ospar) Convention for the Protection of the Marine Environment of the North-East Atlantic; Articles 2, 10 and 12 of the 1998 UNFCCC Kyoto Protocol; Article 4(3) of the 2004 Barcelona Convention for the Protection of the Mediterranean; Article 2(3) of the 1998 Danube River Protection Convention; Articles 1.1 and 6.2 lit. f) of the 2009 FAO International Treaty on Plant Genetic Resources for Food and Agriculture ('Seed Treaty');⁷⁵ Article 1(2)(a) of the Energy Charter Treaty; the preamble as well as Article 915(c) of the NAFTA; Article 1(2) of the 2001 EU-ACP Cotonou Agreement; Article 1(a) of the 2008 EU-CARIFORUM Economic Partnership Agreement (EPA); Article 1(a) of the 2016 EU-SADC-EPA; the preamble, Articles 22.1 and 24.2 of the Comprehensive Economic and Trade Agreement (CETA); Article 3 of the 2014 EU-Ukraine Association Agreement; as well as Articles 3(3) and (5), 21(2)(d) and (f) of the EU-treaty and Article 11 of the Treaty on the Functioning of the EU.⁷⁶ Likewise, the German commodity partnership agreements with Kazakhstan, Mongolia and Peru feature the objective of SD.⁷⁷

These provisions attest that SD in numerous instances has been codified as a regulatory objective within international agreements. As we shall learn subsequently, SD can also operate as a regulatory objective outside of these treaty regimes.⁷⁸

5.1.1.2.2.4 SD as Regulatory Objective Beyond Treaty Regimes

As the ILA scholars have emphasised in their 2012 Guiding Statement #2,

treaties and rules of customary international law should, as far as possible, be interpreted in the light of principles of sustainable development and interpretations which might seem to undermine the goal of sustainable development should only take precedence where to do otherwise would be to undermine territorial boundaries and other fundamental aspects of the global legal order, would otherwise infringe the express wording of a treaty or would breach a rule of *jus cogens*].⁷⁹

The ILA scholars here are essentially advocating to apply SD in a way, which 'is tantamount to the *teleological interpretation* of *all* treaties and custom in the light of SD and its related principles respectively.'⁸⁰ Within domestic legal systems, these effects are typically caused by constitutional objectives—all law generally needs to be interpreted in their light. Only where they interfere with other norms or

⁷⁵Cf. Cordonier Segger (2017), p. 81; Oehl (2019), p. 30.

⁷⁶Oehl (2019), p. 29–30; cf. also the catalogues provided by Schrijver (2017), p. 100 and Barral (2012), p. 388, Fn. 59. On the EU-CARIFORUM-EPA and SD as an objective Grosse Ruse-Kahn (2010).

⁷⁷Oehl (2019), p. 30; on the German commodity partnership agreements, cf. also Sect. 5.2.1.2.3.1 below.

⁷⁸Oehl (2019), p. 29.

⁷⁹ILA (2012), p. 36; Oehl (2019), p. 31.

⁸⁰Oehl (2019), p. 31.

objectives, which are equally of constitutional value, a balance needs to be struck between them and the latter.

Moreover, as expressed by the ICJ in its *Gabcikovo-Nagymaros* and *Pulp Mills* decisions, the award in *Iron Rhine*, and the ILA scholars in their Guiding Statement #3 states are held to ‘act sustainably’, that is to perform the necessary balancing exercise whenever they take action. Therefore, ‘not only existing law needs to be interpreted in light of SD, but also new law that is being created—or any measures that are being taken—needs to be designed mindful of the objectives of SD.’⁸¹

These twofold effects of SD, as a *methodical norm* on the one hand and a *primary norm* on the other, are characteristic for the operation of an object and purpose of, for instance, a field of law or constitution.⁸²

Turning to deliberations on legal doctrine, the question arises how such effects of SD within the international legal order can be explicated and legitimised.⁸³ One approach would lie in classifying the primary rule of SD as a rule of customary international law.⁸⁴ In that context, the methodical norm, which SD entails, could be perceived as a principle of international law, which is likewise derived from custom. Yet, as a consequence, the typical challenges related to the identification of new custom would occur. Paradigmatically, while some authors ascertained a customary status of SD—others have not.⁸⁵

An alternative approach would consist of categorising SD as a general principle, which is derived from domestic law and applies to international relations. However, such endeavour would confront similar challenges as the ones of identifying custom. A sort of comparative exercise between different legal orders would need be carried out, which would presumably bring about equally ambiguous results.⁸⁶

Therefore, it appears to be purposive as well as simpler ‘to leave the classical “boxes” of Article 38 of the ICJ Statute and recognize the fact that SD may constitute a source of international law in its own right—as a fundamental *object and purpose* of international law.’⁸⁷

What can be said to follow from this categorization regarding the normative force of SD beyond the treaties in which it features? One initial step could lie in examining whether SD can be qualified as a sort of ‘customary object and purpose’. In order to

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⁸¹ Oehl (2019), p. 31.

⁸² Oehl (2019), p. 31.

⁸³ Barral (2012), p. 391 appears to see such effects of SD as an “extraneous conventional rule” and thus regardless of its status as international custom; cf. Oehl (2019), p. 31.

⁸⁴ Proelß (2017), para. 56; Barral (2012), p. 386; cf. Oehl (2019), p. 31.

⁸⁵ Cf. already above, Sect. 5.1.1.2.1; Oehl (2019), p. 32.

⁸⁶ Oehl (2019), p. 32.

⁸⁷ Oehl (2019), p. 32, pointing to Cordonier Segger (2017), p. 93 as well as Schrijver (2017), p. 101; referencing SD as an ‘objective’ also ICJ (2010a) *Pulp Mills on the River Uruguay*, Judgment of 20 April 2010, p. 74, para. 177; on the need to leave the ‘boxes’ of Article 38 ICJ Statute cf. Sect. 5.1.1.2.1 above on the remarks by Jennings (1998).

do so, ‘one would have to conduct the usual “two factor test” and analyse relevant state practice as well as corresponding *opinio juris*.’⁸⁸

Yet, in view of the special nature of SD, this approach does not appear to be appropriate, as it does not adequately capture the legal value, which states have assigned to SD:

While the element of state practice can be held to maintain its relevance also when examining the normative force of a regulatory objective, the subjective element of *opinio juris* needs to be modified given that we are dealing with a different type of norm. Instead of asking whether states considered SD to entail a legal obligation, we shall ask – more precisely – whether they wanted to set SD as a regulatory objective, thus expressing their consent to the typical legal effects it brings about. Given the natural “kinship” between political and regulatory objectives, the proliferation of SD as a regulatory objective in international treaty law, the fact that law generally seeks to foster development and the universal nature of the SD Agenda I believe that there are good reasons to answer this question in the positive.⁸⁹

Therefore, SD can unfold its normative effects beyond the treaty regimes, in which it expressly features.⁹⁰

5.1.1.3 The Legal Impact of SD as the Object and Purpose of TCL

As I have demonstrated, there are good reasons to qualify SD as the regulatory objective of fields of international law.

When it comes to Natural Resources Law (NRL), as ‘the field of law, which regulates all [natural resources]-related activities, especially exploration, exploitation or other commercial usage, and preservation’,⁹¹ I arrived at this conclusion, after having observed the manifold factual interrelations between the SD agenda and natural resources, as well as particularly after having studied the applicable jurisprudence and legal instruments. When it comes to international jurisprudence, ‘nearly all prominent cases dealing with SD as a legal concept [...] relate to natural resources.’⁹² Moreover, most international agreements that refer to SD are part of

⁸⁸Oehl (2019), p. 32. In addition, one could examine the ‘fundamental norm creating character’ of SD, cf. Cordonier Segger (2017), pp. 69–72.

⁸⁹Oehl (2019), p. 32.

⁹⁰Oehl (2019), p. 33; *ibid.*, n 156 pointing to the line of argument by Barral (2012), p. 394 with reference to the *Iron Rhine* decision. Accordingly, ‘this *external* normative force can be of such intensity as to even “revise” an individual treaty norm. According to Article XII of the 1839 Treaty, Belgium would have had to bear the costs for the construction of the railway, while in the end the tribunal, interpreting the provision i.a. in light of SD, ruled that costs would have to be shared between the Parties, i.a. in order to factor in the obligation carried by the Netherlands to construct the railway in conformity with contemporary environmental standards’ (original emphasis); cf. PCA (2005) *Iron Rhine arbitration*, award of 24 May 2005, pp. 115–121.

⁹¹Oehl (2019), p. 6.

⁹²Oehl (2019), p. 33.

NRL; also international legal scholarship on NRL is vocal in relying on SD as a ‘foundational reference.’⁹³

Furthermore, the principles of international law relating to SD are of great importance in NRL.⁹⁴

Such is evident regarding the duty of States to ensure sustainable use of natural resources (principle #1) and the precautionary approach to human health, natural resources and ecosystems (principle #4). The principle of common but differentiated responsibilities (principle #3) must be borne in mind in NR protection efforts, particularly with regard to shared resources. Evidently, good governance (principle #6) is key when it comes to sustainably managing NR (and thus fulfilling the duty of principle #1), including the need to ensure adequate public participation and access to information and justice (principle #5) for all stakeholders concerned by a particular NR activity and pursuing integrated approaches in particular in relation to human rights and social, economic and environmental objectives (principle #7). Correctly managed, NR activities contribute to both inter- and intragenerational equity and to the eradication of poverty (principle #2).⁹⁵

Now what follows from these observations regarding NRL for our appraisal of TCL? Both fields significantly overlap, with TCL exhibiting the narrower scope. Recalling our statement from above, the focus on commodities, instead of natural resources alludes to the ‘stronger economic connotation’ of TCL.⁹⁶ It

focuses exclusively on those items originating from natural resources [. . .] that are typically being traded and/or refined/processed for specific end uses as e.g. foodstuffs or industrial goods.⁹⁷

TCL provides the more suitable framework and terminology

whenever one is seeking to address this specific economic use of natural resources—or, for that matter more precisely, commodities. In this sense, the broader field of NRL appears to be the more favourable concept whenever, beyond their use as commodities also other economic usages of natural resources, such as navigation, or energy generation and their related governance challenges are concerned.⁹⁸

Given that TCL thus constitutes a subcategory of NRL, we can infer that SD also constitutes the regulatory objective of this field of law focusing on *commodities*. This is all the more so, in view of the interrelations between commodity operations and SD objectives, which may be even greater—at least in terms of the economic

⁹³ Wälde (2004), p. 119; Oehl (2019), p. 34.

⁹⁴ The ILA principles consist of the following seven principles: (1) The duty of States to ensure sustainable use of natural resources; (2) The principle of equity and the eradication of poverty; (3) The principle of common but differentiated responsibilities; (4) The principle of the precautionary approach to human health, natural resources and ecosystems, (5) The principle of public participation and access to information and justice; (6) The principle of good governance; (7) The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives, ILA (2002).

⁹⁵ Oehl (2019), pp. 34–35.

⁹⁶ Oehl (2019), p. 6.

⁹⁷ Oehl (2019), p. 6, n 20.

⁹⁸ Oehl (2019), p. 6, n 20.

significance of commodity trade as compared to other uses of natural resources.⁹⁹ The *sustainable use* principle constitutes the concretisation of the broader principle of SD in a natural resource or commodity context¹⁰⁰—fostering SD in connection with commodity activity means using resources sustainably.

Consequently, SD guides the elaboration, application and interpretation of all norms of TCL. Sustainable use not only constitutes a balancing norm of TCL. Through TCL, all stakeholders are held to ‘act sustainably’;¹⁰¹ the norms of TCL need to be interpreted in a way so as to give the greatest possible effect to SD.

Through this mode of operation, SD constitutes the pattern cohering the fragmented body of TCL. By defining SD as the object and purpose of TCL, it provides a guideline for balancing conflicts between individual rules, interests and respective norms, as well as entire norm subsets (or ‘branches’). As a consequence, over time those norms, which appear to rather impede respective aspects of SD will either—within the boundaries set by the wording of the rule—be (re-)interpreted so as to reinforce its effect in the interest of SD or be replaced by more conducive rules. These developments will gradually cohere TCL—towards the sub-branch of Sustainable Development Law (SDL), which regulates commodity activity.¹⁰²

The fact that SD has this effect, is most instructively illustrated by the example of permanent sovereignty over natural resources (PSNR). As we have seen above, the principle of PSNR has evolved gradually from a mere competence norm to a principle, which requires states to use natural resources sustainably.¹⁰³ In light of our observations above, it seems natural that this is the consequence of SD having become accepted not only as the universal political agenda of the current era, but also as the fundamental object and purpose of TCL.¹⁰⁴

⁹⁹In view of the great economic interrelations of the globalised economy and the fact that commodities constitute a major precondition for *any* industrial value creation, it relates intensively to matters of international economic equity, cf. Sect. 2.1.2 above.

¹⁰⁰Oehl (2019), p. 35.

¹⁰¹Cf. Gehne (2011), p. 314.

¹⁰²See already Oehl (2019), p. 35: NRL as a sub-branch of SDL. SDL has been defined as the ‘intersection of social, ecological and economic subject-matters of international law’, Oehl (2019), p. 13; Gehne (2011), p. 54; CISDL (2005), p. 1. Yet, as I have already indicated elsewhere, in view of the universal nature of SD and against the backdrop of its dogmatic understanding as a fundamental regulatory objective of international law, it would not seem to be entirely abstruse to classify SD as the ultimate object and purpose of all of international law—which would therefore in its aggregate become SDL, Oehl (2019), p. 35.

¹⁰³Beyond that, Cabrera Medaglia and Perron-Welch (2018a, b) see the PSNR principle as increasingly intertwined with an obligation to share the benefits from commodity operations equitably.

¹⁰⁴See already Oehl (2019), pp. 8–9, 36 with regard to NRL.

5.1.2 Operationalising SD Through Full Integration

Yet, evidently the normative content of SD is still rather broad. While it may require norm addressees to carry out a balancing exercise between its three pillars, there have for long existed little to no guidelines on *how* this balancing exercise should be performed.¹⁰⁵ The same holds true with regard to the sustainable use principle as its commodity-directed emanation. What currently prevents the sustainable use principle from more regulatory vigour, are its broad terms. If we are to take sustainability seriously, we need to be more specific. The *full integration* technique to my mind is a promising way to proceed.

The terms, which define the sustainable use principle, such as ‘rational’, ‘development’, ‘rights of indigenous peoples’, or the ‘needs of future generations’, need to gradually be determined by using concrete benchmarks. As has become clear throughout our analysis of the substance of TCL, this body of law provides a vast volume of material in this respect. As a consequence, ‘sustainable use’ could require states not only to comply with the principle themselves, but also to take legislative and regulatory measures, which ensure that commodity activities performed by their state-owned enterprises (SOEs), corporate, and natural citizens, or on their territory respectively be carried out in accordance with these benchmarks.¹⁰⁶ In addition to legislators, this finding is also addressed to the judiciary, which appears to be quite well suited to develop more specific guidelines, which detail the legal obligations that ‘flow’ from SD in a commodity context.¹⁰⁷

However, given the complexity of the task, the enterprise of elaborating such a sophisticated TCL framework will be challenging. It will require to identify the ‘best rules’, which shall serve as benchmarks. In this regard, the new possibilities provided by computational text analysis may be part of the solution.¹⁰⁸ Moreover, the interaction of the instruments used needs to be properly coordinated and especially integrated in a quest for coherence.

One of the challenges in detailing the obligations that stem from SD quite naturally lies in the imperative to confer sufficient regulatory space to actors operating below the global, i.e. on regional, but especially national and local levels. Evidently, what constitutes sustainable practice needs to be determined to a significant degree on a case-by-case basis. However, there also is a certain *grey area* between the individual case-level on the one hand and the guidance currently provided by—in this ascending order in terms of level of detail—SD, the SDGs, and corresponding publications on the other.

¹⁰⁵ Oehl (2019), p. 17, n 90 pointing to Proelß (2017), para. 56.

¹⁰⁶ On the potential to codify this obligation in International Commodity Agreements (ICAs) *de lege ferenda*, see Sect. 5.2.2.1.4 below.

¹⁰⁷ Cf. Cordonier Segger and Weeramantry (2017), pp. 5–6.

¹⁰⁸ It is hoped that the TCL outline provided in the annex in that respect may be a useful starting point.

The 17 goals, as well as their targets and sub-targets considerably specify what exactly SD means. However, they do so—in accordance with their name—primarily by laying out benchmarks that need to be met by a certain date. When it comes to the *measures* that might lead the global community to reach these benchmarks, the SDGs generally do not specify what practices are in effect sustainable and which ones are not. Such, however, could of course still rather easily be done through programmes or initiatives complementing the respective SDGs, targets and sub-targets.¹⁰⁹ In this grey area, what needs to be done more intensively on the global level is to establish a selection of *best practices*, from which national and local regulators as well as other stakeholders could then choose.¹¹⁰ This is arguably also the intention of the substantial volume of so-called SDG maps, atlases and matrices issued by international organisations, NGOs and research institutes.¹¹¹

The UN Global Compact's SDG Industry Matrix on Energy, Natural Resources and Chemicals provides one example in this connection. With regard to SDG 12, for instance, it i.a. recommends to '[w]henver possible, collect previously used materials and repurpose them instead of extracting new raw materials.'¹¹² Specifying in what scenarios such repurposing is in fact 'possible'—e.g. by providing a list of circumstances or previous uses that typically require repurposing—could further sharpen this best practice. International standard setting bodies that dispose of sophisticated technical expertise, such as ISO, could play an important role in further breaking down what sustainable practices mean in the commodity sector and its various subsectors respectively.

Apart from these 'legal design' challenges, also corresponding implementation mechanisms need to be elaborated, which would effectively be tasked with ensuring the SD of the global commodity sector. It appears natural that parts of the answer in that respect will lie in decentralised multistakeholder formats, which are being combined with legally binding enforcement mechanisms.

¹⁰⁹ See e.g. High Level Political Forum on SD (2014) 10-Year Framework of Programmes on Sustainable Consumption and Production Patterns, https://sustainabledevelopment.un.org/content/documents/1444HLPF_10YFP2.pdf (last accessed 14 May 2021), which was launched formally before the introduction of the SDGs and appears to be little specific itself.

¹¹⁰ For instance, through binding ICAs *de lege ferenda*, see Sect. 5.2.2 below.

¹¹¹ UNDP (2016); UN GC (2017); IPIECA (2017). What SD means with regard to investment policy, has been detailed e.g. by UNCTAD (2015). Cf. also the ICC Business Charter for Sustainable Development as well as the CERES roadmap, which both seek to enhance sustainability in business operations; for more examples cf. the TCL outline in the annex.

¹¹² UN GC (2017), p. 42.

5.1.3 *Learning from International Labour Law*

When analysing the substance of TCL, one area—or norm subset—exhibits a remarkable degree of coherence: the one of international labour law. Core International Labour Organisation (ILO) conventions not only apply to states, but also feature in many standards addressing private actors, particularly enterprises. Not surprisingly, a study on the state of sustainability initiatives found that ‘virtually all initiatives requir[e] compliance with core ILO conventions...’.¹¹³

While the International Bill of Human Rights (HR) likewise constitutes a widely accepted set of norms, TCL standards addressing private actors refer to it less frequently than to transnational labour norms. This may be due not least to the very nature of labour law. Employers can generally organise work according to their will. Thus, they are assuming a pivotal role in protecting the labour rights of their ‘subordinate’ employees.¹¹⁴ Consequently, labour norms quite naturally need to address businesses as private actors directly.

As we have seen above, business respect for HR is ensured by the UN Guiding Principles for Business and Human Rights (UN GP), which then in turn are pointing to the International Bill of HR, according to UN GP #12. Through this latter ‘technique’, obligations designed primarily for state-citizen relationships are being translated into voluntary commitments for business actors to do their part to respect these obligations.

ILO conventions, to the contrary, are from the outset being drafted based on a tripartite approach, which involves states, as well as employer and employee representatives. As research has found, the involvement of the so-called Governance Triangle consisting of states, businesses, and NGOs in regulatory endeavours is a key factor for building sufficient regulatory capacity in tackling transnational challenges.¹¹⁵ The wide proliferation and acceptance of labour norms in both classical international law as well as private standards appears to confirm the research on the importance of the Governance Triangle being involved in transnational regulation.

This wide acceptance has also led to the relatively higher degree of coherence that one can observe with regard to these norms as opposed to other norms of TCL: The more accepted a certain norm set is, the more readily drafters of new agreements and standards may include it in their works—therefore contributing to a coherent overall framework as regards this particular field of labour regulation. As a result, these tripartite approaches involving the Governance Triangle in creating transnational regulatory frameworks may be another ingredient towards producing a coherent, effective legal field.

Yet, apart from the tripartite approach, another element of international labour regulation may be relevant in the ‘quest for coherence’.¹¹⁶ Instead of relying on

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¹¹³ IISD (2010), p. vii.

¹¹⁴ Cf. Preis and Temming (2020), pp. 1, 30; in this connection speaking of an ‘imbalance of power’, Bercusson (2009), p. 336.

¹¹⁵ Abbott and Snidal (2009); Beinisch (2017), p. 3.

¹¹⁶ Aagaard (2010), p. 229; cf. Sect. 3.1 above.

purely voluntary standards, ILO conventions are legally binding upon member states. As a consequence, states are held to implement the labour rules in their domestic legal systems. When doing so, the tripartite, multi-stakeholder origins of these rules may foster compliance by businesses and therefore lead to a further consolidation of these norms. A lesson learned from transnational labour regulation for cohering legal fields may therefore be to combine tripartite approaches with binding international agreements.

This lesson relates to the more abstract question on what level of multilevel governance duties of corporations should be regulated to what extent. Currently, on the global level typically merely some voluntary benchmarks are being set, whereas the actual legally binding regulation occurs primarily on the national level. This i.a. corresponds to the discussion within the international legal community whether or not to introduce a legally binding convention on corporate accountability.¹¹⁷ As for instance the International Finance Corporation (IFC) Standards and the Equator Principles, which are said to be ‘key driver[s] for improvements’ regarding the environmental and social impact of commodity companies,¹¹⁸ show, *global* standard-setting may prove to be particularly useful when it comes to creating a *coherent* regulatory environment conducive to SD. If corporate accountability, as well as other issues of SD for that matter, continue to be specified largely on the national level, there is a high risk that national approaches will conflict with one another,¹¹⁹ thus leaving behind an incoherent regulatory framework, which does not effectively foster a functional commodity sector.

5.1.4 *Interim Conclusion*

The aim of fostering the effectiveness of TCL corresponds with the objective of creating a coherent field of law—and *vice versa*. ‘Taxonomy inevitably and inherently is a quest for coherence’.¹²⁰ As such, ‘legal taxonomy may advocate for particular norms to draw aspects of the field together, as well as create paradigms

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¹¹⁷ UN (2003) Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Sub-Commission on the Promotion and Protection of HR, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, <https://undocs.org/en/E/CN.4/Sub.2/2003/12/Rev.2>; UN HRC (2014) Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Resolution 26/9 of 26 June 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>; OHCHR (2019) Revised draft of 16 July 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (all last accessed 14 May 2021).

¹¹⁸ Lindsay et al. (2013), p. 46.

¹¹⁹ On potential conflicts between global, regional and national SD objectives and measures, cf. already Sects. 4.3.2 and 4.4 above.

¹²⁰ Aagaard (2010), p. 229.

under which a particular field is understood.’¹²¹ Coherence is ‘the strength, simplicity, and predominance of the field’s patterns’.¹²²

This chapter illustrated how SD can serve as the ‘cohering pattern’ of TCL. In accordance with the methodological foundations we have cast in Chap. 3 above, coherence here is understood as the ‘flexible’ concept advocated for by Ruger.¹²³ Yet, even from the perspective of more narrow understandings of the concept, which i.a. require ‘linear historical development’ and ‘a high level of institutional specification and centralization’,¹²⁴ TCL can claim to exhibit at least *indications* of coherence in view of its historical normative bases of i.a. the Havana Charter and International Commodity Agreements (ICAs), as well as the institutionalisation which ensued in the form of international commodity organisations (ICOs), the Common Fund for Commodities (CFC) and—to a certain degree—UNCTAD overall. Thus, our understanding—in line with Ruger—is more ‘flexible’ especially with regard to the remaining two requirements of ‘internal logic’ and ‘essential legal form’, which ultimately corresponds with the concepts of ‘governance’ and ‘transnationalism’, as introduced and discussed in Chaps. 2 and 3 respectively that this treatise is based on.

SD constitutes the object and purpose of this field of law. It draws the various objectives and norm subsets together, constitutes the paradigm under which the field of TCL is understood,¹²⁵ and therefore opens avenues towards cohering the legal framework of GCG. By fully integrating benchmarks from the vast body of TCL into the terms, which define the sustainable use principle, the entire field gains simplicity, and therefore regulatory vigour. Involving the governance triangle in this process may serve to enhance its acceptance as a legal concept, thus further reinforcing the field’s coherence and effectiveness.

5.2 ICAs as Instruments Specifying Sustainable Commodity Use

Beyond this challenge of coherence, our analysis of the current TCL framework has revealed several parameters, which limit its effectiveness. We have seen that it consists of too many indirect, soft, and private norms, many of which lack sufficient specificity, particularly where they address states. Therefore, what would remedy

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¹²¹Tai (2015), p. 120. She moreover points out that ‘[c]oherence [...] comes with a number of benefits’, which include ‘ease of learning, practicing, and theorising within that defined field. They also include more pragmatic concerns, such as more legitimacy within the legal academy, where coherence is regarded as important for academic legitimacy’, Tai (2015), p. 120.

¹²²Aagaard (2010), p. 231; cf. Sect. 3.1 above.

¹²³Ruger (2008), p. 648, cf. Sect. 3.1 above.

¹²⁴Ruger (2008), p. 629, cf. Sect. 3.1 above.

¹²⁵Cf. Tai (2015), p. 120.

these deficits would be instruments codifying direct, hard, specific, state-oriented law, which balances all five commodity interest comprehensively. Instruments that appear suitable in this respect are international agreements regulating commodity activity—International Commodity Agreements. They can foster the effectiveness of TCL where they codify balancing norms—and thus spell out more precisely what sustainable use means.

Subsequently, we shall first analyse current types of ICAs, whereby we will focus particularly on whether they provide balancing norms, or at least guidance that addresses some of the commodity policy trade-offs (Sect. 5.2.1). Second, we will, based on these findings, reflect on how ICAs *de lege ferenda* could be designed to foster the effectiveness of TCL (Sect. 5.2.2).

5.2.1 Analysis of Current ICAs

This section assesses the relevance of current International Commodity Agreements (ICAs) for GCG.¹²⁶ The chapter first outlines and categorises the types of ICAs, which currently feature in the international legal order (Sect. 5.2.1.1). Second, it analyses ICAs *sensu originali* and a selection of central ICAs *sensu stricto*, particularly their object and purpose, substantive provisions and dispute settlement mechanisms (Sect. 5.2.1.2). Third, some reflections on the role of ICAs *sensu lato* in GCG will be shared (Sect. 5.2.1.3). Lastly, an interim conclusion will be drawn regarding the current relevance of the different types of ICAs in GCG (Sect. 5.2.1.4).

5.2.1.1 Types of ICAs

We shall distinguish between ICAs *sensu originali* (Sect. 5.2.1.1.1), *sensu stricto* (Sect. 5.2.1.1.2) and *sensu lato* (Sect. 5.2.1.1.3).

5.2.1.1.1 ICAs *sensu originali*

The category of ICAs *sensu originali* stands for those commodity agreements that were paradigmatic for the market-interventionist approach of the 1970s and 80s.¹²⁷ ICAs ‘in the original sense’ were instruments seeking to rebalance the economic

¹²⁶This chapter is exclusively confined to ‘international agreements’ in the sense of ‘treaties’ according to Article 2(1)(a) VCLT, which are concluded between states, can dispose of any possible designation and be of bi-, pluri-, or multilateral nature. Private standards, working groups and other initiatives, which are not of inter-state or treaty character, are thus being excluded here. See however Sect. 5.2.2 on how ICAs *de lege ferenda* and these non-inter-state and/or non-treaty instruments may intertwine in the future.

¹²⁷Cf. Sect. 2.2.3 above on the NIEO-UNCTAD phase of global commodity policy.

equilibrium between consumers and producers by maintaining stable commodity prices. The Havana Charter explicitly addressed ICAs (using the term ‘Inter-Governmental Commodity Agreements’) and established a series of principles applicable to them, but refrained from giving an abstract definition.¹²⁸ The term ‘ICA’ has become most commonly known in connection with the agreements negotiated under the auspices of UNCTAD as an element of establishing the New International Economic Order (NIEO). Article 1(2) of the Agreement Establishing the Common Fund for Commodities (CFC), which builds on Articles 60(d) and 63(b) Havana Charter,¹²⁹ provides the authoritative definition of this type of ICAs. Accordingly, ICAs *sensu originali* were defined as

[a]ny intergovernmental agreement or arrangement to promote international cooperation in a commodity, the parties to which include producers and consumers covering the bulk of world trade in the commodity concerned.¹³⁰

The definition’s qualification ‘covering the bulk of world trade in the commodity concerned’ demonstrates that UNCTAD’s approach was explicitly targeting multi-lateral commodity agreements (since bilateral relations will generally not cover the ‘bulk of world trade’ in a specific commodity). Likewise excluded are development, free trade, partnership, environmental, and diplomatic agreements, which are generally not intended ‘to promote international cooperation in a commodity’. Also, these agreements will ordinarily not cover the bulk of world trade in a specific commodity.

‘Original’ ICAs therefore constitute commodity-specific instruments and thus belong to the category of ‘direct TCL’ delineated above. Their scope, legal nature and effectiveness were subject to several comprehensive studies within international legal scholarship between the 1960s and mid-1990s.¹³¹

However, as has been outlined above, all of the market-interventionist devices of these ICAs had been abandoned by the mid-1990s in view of the emerging doctrine of liberalised markets, which has been prevailing since. While some agreements were vacated entirely,¹³² many others have been transformed into cooperation

¹²⁸Cf. Articles 55–70 HC.

¹²⁹Desta (2010), paras. 17–19.

¹³⁰Article 1(2) CFC Agreement, UN treaty collection (2019) Agreement establishing the CFC, https://treaties.un.org/doc/Treaties/1989/06/19890619%2004-23%20AM/Ch_XIX_21p.pdf (last accessed 14 May 2021); Chimni (1987), p. 33.

¹³¹The most pertinent treatises were elaborated by Johnston (1976); Khan (1982); Chimni (1987); Weberpals (1989); and Pelikahn (1990), summary of the monograph available at Pelikahn (1988). Other works, in chronological order, are the ones provided by Wenzel (1961); Greve (1961); Knot (1964); Bohrisch (1965); Thees (1967); Krappel (1975); Rudolph (1983); Habermayer (1984); Hoffmeyer et al. (1988); Michaelowa and Naini (1994); Raffaelli (1995); see also the comprehensive study—the only one of its kind thus far—on international commodity law in general by Jaenicke et al. (1977–1986), summarised by Mertens and Spindler (1989).

¹³²Historical treaties that have been abandoned e.g. include the International Wheat Agreement (replaced by the International Grains Agreement in 1995); the International Natural Rubber Agreement (terminated on 30 September 1999, effective 13 October 1999, Resolution

agreements, such as the International Coffee Agreement, the International Tropical Timber Agreement, or the International Cocoa Agreement. A full list of these transformed ICAs *sensu originali* as well as an analysis of their objectives and substantive provisions will be provided in Sect. 5.2.1.2.2 below.

5.2.1.1.2 ICAs *sensu stricto*

The second category of ICAs consists of those agreements that do not constitute ICAs in the original sense, i.e. do not fit the definition of Article 1(2) of the CFC Agreement, yet still are explicitly directed at the regulation of commodity activities. *Explicitness* here implies that these agreements exhibit an express, ‘conscious consideration for the specificities of commodity activities.’¹³³ Like ICAs *sensu originali*, these ICAs *sensu stricto* therefore form part of direct TCL. This is what distinguishes them from indirect TCL and ICAs *sensu lato*. ICAs *sensu stricto* shall be defined as

international agreements, which, in whole or in part, are explicitly directed at the regulation of commodity activity or particular aspects of the latter.

Thus, examples of ICAs *sensu stricto* include diverse forms of treaties, such as the OPEC statute, the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), Bilateral Commodity Agreements (BCAs), including German commodity partnerships, as well as the ASEAN Agreement on the Conservation of Nature and Natural Resources and ILO Convention 176 concerning Safety and Health in Mines. As reflected for instance in the case of Part XI of UNCLOS, agreements, which are not themselves commodity-directed, may nevertheless contain entire chapters dedicated to commodity activities.¹³⁴

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212 (XXXXI) International Rubber Council); in reaction to the termination of the agreement, Malaysia, Indonesia and Thailand initiated the International Rubber Consortium in 2001, <https://ircorubber.com/about-us/> (last accessed 14 May 2021); the International Tin Agreement (terminated on 31 June 1989); the International Agreement on Jute and Jute Products (terminated on 11 April 2000); the International Bovine Meat Agreement (terminated on 30 September 1997, effective 31 December 1997); cf. Desta (2010), paras. 26–27; Gilbert (2011), pp. 21–22; on the geopolitical backdrop see already Sect. 1.2.3 above. On erstwhile commodity cartels—which do *not* constitute ICAs *sensu originali*—, cf. e.g. the 1935 World Copper Agreement or the 1972 International Uranium Cartel, Desta (2010), para. 15.

¹³³ Aagaard (2010), p. 262 as well as already Chap. 4 above.

¹³⁴ Given that these norms constitute a commodity-directed normative subsystem, regardless of their inclusion in an agreement of broader or a different overall scope, the UNCLOS for our purposes shall be studied as part of our analysis of ICA *sensu stricto*. Those international agreements, which—from the perspective of GCG—operate in even more remote spheres, could therefore be described as ICAs *sensu latissimo*. These agreements may have some sort of impact on commodity activities, but one that will only be discernible when one closely analyses the corresponding normative ‘causal chain’. Evidently, there is little to gain from an analysis of these ‘remote’ legal instruments for the purposes of our investigation, which seeks to identify those international

5.2.1.1.3 ICAs *sensu lato*

The third and last category of ICAs consists of those agreements, which significantly impact commodity activities, yet without explicitly pursuing a commodity-directed object and purpose or exhibiting a ‘conscious consideration’ of commodity activities. These ICAs *sensu lato* therefore fall under the category of indirect TCL. In the broadest sense, this type of ICA could be defined as

any international agreement that exhibits a substantial regulatory impact on commodity activity, yet without having been explicitly directed at or designed for that purpose.

Consequently, ICAs *sensu lato* can stem from any original background and be aimed at any purpose that factually corresponds to GCG. As such, for instance Free Trade Agreements (FTAs), Preferential Trade Agreements (PTAs), the General Agreement on Tariffs and Trade (GATT), the International Bill of Human Rights, as well as international environmental agreements can constitute ICAs *sensu lato*. This category will thus largely coincide with the (self-imposed) qualifications of a state’s permanent sovereignty over natural resources (PSNR) under international law that have been briefly touched upon in Chap. 3 above.

5.2.1.2 Analysis of ICAs *sensu originali* and *sensu stricto*

This section aims to provide an account of the central normative contents of current ICAs. For that purpose, it analyses objectives, substantive provisions and institutional arrangements of both ICAs *sensu originali* (Sect. 5.2.1.2.2) and *sensu stricto* (Sect. 5.2.1.2.3). In order to better understand the role and status of ICAs *sensu originali*, we shall first, however, turn to so-called International Commodity Bodies (ICBs) as a category, which somewhat ‘frames’ ICAs *sensu originali* and elucidates their current role and functioning (Sect. 5.2.1.2.1).

5.2.1.2.1 International Commodity Bodies

ICBs are organisations or institutions, which have been recognised by the Common Fund for Commodities (CFC) in accordance with Schedule C ‘Eligibility Criteria for ICBs’ of the CFC Agreement.¹³⁵ Accordingly, ICBs are intergovernmental bodies that all member states of the UN, its specialised agencies or the International Atomic Energy Agency (IAEA) can join. Regarding its objectives and activities, the CFC

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agreements that actually have a bearing on commodity activities today. This category thus rather serves the purpose of theoretical completeness than to contribute substantially to the knowledge we are seeking to gain from this analysis. It appears to be appropriate to limit an analysis of ICAs—as well as a conceptualisation of TCL—to the boundaries, which are represented by ICAs *sensu lato*. Beyond these boundaries, assuming a ‘commodity perspective’ on the normative landscape of, for instance, the law of consular and diplomatic relations, appears more and more absurd.

¹³⁵ UNCTAD (2016), p. 1.

Agreement sets forth that '[i]t shall be concerned on a continuing basis with trade, production and consumption of the commodity in question.' Moreover, '[i]ts membership shall comprise producers and consumers which shall represent an adequate share of exports and of imports of the commodity concerned.' Also, it needs to dispose of 'an effective decision making process that reflects the interests of its participants.' ICBs are eligible for projects financed by the CFC.¹³⁶

Given that they meet all criteria under Schedule C of the CFC Agreement, UNCTAD has designated all international commodity organisations (ICOs) corresponding with an International Commodity Agreement (ICA) as ICBs.¹³⁷ ICAs *sensu originali* thus need to be perceived in the context of other arrangements, which likewise qualify as ICBs. Apart from ICOs, several so-called *International Study Groups* (ISGs) qualify as ICBs and perform similar duties. These ISGs include the International Rubber Study Group (established 1934); the International Lead and Zinc Study Group (ILZSG; established 1959); the International Nickel Study Group (INSG; established 1990); the International Copper Study Group (ICSG; established 1992); the International Network for Bamboo and Rattan (INBAR; established in 1997); as well as the International Jute Study Group (IJSG; established in 2002).¹³⁸

Similar to the international commodity organisations (ICOs), the international study groups are intergovernmental organisations, which are being governed and financed primarily by states. They usually function based on an intergovernmental agreement, typically either termed 'constitution' or 'terms of reference' and accompanied by some sort of procedural rules.¹³⁹ The various study groups tend to be quite similar regarding their organisational design and objectives.¹⁴⁰ Their main goals generally lie in ensuring transparency of the respective sector and correspondingly providing accurate production, trade, and consumption data, e.g. through monthly

¹³⁶ UNCTAD (2016), p. 1. In these projects, study groups typically 'prioritize[], formulate[] and/or supervise[] CFC-financed projects', ICSG (2019) Current work and activities, <https://www.icsg.org/index.php/who-we-are/current-work-and-activities> (last accessed 14 May 2021). While the CFC agreement provides the definition of ICAs *sensu originali*, it does not fall under this category itself. Instead, it constitutes an ICA *sensu stricto*, yet without significant balancing norms.

¹³⁷ UNCTAD (2016), p. 1. This appears to include the International Cotton Advisory Committee (ICAC), UNCTAD (2016), p. 2; UNCTAD (2019) ICBs, <https://unctad.org/en/Pages/SUC/Commodities/International-Commodity-Bodies.aspx> (last accessed 14 May 2021).

¹³⁸ IJSG (2003) About, <http://www.jute.org/index1.htm>; cf. UNCTAD (2016), p. 1; UNCTAD (2019) ICBs, <https://unctad.org/en/Pages/SUC/Commodities/International-Commodity-Bodies.aspx> (both last accessed 14 May 2021); cf. Espa and Oehl (2018), p. 8, n 34.

¹³⁹ Not all appear to have been published. IRSG (2011) Constitution, <http://www.rubberstudy.com/documents/IRSG%20Constitution%20-Effective%201%20July%202011.pdf>; IRSG (2011) Rules of procedure, <http://www.rubberstudy.com/documents/IRSG%20ROP%20-Effective%201%20July%202011%20Rvsd%201%20Jul%2012.pdf>; INSG (2015) Terms of reference, http://insg.org/wp-content/uploads/2019/01/doc_INSG_TERMS_OF_REFERENCE_Jan2015.pdf; INSG (2015) Rules of procedure, http://insg.org/wp-content/uploads/2019/01/doc_INSG_RULES_OF_PROCEDURE_May2015.pdf (all last accessed 14 May 2021).

¹⁴⁰ The INSG and the ICSG for instance have been explicitly modelled after the ILZSG (2019) Who we are, <http://www.ilzsg.org/static/howwebegan.aspx?from=1> (last accessed 14 May 2021).

newsletters, annual reports and market forecasts.¹⁴¹ Moreover, they usually implement a forum for exchange, often on an annual basis, such as the World Rubber Summit. While study groups are typically being controlled through member state delegates and respective standing or executive committees, they also dispose of so-called industry advisory panels and allow NGOs or other international organisations to participate in their meetings as observers. This opens their exchange fora for multi-stakeholder debates. Consequently, the respective study group is frequently described as the premier forum for sector-specific exchange.¹⁴²

While study groups are typically comparatively small organisations, the most recent study group, INBAR, not only disposes of a Secretariat with over 35 employees, but also seeks to ‘promote[] environmentally sustainable development using bamboo and rattan.’¹⁴³ Thus going beyond the objectives of the other study groups, INBAR aligns its activities with the SDGs¹⁴⁴ and according to its own ‘Strategic Plan 2015–2030’ engages in i.a. lobbying, advocacy, knowledge sharing, and country-level capacity building.¹⁴⁵

Further entities that have been recognised as ICBs are various institutions at FAO.¹⁴⁶ This includes so-called *FAO Intergovernmental Groups* (IGGs) on individual agricultural commodities, including Bananas and Tropical Fruits;¹⁴⁷ Citrus Fruit;¹⁴⁸ Grains;¹⁴⁹ Hard Fibres;¹⁵⁰ Meat and Dairy Products;¹⁵¹ Oilseeds, Oils and

¹⁴¹ See already Espa and Oehl (2018), p. 8, n 34.

¹⁴² See e.g. IRSG (2019) Mission statement, <http://www.rubberstudy.com/mission-statement.aspx> (last accessed 14 May 2021): ‘The IRSG shall be THE FORUM for the discussion of matters affecting the supply and demand for natural as well as synthetic rubber.’

¹⁴³ INBAR (2019) Promoting the use of bamboo and rattan for SD, <https://www.inbar.int/about-inbar/#2> (last accessed 14 May 2021).

¹⁴⁴ Notably SDGs #1, #7, #11, #12, #13 and #15, INBAR (2019) Mission & strategy, <https://www.inbar.int/about-inbar/mission-strategy/#1> (last accessed 14 May 2021).

¹⁴⁵ INBAR (2019) Mission & strategy, <https://www.inbar.int/about-inbar/mission-strategy/#1> (last accessed 14 May 2021).

¹⁴⁶ UNCTAD (2019) ICBs, <https://unctad.org/en/Pages/SUC/Commodities/International-Commodity-Bodies.aspx> (last accessed 14 May 2021).

¹⁴⁷ ‘Established by the Committee on Commodity Problems (CCP) at its Sixty-second Session (1999). It replaced the former Intergovernmental Group on Bananas’, FAO (2019) Governing and statutory bodies, http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/162/?no_cache=1 (last accessed 14 May 2021); FAO (2019) IGG on bananas and tropical fruits, <http://www.fao.org/economic/est/est-commodities/bananas/meetings-on-bananas-and-tropical-fruits/en/> (last accessed 14 May 2021).

¹⁴⁸ ‘Established by the Committee on Commodity Problems (CCP) at its Thirty-second Session (1959)’, FAO (2019) Governing and statutory bodies, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/140/> (last accessed 14 May 2021); FAO (2019) IGG on citrus fruit, <http://www.fao.org/economic/est/est-commodities/citrus-fruit/citrus-fruit-meetings/en/> (last accessed 14 May 2021).

¹⁴⁹ FAO (2019) IGG on grains, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/135/> (last accessed 14 May 2021).

¹⁵⁰ FAO (2019) IGG on hard fibres, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/173/> (last accessed 14 May 2021).

¹⁵¹ FAO (2019) IGG on meat and dairy products, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/210/> (last accessed 14 May 2021).

Fats;¹⁵² Rice;¹⁵³ and Tea.¹⁵⁴ These IGGs were established as subsidiary entities to the FAO Committee on Commodity Problems and are focussing on trade issues regarding individual commodities.¹⁵⁵ While their coverage is constantly shifting depending on current challenges in the respective sector at hand, they are—quite similarly to the ISGs—seeking to provide forums

for intergovernmental consultation and exchange on trends in production, consumption, trade and prices of key commodities, including regular appraisal of the global market situation and short-term outlook. The IGGs consider changes in policies and examine their effects relating to the current and prospective market situation.¹⁵⁶

In addition, ‘technical side events’ are intended to engage other stakeholders in the conversation on the individual sectors at hand.¹⁵⁷ Further recognised ICBs include the FAO Sub-Group on Hides and Skins, which operates as a subsidiary of the IGG on Meat and Dairy Products, as well as the FAO Intergovernmental Sub-Committee on Fish Trade.¹⁵⁸ The latter constitutes a sub-entity of the FAO Committee on Fisheries (COFI).¹⁵⁹

5.2.1.2.2 ICAs *sensu originali*

Given that we aim to sketch the normative contents of International Commodity Agreements (ICAs) as they are applicable to commodity activities *today*, our analysis is focused on ICAs that are still in existence. With regard to ICAs *sensu originali*, our evaluation is thus exclusively concerned with those *transformed*, post-market-interventionist ICAs that have not been eliminated entirely.¹⁶⁰ ICAs that

¹⁵²FAO (2019) IGG on oilseeds, oils and fats, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/158/> (last accessed 14 May 2021).

¹⁵³FAO (2019) IGG on rice, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/127/> (last accessed 14 May 2021).

¹⁵⁴FAO (2019) IGG on tea, <http://www.fao.org/unfao/govbodies/gsb-subject-matter/statutory-bodies-details/en/c/205/> (last accessed 14 May 2021); FAO (2019) IGGs, <http://www.fao.org/ccp/igg/en/> (last accessed 14 May 2021).

¹⁵⁵FAO (2019) IGGs, <http://www.fao.org/ccp/igg/en/> (last accessed 14 May 2021).

¹⁵⁶FAO (2019) IGGs, <http://www.fao.org/ccp/igg/en/> (last accessed 14 May 2021).

¹⁵⁷FAO (2019) IGGs, <http://www.fao.org/ccp/igg/en/> (last accessed 14 May 2021).

¹⁵⁸UNCTAD (2019) ICBs, <https://unctad.org/en/Pages/SUC/Commodities/International-Commodity-Bodies.aspx> (last accessed 14 May 2021).

¹⁵⁹UNCTAD (2019) ICBs, <https://unctad.org/en/Pages/SUC/Commodities/International-Commodity-Bodies.aspx>; ‘Established by the Committee on Fisheries (COFI) at its Sixteenth Session (1985) in accordance with Rule XXX-10 of the General Rules of the Organization and Rule VII of the COFI Rules of Procedure’, FAO (2019) Sub-committee on fish trade, <http://www.fao.org/fishery/about/cofi/trade/en> (both last accessed 14 May 2021).

¹⁶⁰On historical ICAs—especially *sensu originali*—that have been vacated or terminated, see Sect. 5.2.1.1.1 above. See also for instance Article 22 GTC, which still—perhaps somewhat hopeful—refers to potentially adopting a new agreement that includes ‘economic provisions’ in the future.

qualify as such, include the International Grains Agreement, more precisely the Grains Trade Convention (GTC);¹⁶¹ the International Sugar Agreement (ISA);¹⁶² the International Tropical Timber Agreement (ITTA);¹⁶³ the International Cocoa Agreement (ICoCA);¹⁶⁴ the International Coffee Agreement (ICoFA),¹⁶⁵ as well as the International Agreement on Olive Oil and Table Olives (IAO).¹⁶⁶ These ICAs generally correspond with respective international commodity organisations (ICOs) administering the individual agreement, such as the International Olive Council (IOC), International Cocoa Organisation (ICCO), or the International Coffee Organisation (ICoFO).¹⁶⁷

In the following, we will analyse the provisions of these ICAs *sensu originali* in more detail. For that purpose, we are comparing and clustering their respective objectives (Sect. 5.2.1.2.2.1), substantive obligations (Sect. 5.2.1.2.2.2), institutional arrangements (Sect. 5.2.1.2.2.3) and dispute settlement mechanisms (Sect. 5.2.1.2.2.4).

5.2.1.2.2.1 Objectives

Arguably the central objective of ICAs *sensu originali* is fostering *international cooperation* with regard to the respective commodity sectors, as reflected in Articles 1(a) ICoCA, 1(a) ITTA, 1(a) ISA, 1(1) ICoFA, 1(a) GTC, as well as Article 1 (c) ICACRR. In some cases, the mode of international cooperation is further specified so as to include particularly technology and technical cooperation, for instance according to Articles 1(2) IAO and 1(p) ITTA. This may involve training

¹⁶¹ IGC (1995) International Grains Agreement, <http://igc.int/en/downloads/brochure/iga1995.pdf> (last accessed 14 May 2021).

¹⁶² ISO (1992) International Sugar Agreement, <https://www.isosugar.org/membership/isa-agreement> (last accessed 14 May 2021).

¹⁶³ ITTO (2006) International Tropical Timber Agreement, https://www.itto.int/direct/topics/topics_pdf_download/topics_id=3363&no=1&disp=inline (last accessed 14 May 2021); entered into force on 7 December 2011, superseding the 1994 ITTA.

¹⁶⁴ ICCO (2010) International Cocoa Agreement, https://www.icco.org/about-us/international-cocoa-agreements/doc_download/6-english-2010-international-cocoa-agreement.html (last accessed 14 May 2021).

¹⁶⁵ ICO (2007) International Coffee Agreement, <http://www.ico.org/ica2007.asp> (last accessed 14 May 2021).

¹⁶⁶ UN treaty collection (2015) International Agreement on Olive Oil and Table Olives, https://treaties.un.org/doc/Treaties/2015/10/20151009%2010-35%20AM/Ch_XIX-49.pdf (last accessed 14 May 2021).

¹⁶⁷ While the International Cotton Advisory Committee (ICAC) has been founded already in 1939, and designated as a public international organisation by means of the US presidential executive order no. 9911 of 19 December 1947, what is more pertinent for its operation *today*, are its Rules and Regulations (ICACRR), ICAC (2015) ICACRR, https://icac.org/Content/Pdf%20Files910ff222_e6a9_4d39_939b_7cf3663d6b52/E_Rules-Regs_dec2015_FINAL.pdf.pdf (last accessed 14 May 2021), which consequently also feature in our analysis below. In line with UNCTAD, it thus appears fair to speak of *seven* ICAs *sensu originali*, which are in existence today, UNCTAD (2016), p. 2.

programmes to promote technology transfer according to Articles 1(f) ICocA and 1(11) ICofA; capacity building for poverty alleviation as set forth in Articles 1(j) ICocA and 1(12) ICofA; capacity building for sustainable forest management, as provided for in Article 1(d) ITTA; encouraging members to develop food safety standards according to Articles 1(i) ICocA and 1(10) ICofA; as well as generally the objective to promote the quality of the commodity at hand, such as coffee according to Article 1(9) ICofA.

Another central objective of ICAs *sensu originali* lies in providing an intergovernmental discussion *forum*, as reflected in Articles 1(b) ITTA, 1(d) GTC, 1(b) ISA, as well as Article 1(d) ICACRR. In some cases, also exchanges with the private sector or other non-governmental stakeholders are already mentioned explicitly as an objective of the respective agreement, for instance according to Articles 1(b) ICocA and 1(2) ICofA.¹⁶⁸ These fora are not least intended to foster the *exchange of* all sorts of commodity-relevant *information*. In this respect, one can largely distinguish two types of information dissemination. The first type relates to the objective of achieving the greatest possible degree of market transparency between members and thus involves the dissemination of statistics, studies, reports, and other trade-related data, as e.g. provided for according to Articles 1(g) ICocA, 1(h) and 1(l) ITTA, as well as Article 1(6) ICofA. The second type concerns the dissemination and exchange of information, which serves to promote the consumption of the respective commodity or corresponding secondary products, such as scientific information on nutritional, health or other properties of the commodity in question, as set forth in i.a. Articles 1(3) IAO, 1(h) ICocA, 1(d) ISA, and 1(7) ICofA.¹⁶⁹

Exchange of information is one of the instruments raised when it comes to the objective of facilitating, expanding or promoting *trade* in the respective commodity, as provided for in e.g. Articles 1(c) ISA and 1(5) ICofA. For this purpose, also the elimination of trade barriers and discriminatory practices is being aimed for, as reflected e.g. in Article 1(b) GTC. Besides, what constitutes an objective of various ICAs *sensu originali* is specifically strengthening the respective *national commodity sectors*, as for instance set forth in Article 1 ICocA. More precisely, objectives include the seeking of finance for projects strengthening the respective sector, according to Articles 1(c) ICocA as well as 1(8) ICofA; improving marketing and distribution of timber, according to Article 1(k) ITTA; and fostering the availability of information on financial tools for coffee producers, according to Article 1(13) ICofA.

Apart from purely economic objectives, remarkably most ICAs *sensu originali*—and all which have been adopted in the past decade—also explicitly refer to SD. Fostering the SD of the respective sector is the objective of various agreements according to Articles 1, 1(e) ICocA, 1, 1(c) ITTA, 1(3) ICofA, and 1(2) IAO. Some agreements specify this commitment by including the objectives of promoting sustainable utilisation, according to Article 1(m) ITTA; encouraging members to

¹⁶⁸ On the institutional arrangements for involving non-state actors, see Sect. 5.2.1.2.2.3 below.

¹⁶⁹ On respective substantive obligations of members, see Sect. 5.2.1.2.2.2 below.

recognise the role of indigenous and local communities for sustainable forest management, according to Article 1(r) ITTA; encouraging information sharing on certification mechanisms in order to foster sustainable forest management, Article 1 (o) ITTA; or particularly calling upon members to develop a sustainable coffee sector, according to Article 1(3) ICofA. Article 2 of the ICocA even provides a detailed definition of what constitutes a ‘sustainable cocoa economy’. Accordingly, the latter

implies an integrated value chain in which all stakeholders develop and promote appropriate policies to achieve levels of production, processing and consumption that are economically viable, environmentally sound and socially responsible for the benefit of present and future generations, with the aim of improving productivity and profitability in the cocoa value chain for all stakeholders concerned, in particular for the smallholder producers[.]¹⁷⁰

Four out of seven ICAs analysed also refer to objectives that relate to creating a long-term *economic equilibrium* between producers and consumers and ultimately a balanced world trade system with regard to the commodity at hand. Respective provisions include Articles 1(d) ICocA, 1(4) ICofA, 1(i) ITTA, and 1(c) GTC.

5.2.1.2.2 Substantive Obligations

Member states are generally held to *cooperate* and take measures, which foster the objectives of the agreement, as set forth in Articles 28 ISA and 3(1) ICofA. In some agreements, this obligation is formulated in the negative, i.e. as an obligation not to take measures that conflict with the objectives of the agreement, for instance according to Articles 22 IAO, 29(1) ITTA.

Again remarkably, members have widely obliged themselves to *foster the SD* of the respective sectors. According to Article 24 IAO, members commit to promote the ‘development of sustainable olive growing’, which relates ‘to the improvement of practices at all stages of olive and olive oil production’. The ICocA even dedicates a separate chapter to SD. According to Article 42 ICocA, members ‘shall give consideration’ to improving living and working conditions of people engaged in cocoa production in line with ILO standards and internationally recognised principles. Moreover, according to Article 43(1) ICocA,

Members shall make all necessary efforts to accomplish a sustainable cocoa economy, taking into account the sustainable development principles and objectives contained, inter alia, in the Rio Declaration on Environment and Development and in Agenda 21 adopted in Rio de Janeiro in 1992, the United Nations Millennium Declaration adopted in New York in 2000, the Report of the World Summit on Sustainable Development held in Johannesburg in 2002, the 2002 Monterrey Consensus on Financing for Development, and the 2001 Ministerial Declaration on the Doha Development Agenda.

The ICCO shall support members in the pursuit of this objective, and as such provide a forum for ‘permanent dialogue’, encourage cooperation between

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¹⁷⁰ Likewise, the ITTA touches upon the definition of sustainable forest management, for this purposes however refers to the ITTO’s internal guidelines, Article 2(2) ITTA.

members, adopt and periodically review work programmes and projects fostering a sustainable cocoa economy, and seek corresponding finance from multi—and bilateral donors, according to Article 43(2)–(6) ICocA.

Also, according to Article 36 ICofA, '[m]embers shall give due consideration to sustainable management of coffee resources and processing', again in line with the principles contained in Agenda 21 and formulated at the World Summit on Sustainable Development (WSSD) in 2002. Individual 'pillars' of SD are furthermore being addressed i.a. in Articles 29 ISA and 37 ICofA, according to which members shall ensure that fair labour standards are being maintained in the respective industries and be committed to improving living conditions for farmers and workers. According to Article 30 ISA, '[m]embers shall give due consideration to environmental aspects in all stages of sugar production.' Further specifications of what the duty to foster the SD of the respective sector entails, is generally not included in the agreements.

Furthermore, members commit to *promoting* markets and *consumption* of the respective commodity, according to Articles 37(1) ICocA and 25(1) ICofA. For this purpose, they i.a. oblige themselves to 'remove or reduce substantially domestic obstacles to the expansion of cocoa consumption' according to Article 37(2) ICocA; task the respective ICOs to conduct thorough market analyses along the entire commodity value chain, according to Articles 36(1), 38(1) ICocA; or to improve product quality according to Article 25(1) ICofA. According to Article 25(2) ICofA, such market promotion may furthermore be pursued for example through information campaigns, research, and capacity building.

Perhaps the most far-reaching, 'biting' obligations provided for in ICAs *sensu originali* concern the *collection and dissemination of data*. Not least for the purpose of ensuring the greatest possible degree of market transparency, members are tasking the respective ICOs to act as 'global information centres' for the commodity in question, as reflected in Articles 30(1) ICocA, 32, 33 ISA, 32 ICofA, as well as 1 (b) ICACRR. This entails the duty, for one, to collect relevant data from members and other international organisations, according to Articles 25 IAO, 27 ITTA, 30(2), (3) ICocA. Data to be made available includes information on commodity stocks (Article 31(1) ICocA), supply, demand and market conditions (Article 3(a) GTC), trade statistics and national commodity policies (Article 25 IAO, 3(b) GTC), accurate data on re-exports by importers (Article 3(3) ICofA), geographical indications and their legal protections (Article 20(6) IAO), as well as annual reports on all commercial and special transactions in the commodity at hand (Article 7(1) GTC).¹⁷¹ However, where a member does not comply with this obligation, the agreements typically do not provide the option of introducing specific sanctions beyond the offering of assistance in compiling and transmitting the data as well as asking for an explanation for non-compliance, as set forth e.g. in Article 30(4) ICocA. Yet, Article 32(5) ICofA goes further in this respect, allowing the

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¹⁷¹ Article IX(1) ICACRR in this respect refers to 'available information as may be required to carry out the work program'.

Council to ‘take initiatives likely to lead such a Member to furnish the required information.’

For the other, ICOs are required to publish their own studies, surveys and reports on the respective commodity sectors (Articles 34 ICofA, 32(1) ISA, 7(1)(d) IAO, 1 (b) ICACRR), promote scientific research (Article 35 ICocA) or calculate commodity indicator prices (Articles 33(1) ICocA, 32(3) ICofA).¹⁷² This naturally requires a continuous review of the market (Articles 4(1), 16 GTC, 33(2) ISA, 7(2) (c) ICACRR, 36(3) ICocA, 28 ITTA).

Apart from that, members may be required to remove obstacles from trade and to commit to non-discrimination. According to Article 34 ITTA for instance,

[n]othing in this Agreement authorizes the use of measures to restrict or ban international trade in, and in particular as they concern imports of, and utilization of, timber and timber products.

According to Article 24(1) ICofA, members ‘recognize’ the importance of removing obstacles to trade, yet at the same time recognise their right to regulate, particularly mentioning ‘national health and environmental policy objectives’ and respective commitments under international agreements, including ones addressing trade.

While thus generally ICAs *sensu originali* exhibit quite similar, at times identical, provisions, they also entail some *specific obligations*, which typically correspond with specific traits of the commodity in question. For instance, the IAO especially emphasises its definition of olive products according to Articles 19, 20 IAO as well as annexes B, C. According to Article 20(1) IAO, members ‘undertake to apply’ these designations in international trade. Moreover, according to Article 27(1) ICofA members commit to prohibit the sale of products as coffee that ‘contain less than the equivalent of 95% green coffee as the basic raw material’, a term equally defined by the agreement in its Article 2(1)(a). According to Article 32(1) ICocA, members recognise that it may be generally advisable to renounce substitutes and observe corresponding recommendations of competent international bodies as well as the provisions of the Codex Alimentarius. Article 21 IAO refers to the international guarantee label of the IOC,¹⁷³ the ICofA according to its Articles 3(2), 33 ICofA establishes a scheme for certificates of origin, and Article 21 ITTA establishes the Bali Partnership Fund for sustainable tropical timber management.

Lastly, one should note that *obligations* that relate to the ‘big picture’ of commodity governance, such as the challenge of balancing the global trading system

¹⁷²In addition, ICOs typically publish annual reports on their activities (Articles 18 ICocA, 28(1) ITTA), policy works or action plans (Article 24 ITTA) as well as draft forward work programs (Article 33(4) ISA, IV(3)(a)(3) ICACRR), which usually besides issues of market transparency also touch upon a variety of other topics, see for instance ITTO (2018) Annual report 2017, https://www.itto.int/direct/topics/topics_pdf_download/topics_id=5734&no=1 (last accessed 14 May 2021).

¹⁷³On the standard- and certification-related work of the IOC (2019) Standards, <http://www.internationaloliveoil.org/estaticos/view/222-standards> (last accessed 14 May 2021).

between consumer and producer interests, are only reflected in one provision. According to Article 26 ICofA,

[m]embers recognize the need of developing countries to broaden the base of their economies through, inter alia, industrialization and the export of manufactured products, including the processing of coffee and the export of processed coffee. . .¹⁷⁴

To summarise, ‘big picture’ perspectives on commodity governance still played a considerably greater role in the *objectives* of the various agreements. The fact that the operative section of only one ICA *sensu originali* features a clause addressing this perspective, and notably a clause, which merely ‘recognize[s]’ the needs of developing countries, is quite paradigmatic. It demonstrates how these agreements have largely lost their ‘bite’. While they primarily implement fora for exchange and cooperation and task ICOs as well as member states with compiling and disseminating data, *tools* to effectively address challenges of development, participation, or environmental protection, are missing almost entirely.¹⁷⁵ As such, ICAs *sensu originali* are not suited to remedy imbalances in the current design of the TCL framework.

5.2.1.2.2.3 Institutional Arrangements

When it comes to institutional arrangements, ICAs *sensu originali* exhibit quite a straightforward, typical design for international treaties. All of them explicitly establish or confirm their corresponding international organisations, which are responsible for implementing the provisions of the agreement. They include the International Olive Council (IOC), according to Article 3 IAO; the International Cocoa Organisation (ICCO), according to Article 3(1) ICocA; the International Tropical Timber Organisation (ITTO), according to Article 3(1) ITTA; the International Sugar Organisation (ISugO), according to Article 3(1) ISA; the International Coffee Organisation (ICofO), according to Article 6(1) ICofA; and the International Grains Council (IGC), according to Article 9(1) GTC.¹⁷⁶

¹⁷⁴Article 6(1) GTC merely states that ‘[m]embers undertake to conduct any concessional transactions in grains in such a way as to avoid harmful interference with normal patterns of production and international commercial trade.’

¹⁷⁵This is especially reflected in the ICocA, which in Article 1(d) states that it is one of the objectives of the agreement to ‘strive towards obtaining fair prices leading to equitable economic returns to both producers and consumers in the cocoa value chain, and to contribute to a balanced development of the world cocoa economy in the interest of all Members’, cf. Sect. 5.2.1.2.2.1 above. Yet, in terms of concrete measures it merely refers to an option for the Council, which ‘may also promote studies likely to contribute to greater market transparency and facilitate the development of a balanced and sustainable world cocoa economy’, according to Article 38(2) ICocA. Articles 42 and 43 ICocA, which have been discussed above, do not appear to refer to matters of *global* equity, but to instead be concerned primarily with efforts to implement sustainable cocoa industries on the *national* level. In any case, they do not mention the need for a ‘balanced’ economy or other matters of ISI as referred to in Article 26 ICofA.

¹⁷⁶On the special case of ICAC, see already n 167 above. The organisations are typically being granted legal personality under the individual agreement.

In terms of the organs that are competent to carry out respective tasks and duties of the international commodity organisations (ICOs), one can discern a typical governing structure of an international organisation consisting of an executive council or standing committee, in which representatives from member states decide on strategy and work programme of the organisation; potentially topic-specific sub-committees to the council; as well as a secretariat tasked with daily operations of the ICO.¹⁷⁷ Moreover, all ICOs are explicitly encouraged to enter co-operations with other IOs, particularly UNCTAD or FAO, according to the respective provisions (Articles 12 IAO, 13 ICocA, 15 ITTA, 14 ISA, 15 ICofA, 19 GTC, XII ICACRR). Often, non-member states as well as IOs are invited to join annual meetings as observers, as for instance provided for in Articles 13, 14 ICocA, 15, 16 ITTA, 16(2) ISA.

Additional institutional arrangements can turn the ICOs into full-fledged multi-stakeholder fora,¹⁷⁸ for instance through advisory committees, or consultative boards, which comprise experts especially from the private sector.¹⁷⁹ Some clauses in this respect are very wide, such as Article 14(3) ISA, which allows the ISugO to enter into ‘whatever arrangements’ for effective contacts with sugar producers, traders and manufacturers. Likewise, Article 16 ICofA generally opens the ICofO for co-operations with NGOs and other experts.

5.2.1.2.2.4 *Dispute Settlement*

Five out of the seven agreements analysed contain dispute settlement clauses.¹⁸⁰ These clauses exclusively apply to cases of disputes between members regarding the functioning of the respective ICA. Typically, the council is declared competent to decide disputes. Arguably the most comprehensive dispute settlement clause is provided in Article 26 IAO, which i.a. grants a member that is to be excluded from the agreement the right to recourse to the ICJ, according to Article 26(4) IAO. Article 32 ITTA provides a special provision for remedies in favour of developing countries and LDCs respectively that have been affected adversely by measures taken under the agreement.

¹⁷⁷ See the respective provisions: Article 7 IAO; Article 3(4) ICocA; Articles 3(2), 26 ITTA; Articles 7, 18, 23 ISA; Article 6(3) ICofA; Articles 9, 15–17 GTC; Articles IV, VII ICACRR.

¹⁷⁸ For example, the ICofA explicitly mentions the World Coffee Conference, according to Article 30 ICofA, as well as the Consultative Forum on Coffee Sector Finance, according to Article 31 ICofA, both of which are designed as multi-stakeholder fora.

¹⁷⁹ See for instance Article 44 ICocA as well as the Private Sector Consultative Board, according to Article 29 ICofA. On the advisory board of the IOC, which serves scientific purposes, see IOC (2019) Scientific research, <http://www.internationaloliveoil.org/estaticos/view/239-scientific-research> (last accessed 14 May 2021). According to Article XII ICACRR, non-members, including private organisations may also be invited to meetings of the Advisory Committee.

¹⁸⁰ See Article 26 IAO; Article 50 ICocA; Article 31 ITTA; Article 39 ICofA, which merely states that dispute settlement procedures shall be determined by the Council as well as Article 8 GTC.

5.2.1.2.2.5 *Interim Conclusion*

To conclude, International Commodity Agreements (ICAs) *sensu originali* primarily serve commodity-specific cooperative purposes. While most agreements refer to SD, it is typically defined as a mere objective, yet does not translate into significant commitments or measures in the operative parts of the agreements.¹⁸¹ Also when it comes to the challenge of creating a balance in world commodity trade between consumer and producer interests, particularly with regard to the producers' need to diversify their often commodity-dependent economies, ICAs *sensu originali* do not provide for any specific commitments. Instead, they have been said to be 'similar to existing [International Study Groups]' in many respects.¹⁸²

Moreover, it shall be noted that ICAs *sensu originali* currently only exist for seven commodities—namely cocoa, coffee, cotton, grains, olives and olive oil, sugar, and tropical timber. They are thus not only limited regarding their substantive obligations, but also in their number. Naturally, this status quo needs to be perceived against the backdrop of the 'ideological shift' away from market-interventionist agreements to the current form of agreements in the 1980s and 1990s.¹⁸³ This is not likely to change, as UNCTAD notes:

At present, Governments do not appear to be prepared for discussions concerning the producer-consumer schemes for price stabilization through market intervention in the framework of existing ICAs.¹⁸⁴

However, regardless of these little promising prospects for market-interventionist tools and the limited number of ICAs *sensu originali*, the design especially of the more recent agreements alludes to what constitutes Global Commodity Governance (GCG) today. For one, their multi-stakeholder, open, and transparent fora illustrate the mode of collaboration in this respect. For the other, they demonstrate how distinct and complex governance challenges are already with regard to individual commodity sectors, and how important it is to build and exchange specific expertise between all stakeholders.¹⁸⁵ What is more, however, by definition these ICAs are designed to address both consumer as well as producer interests.¹⁸⁶ While focusing primarily on cooperation and information exchange, they thus still are intended to employ a comprehensive perspective on an entire commodity sector as well as to foster a thorough understanding of its functioning. As such, some agreements at least

¹⁸¹ This is, to some degree, with the exception of Article 43 ICocA.

¹⁸² UNCTAD (2016), p. 2.

¹⁸³ See Sect. 2.2.4 above. However, also during the 'high time' of market-interventionist ICAs, only a comparatively small number of commodities was covered by such instruments; cf. on the slow progress in the conclusion of the treaties in the 1980s, Kirthisingha (1983).

¹⁸⁴ UNCTAD (2016), p. 2.

¹⁸⁵ Cf. UNCTAD (2016), p. 2. In this respect see also the IGF, which is convened in the framework of UNCTAD, cf. already Sect. 4.2.2.2.1.1 above.

¹⁸⁶ Cf. Sect. 5.2.1.1.1 above.

refer to the challenge of diversifying commodity-dependent economies, and building an equitable, sustainable world trade system.

5.2.1.2.3 ICAs *sensu stricto*

With regard to ICAs *sensu stricto*—the object of examination in this section—, this comprehensive perspective constitutes the exception rather than the general rule.

5.2.1.2.3.1 *Agreements with a Narrow Scope*

Most ICAs *sensu stricto* exhibit a rather *narrow* scope in the sense that they are regulating specific, clearly delimited factual scenarios. They are frequently intended to serve a clear-cut, somewhat ‘singular’ purpose—as opposed to other ‘comprehensive’ instruments, which are seeking to reconcile and balance multiple competing interests.¹⁸⁷ Instead of addressing a sector in aggregate, many ICAs *sensu stricto* are regulating a specific element of commodity activity, often exclusively in a particular geographic *location*, or particular uses or effects of a specific commodity. In other words, they typically cover some *aspects* of GCG, but are not intended to remedy its various policy trade-offs.

For instance, the OPEC statute essentially serves to establish a producer cartel for petroleum. According to its Article 2(a), its ‘principle aim’ lies in

the coordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively.

While it also mentions the interest of consuming nations to obtain ‘an efficient, economic and regular supply of petroleum’, according to Article 2(c) OPEC statute, membership is generally only open to countries ‘with a substantial net export of crude petroleum, which ha[ve] fundamentally similar interests to those of [the other members]’, according to Article 7(c) OPEC statute. The OPEC statute does not dispose of mechanisms for balancing competing consumer and producer interests or promoting international cooperation beyond the membership of the cartel and thus exhibits a rather narrow focus.

Another field, which has already been discussed in our account of the substance of TCL above and is dominated by ICAs *sensu stricto*, is the one of *joint development* of commodity deposits, particularly hydrocarbon fields.¹⁸⁸ Corresponding joint development agreements seek to regulate the conditions under which the exploitation of the respective areas takes place. They generally serve the purpose of balancing the interests of two producers, which both dispose of sovereign rights

¹⁸⁷ Often, one will perceive the latter kind of instruments as assuming somewhat more of a ‘big picture’ perspective, whereas the former kind is occupied with one *detail* of the overall picture—which in our case, of course, is GCG.

¹⁸⁸ See Sect. 4.2.2.1.4.1 above.

over the deposit in question. Their function thus lies in establishing an equitable exploitation scheme between those stakeholders, only rarely and if so, peripherally touching upon other interests at stake, such as environmental protection. However, especially more recent ‘model III’-type agreements tend to also address environmental concerns. With increased awareness of the need to balance commodity policy trade-offs, i.e. further proliferation of the objectives and concepts associated with Global Commodity Governance (GCG), the negotiation and conclusion of such agreements will provide opportunities to include commodity-directed standards and therefore develop the TCL framework further.¹⁸⁹

Furthermore, three ICAs *sensu stricto* are providing the regulatory framework for the civil liability of ship owners in the case of oil pollution.¹⁹⁰ According to Article 3(1) of the International Convention on Civil Liability for Oil Pollution Damage (CPC), as a general rule

the owner of a ship at the time of an incident [...] shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.

The rest of the convention is essentially dedicated to the implementation of this general rule, including i.a. respective exceptions. The 1992 Fund Convention supplements the compensation scheme provided by the CPC.¹⁹¹ The International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) according to its Article 1(1) requires members ‘to take all appropriate measures [...] to prepare for and respond to an oil pollution incident.’ The function of these agreements therefore lies in implementing a compensation mechanism for oil spill incidents.

Moreover, the Minamata Convention on Mercury puts in place a legal framework for the protection of ‘human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds’, according to its Article 1, and for that purpose addresses i.a. both mining of mercury ores, such as cinnabar, as well as particularly the usage of mercury in artisanal and small-scale gold mining.¹⁹² According to its Article 3(3), the convention implements an effective ban on all new primary mercury mining projects that had not been commenced prior to the date of entry into force of the agreement. Similarly to ICAs *sensu originali*, it therefore addresses several mercury-related aspects. However, it does not touch upon potentially opposing interests of e.g. consumers and producers, but instead gives effect to measures intended to contain harmful consequences of mercury use, thus balancing environmental protection and economic objectives.

¹⁸⁹ Cf. Ong (2003), p. 141; Sect. 4.2.2.1.4.1 above.

¹⁹⁰ Given that the conventions apply to shipping, one could also argue that they rather constitute indirect TCL, and thus ICAs *sensu lato* rather than *stricto*. However, since they are particularly addressing oil pollution, it appears valid to classify them as ICAs *sensu stricto*.

¹⁹¹ IOPC Funds (2019) 1992 Fund convention, <https://www.iopcfunds.org/about-us/legal-framework/1992-fund-convention-and-supplementary-fund-protocol/> (last accessed 14 May 2021).

¹⁹² Cf. Espaa and Oehl (2018), p. 9.

In addition, ICAs *sensu stricto* regulate working conditions in several commodity sectors. While naturally ILO conventions are concerned with regulating labour, some of them are explicitly directed at commodity activities. This is the case i.a. for ILO Convention 110 concerning Conditions of Employment of Plantation Workers; ILO Convention 176 concerning Safety and Health in Mines; ILO Convention 184 concerning Safety and Health in Agriculture; and ILO Convention 188 concerning Work in the Fishing Sector.¹⁹³ All of the agreements are addressing specific risks associated with the respective activities, including e.g. preventive and protective measures at mine sites; engagement and recruitment of migrant workers in the plantation sector; machinery safety and ergonomics in agriculture; and minimum requirements for work on board fishing vessels.

Further examples of ICAs *sensu stricto* with a ‘narrow’ scope include the presumably great number of bilateral commodity agreements (BCAs).¹⁹⁴ BCAs can for instance regulate trade, investment, or other cooperation parameters between two countries with regard to a specific commodity or sector.¹⁹⁵ One particular kind are the commodity partnership agreements, which Germany concluded with Kazakhstan, Mongolia, and Peru.¹⁹⁶ These agreements are intended to foster

¹⁹³ Also several other ILO Conventions appear to qualify as ICAs *sensu stricto*, e.g. ILO (1965) Convention 124—Medical Examination of Young Persons (Underground Work); ILO (1969) Convention 129—Labour Inspection (Agriculture), ILO (2019) List of instruments, <https://www.ilo.org/dyn/normlex/en/f?p=1000:12030::NO> (last accessed 14 May 2021); yet, it would go beyond the scope of this monograph to address all of them in more detail.

¹⁹⁴ Examples for BCAs include so-called voluntary partnership agreements, which the EU concludes with timber exporting developing countries, EUFLEGT (2019) What is a VPA, <http://www.euflegt.efi.int/what-is-a-vpa>; cf. also e.g. the 2006 Softwood Lumber Agreement between the US and Canada, which expired on 12 October 2015, Global Affairs Canada (2019) Softwood Lumber, https://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/index.aspx?lang=eng. On the numerous agreements that China has concluded with particularly resource-rich African countries Shi (2016), pp. 271–273; cf. e.g. the 2008 ‘Convention de Collaboration’, which was concluded between China and the DRC in implementation of the ‘Sicomines’ deal, Landry (2018), p. 10; full text available at <http://congomin.es.org/system/attachments/assets/000/000/276/original/B5bis-Sicomines-Convention-Incl-Anx-2008-Consortium-Entreprises-Chinoises-RDC.pdf?1430928308> (all last accessed 14 May 2021).

¹⁹⁵ Also the joint development agreements mentioned above qualify as such, provided they are being concluded between two state parties.

¹⁹⁶ BMWi (2012) Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Kasachstan über Partnerschaft im Rohstoff-, Industrie- und Technologiebereich https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischenbrd-und-kasachstan-partnerschaft-rohstoff-industrie-und-technologiebereich.pdf?__blob=publicationFile&v=1; BMWi (2011) Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Mongolei über Zusammenarbeit im Rohstoff-, Industrie- und Technologiebereich, https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischen-brd-und-mongolei-zusammenarbeit-rohstoff-industrie-technologie.pdf?__blob=publicationFile&v=1; BMWi (2014) Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Peru über Zusammenarbeit im Rohstoff-, Industrie- und Technologiebereich, <https://www.bmwi.de/Redaktion/DE/Downloads/A/abkommen-zwischen-brd-und-peru-partnerschaft-rohstoff-industrie-und-technologiebereich>.

technical cooperation between Germany and its partners and to particularly facilitate investments and the overall conduct of commodity projects, which involve German businesses.¹⁹⁷ While applicable to commodities in general, these German commodity partnership agreements were concluded not least under the impression of Chinese export restrictions on i.a. Rare Earths.¹⁹⁸ Similarly to ICAs *sensu originali*, these agreements are emphasising both consumer interests, i.a. supply security, as well as producer interests, i.a. diversifying the national economy; yet they do entail very broad and ‘soft’ substantive obligations.¹⁹⁹

5.2.1.2.3.2 *Broader Scope*

Naturally, the degree to which ICAs *sensu stricto* exhibit a ‘narrow scope’ in the sense delineated above differs.

For example, the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) aims to ensure that mineral resource activities are conducted in a manner that does not significantly harm the environment, according to Article 4(2) CRAMRA.²⁰⁰ In that interest, and ‘to ensure that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord’, according to Article 2(1) CRAMRA, the convention implements a procedure for adopting so-called Management Schemes, which are applicable to respective ‘blocks’ in which mineral commodity deposits are detected.²⁰¹ With its focus on especially environmental protection, CRAMRA thus exhibits a focus, which is broader than e.g. the one of the OPEC statute or typical joint development agreements. Yet, it still exhibits a narrow scope in the sense that it provides a tailor-made exploitation scheme for specific commodities in a delimited geographic location.²⁰²

Similarly to CRAMRA, the United Nations Convention on the Law of the Sea (UNCLOS) ‘provides a specific regime for the sourcing of mineral commodities that

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[pdf?__blob=publicationFile&v=6](#). Additional arrangements, i.a. based on memoranda of understanding and mail correspondence, exist with Chile, Australia and Canada, BMWi (2019) Rohstoffe und Ressourcen, <https://www.bmwi.de/Redaktion/DE/Dossier/rohstoffe-und-ressourcen.html> (all last accessed 14 May 2021).

¹⁹⁷ Nowrot (2013), p. 11.

¹⁹⁸ See Nowrot (2013), pp. 7–8.

¹⁹⁹ Preamble, Germany-Kazakhstan commodity partnership agreement; Nowrot (2013), p. 22. Rüttinger and Scholl (2017), p. 31 suggest that the German commodity partnership agreements could serve as an effective basis to actively promote environmental and social standards in the mining sector.

²⁰⁰ See already Espá and Oehl (2018), p. 8.

²⁰¹ Cf. Espá and Oehl (2018), p. 8. Moreover, see CRAMRA’s institutional structure as set forth in Articles 18–36, as well as its norms covering the exploration regime, Articles 39–52.

²⁰² Yet, since none of the 19 states that signed the CRAMRA eventually ratified the agreement, it has never entered into force. Instead, the states concerned adopted the Protocol on Environmental Protection to the Antarctic Treaty in 1998, Espá and Oehl (2018), p. 8, n 30.

occur on the seabed.²⁰³ Yet, as reflected in Articles 150 UNCLOS, it differs from CRAMRA in that requires that all activities

be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries. . .

Subsequently, it overtly seeks ‘to strike a balance between onshore producers and consumers of the minerals sourced in the Area.’²⁰⁴ While serving the clear-cut purpose of regulating commodity exploitation in the Area, Part XI thus explicitly addresses potential policy trade-offs not only between different producers, but also between producers and consumers. This perspective resembles the comprehensive one of ICAs *sensu originali*. However, PART XI of the UNCLOS is of rather historical significance for legal analysis today since it has been replaced by Section 6 of the corresponding Implementation Agreement.²⁰⁵ The latter bases commodity exploitation in the Area on principles of the General Agreement on Tariffs and Trade (GATT) and other WTO disciplines,²⁰⁶ thus subjecting it mostly to rules stemming from indirect TCL.

5.2.1.2.3.3 *Comprehensive Scope*

However, some ICAs *sensu stricto* also exhibit a more comprehensive approach to tackling commodity governance. Where they do, they often provide guidance on how to balance at least some of the five major interests associated with commodity activity.²⁰⁷

The perhaps most elaborate guidance on what constitutes sustainable use to date has emerged in the context of biodiversity conservation with regard to genetic resources. The Convention on Biological Diversity (CBD) is intended to foster the sustainable use of such resources, as well as ‘the fair and equitable sharing of the benefits out of [their] utilization’, according to Article 1 CBD. In this connection, the CBD seeks to strike a balance between developing and industrialised states by

²⁰³ Espa and Oehl (2018), p. 8.

²⁰⁴ Espa and Oehl (2018), who also point to Article 151(1)(a) UNCLOS in this context, which reads: ‘Without prejudice to the objectives set forth in article 150 and for the purpose of implementing subparagraph (h) of that article, the Authority, acting through existing forums or such new arrangements or agreements as may be appropriate, in which all interested parties, including both producers and consumers, participate, shall take measures necessary to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, at prices remunerative to producers and fair to consumers. All States Parties shall cooperate to this end.’

²⁰⁵ UN treaty collection (1982) Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, https://treaties.un.org/doc/Treaties/1994/11/19941116%2006-01%20AM/Ch_XXI_06a_p.pdf (last accessed 14 May 2021).

²⁰⁶ Espa and Oehl (2018), p. 8; Desta (2010), para. 39.

²⁰⁷ On the latter, see Sect. 2.1.3 above.

addressing issues of technology transfer; right to access; national conservation; cooperation; and financing.²⁰⁸

More detailed guidance on how to enhance sustainable use of biodiversity is provided by the 2004 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (AAPG). According to its *14 practical principles*, the AAPG i.a. guide states to maintain and link supportive laws, institutions, and policies at all governance levels (principle #1);²⁰⁹ practice adaptive management based on science as well as traditional and local knowledge (principle #4(a)),²¹⁰ and that, as a general rule,

costs of management and conservation of biological diversity should be internalized within the area of management and reflected in the distribution of the benefits from the use (principle #13).²¹¹

Specific guidance on how benefit sharing shall be implemented, is provided by the Bonn Guidelines as well as the Nagoya Protocol.²¹² Regarding plant genetic resources for food and agriculture, the FAO has i.a. put in place a multilateral system of access and benefit sharing, according to Article 10 of its International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).²¹³ According to Article 12.4 ITPGR, ‘facilitated access’ to resources shall be provided on the basis of a ‘standard material transfer agreement’. According to Article 13.2 ITPGR, benefits from the use of plant genetic resources shall be shared through the ‘mechanisms’ of information exchange, technology transfer, capacity building, and the ‘sharing of benefits arising from commercialization’. The latter generally shall be paid to a respective ‘Trust Account’, according to Articles 13.2(d)(ii), 19.3(f) ITPGR.

Moreover, particularly two regional conventions aimed at the conservation of nature and natural resources are touching upon rules on how to remedy potential use conflicts and corresponding commodity policy trade-offs.

While the ASEAN Agreement on the Conservation of Nature and Natural Resources (ACNR) naturally focuses on conservation, it nevertheless exhibits a comprehensive scope as well as a ‘balanced’ design in view of the broad scope of measures it addresses.²¹⁴ According to its Article 1(1), members shall i.a.

²⁰⁸ Cf. Beyerlin and Grote Stoutenberg (2012), para. 45.

²⁰⁹ Secretariat of the CBD (2004), p. 8.

²¹⁰ Secretariat of the CBD (2004), p. 11.

²¹¹ Secretariat of the CBD (2004), p. 20.

²¹² Secretariat of the CBD (2002); Secretariat of the CBD (2011); on the current status of the benefit-sharing principle, cf. Cabrera Medaglia and Perron-Welch (2018a, b).

²¹³ FAO (2009).

²¹⁴ ASEAN (1985) ACNR, <http://environment.asean.org/agreement-on-the-conservation-of-nature-and-natural-resources/> (last accessed 14 May 2021). The ACNR i.a. sets forth specific requirements for endangered and endemic species (Article 5 ACNR); vegetation cover and forest resources (Article 6 ACNR); soil (Article 7 ACNR); water (Article 8 ACNR); and air (Article 9 ACNR). According to Article 10 ACNR, states shall ‘wherever possible [...] prevent, reduce and control degradation of the natural environment’, i.a. by controlling the use of chemicals in agriculture (Article 10(a) ACNR); promoting pollution control (Article 10(b) ACNR); and by considering ‘the

ensure the sustainable utilization of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development.

For this purpose, the parties shall develop and coordinate their national conservation strategies, according to Article 1(2) ACNR. Moreover, according to Article 2(1) ACNR, the conservation and management of NR shall be ‘treated as an integral part of development planning’, which relates to social, ecological and economic factors, according to Article 2(2) ACNR. According to Article 3(1) ACNR, members are held to ‘maintain maximum genetic diversity’.

In addition, members ‘shall endeavour to’ develop and implement resource management plans fostering the sustainable use of the resources in question, according to Article 4(1) ACNR. This requirement is being spelled out in further detail, i.a. demanding states to prevent decrease of the harvested species below levels, which are required for its ‘stable recruitment’, according to Article 4(1)(a) ACNR; maintain ‘the ecological relationship between harvested, dependent and related populations of living resources of the ecosystem considered’, according to Article 4(1)(b) ACNR; and to prevent alterations to the ecosystem, which are ‘not reversible over a reasonable period of time’, according to Article 4(1)(d) ACNR. Moreover, activities causing ‘local distinction’ or ‘serious disturbance’ of species prohibited, according to Article 4(2)(c) ACNR.

Exhibiting several similar provisions to the ACNR, also the African Convention on the Conservation of Nature and Natural Resources (AfCNR; ‘Maputo convention’) comprehensively tackles the challenges of sustainably developing NR, e.g. expressly according to its Article XIV.²¹⁵ Going beyond the scope of the ACNR, the AfCNR also addresses challenges related to commodity activity with regard to military activities (Article XV AfCNR); procedural rights, i.a. with regard to dissemination of and access to environmental information (Article XVI AfCNR); traditional rights of local communities and indigenous knowledge (Article XVII AfCNR); technology transfer (Article XIX AfCNR); and capacity building (Article XX AfCNR).

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originator of the activity which may lead to environmental degradation responsible for its prevention, reduction and control as well as [...] rehabilitation and remedial measures required’ (Article 10(d) ACNR). The Convention also addresses i.a. the prevention of pollution discharges (Article 11 ACNR); land use planning (Article 12 ACNR); protected areas (Article 13 ACNR); shared resources (Article 19 ACNR); and transfrontier environmental effects (Article 20 ACNR). It shall be noted, however, that the ACNR has not yet entered into force, Beyerlin and Grote Stoutenberg (2013), para. 42; Ecolex (2019) ACNR, <https://www.ecolex.org/details/asean-agreement-on-the-conservation-of-nature-and-natural-resources-tre-000820/participants/> (last accessed 14 May 2021).

²¹⁵ AU (2014) Revised AfCNR, <https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version> (last accessed 14 May 2021). At the time of writing, the convention had been ratified by 17 member states of the AU (2019) List of countries, https://au.int/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_resources.pdf (last accessed 14 May 2021).

The Southern African Development Community (SADC) has elaborated further regional guidance on how to balance commodity interests in individual sectors, namely mining and forestry. The SADC Protocol on Mining (SADCPM) seeks to generally foster ‘a thriving mining sector’ as a means to promote economic development, alleviate poverty and generally raise the living standard in the region, according to Article 2(1).²¹⁶ For that purpose, member states i.a. engage in information sharing (Article 3 SADCPM), enhancing their technological capacities (Article 4 SADCPM), developing common standards (Article 5 SADCPM), promoting private sector participation (Article 6 SADCPM), as well as promoting small-scale mining (Article 7 SADCPM) and occupational health and safety (Article 9 SADCPM). Moreover, according to Article 8(1) SADCPM members

shall promote sustainable development by ensuring that a balance between mineral development and environmental protection is attained.²¹⁷

With regard to the forestry sector, the SADC Protocol on Forestry (SADCPF) shall ‘promote the development, conservation, sustainable management and utilisation of all types of forests and trees’, according to its Article 3(1)(a). Article 4 SADCPF sets forth various ‘guiding principles’, which reflect core norms of TCL, i.a. the duty to cooperate, PSNR, the no harm rule, public participation, as well as the benefit sharing principle. Further issues and commodity governance challenges include tenure and ownership (Article 5 SADCPF); the establishment of a regional database (Article 10 SADCPF); community-based forest management (Article 12 SADCPF); participation of women in forest management (Article 13 SADCPF); traditional forest-related knowledge (Article 16 SADCPF); industry, trade and investment (Article 18 SADCPF); and capacity-building as well as public awareness (Article 19 SADCPF).

Moreover, describing a rather recent development, several EU Free Trade Agreements (FTAs) that have been concluded since 2016 provide commodity-directed contents. Besides the fact that these agreements now routinely appear to include so-called ‘trade and SD’ chapters,²¹⁸ especially agreements, which have been concluded or negotiated in 2018 and 2019, moreover address issues of biodiversity, as well as sustainable forest and fisheries management.²¹⁹ In addition, these recent agreements seek to promote the integration of various norm subsets of TCL, i.a. by explicitly confirming commitments under multilateral labour as well as

²¹⁶The 1997 SADCPM arguably constitutes one of the normative foundations of the 2009 AMV, which has already featured in Sect. 4.2.2.2.1.1 above. See also ZIMCDD (2017), p. 6, which recommends ‘SADC countries to fully domesticate the AMV and SADC Mining Protocol through policy and legislative reforms’.

²¹⁷In that connection, member states are also called upon to encourage regional approaches to EIAs, especially when it comes to potential cross-border environmental harm, according to Article 8(2) SADCPM.

²¹⁸Cf. Sect. 4.3.1.2 above, n 457.

²¹⁹See Articles 12.7, 12.8 EU-Singapore FTA; Articles 16.6, 16.7, and 16.8 EU-Japan FTA; Articles 13.7, 13.8, 13.9 EU-Vietnam FTA.

environmental agreements in the context of trade.²²⁰ Furthermore, several recent EU FTAs establish so-called committees on trade and SD, which are i.a. tasked with reviewing the implementation of the agreement's corresponding chapter.²²¹ The respective reports that these 'sustainability committees' are going to produce, may over time bring about further guidance on how to integrate the three pillars of SD in the context of commodity activity.²²²

5.2.1.2.3.4 *Interim Conclusion*

As this brief survey has demonstrated, many ICAs *sensu stricto* do not address commodity policy trade-offs or questions of how to foster the SD of commodity sectors. Instead, they are frequently designed for clear-cut purposes, such as the joint development of commodity deposits, the civil liability of corporations for oil pollution, or establishing fair and safe working conditions in specific commodity sectors. While some areas exhibit quite a concentrated form of regulation through ICAs *sensu stricto*, other agreements are 'scattered' across a variety of factual scenarios, such as the bilateral German commodity partnerships, or CRAMRA.

However, a number of instruments also seek to address challenges related to commodity governance more comprehensively. Examples include the Convention on Biological Diversity (CBD) and related guidance, the ASEAN Agreement on the Conservation of Nature and Natural Resources (ACNR) and African Convention on the Conservation of Nature and Natural Resources (AfCNR), as well as the Southern African Development Community (SADC) protocols. The ACNR for instance reconciles various aspects of commodity governance in one agreement, including biodiversity, sustainable use, and shared resources. Yet, being especially concerned with *conservation*, it does neither touch upon Human Rights nor aspects of trade or international investment.²²³ While the AfCNR expands further, i.a. touching upon traditional and indigenous peoples' as well as procedural rights, it likewise does not integrate said elements of TCL. Nevertheless, these regional examples describe potential avenues towards creating more comprehensive legal instruments regulating commodity activities. In fact, it is this approach that recent EU FTAs, which now increasingly include commodity-directed contents in their respective trade and SD chapters, i.a. touching upon sustainable forest and fisheries management, mirror to a certain degree.

²²⁰ See i.a. Articles 12.4, 12.6 EU-Singapore FTA; 16.3, 16.4 EU-Japan FTA; Articles 13.4, 13.5, 13.6 EU-Vietnam FTA; cf. also Gehring et al. (2018), p. 21.

²²¹ Cf. Sect. 4.3.1.2 above, n 457.

²²² As such, the committees on trade and SD appear to be considerably well-suited to develop parameters for the continuous elaboration of the TCL framework.

²²³ The same appears to be true for the current draft of the 'Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (BBNJ agreement), UN (2019) Draft text of the agreement, <https://undocs.org/a/conf.232/2019/6> (last accessed 14 May 2021).

5.2.1.3 Some Reflections on ICAs *sensu lato*

ICAs *sensu lato* constitute indirect Transnational Commodity Law (TCL), i.e. they are not commodity-directed. This category of commodity agreements includes a wide spectrum of multilateral conventions on the environment, trade, HR, and other subjects. Concrete examples are those, which we have analysed in more detail above, as for instance the International Bill of Human Rights, or the GATT, to name but a few prominent instruments. Also Regional and Bilateral Trade Agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the Comprehensive Economic and Trade Agreement (CETA), Preferential Trade Agreements, such as the Cotonou Agreement, Bilateral Investment Treaties, or technical cooperation agreements substantially impact commodity governance and therefore constitute ICAs *sensu lato*.²²⁴ Recalling our broad definition of ICAs *sensu lato* as ‘any international agreement that exhibits a substantial regulatory impact on commodity activity, yet without having been explicitly directed at or designed for that purpose’, it becomes clear that most of these agreements already featured in our account of TCL in Chaps. 3 and 4 above. Therefore, only a few reflections on the relationship between these agreements and ICAs *sensu originali* and *stricto* respectively shall be shared in brief.

First, ICAs *sensu originali*, *stricto* and *lato* exist largely *in parallel*, meaning that there is typically no or only limited normative interaction between the different instruments. While some agreements may be referring to others, no concrete legal effects usually accompany these references.²²⁵ Despite the fact that many ICAs *sensu lato* are pursuing similar, if not identical objectives, especially fostering the sustainable development (SD) of a specific region, country, or sector,²²⁶ their primary non-commodity-directed purpose is what distinguishes them from ICAs *sensu stricto*. As we have discussed above, this creates an incoherent framework, which, however, may be effectively tied together under SD as the overall regulatory objective of TCL.

Second, while the body of ICAs *sensu lato* is certainly considerably large, one can still identify instruments, which are of greater importance for the framework of TCL than others. First and foremost, one in this connection of course has to refer to

²²⁴ Given that some of these agreements contain commodity-directed provisions, such as the Bilateral Dialogue on Raw Materials, which is being established according to Article 25.4 CETA, or the sustainable forest management provisions contained in Articles 13.8 EU-Vietnam FTA and 12.7 EU-Singapore FTA respectively, it is not always evident to qualify them as either ICAs *sensu lato* or *sensu stricto*. In fact, examples of commodity-directed provisions can be found here and there in various ICAs *sensu lato*, which are thus delineating a sort of ‘commodity-directed patchwork’, as e.g. reflected in the respective GATT provisions, cf. Sects. 4.2.2.1.4.2 and 4.3.2 above as well as shortly below.

²²⁵ On the few incidents in which they do, see already Sect. 4.2.3 above.

²²⁶ In this respect, see especially the EU-ACP agreements, cf. Weiss (2009), para. 25; on SD provisions in recent EU FTAs, see already Sect. 4.3.1.2 above; generally, on EU development cooperation, Oehl (2018a).

the International Bill of HR. One field, however, which exhibits the greatest degree of consistency is international labour law. Particularly the eight ‘fundamental conventions’ are being referred to in international agreements, standards, and guidelines across the entire field of TCL, be they of intergovernmental or private nature. Naturally also the multilateral environmental conventions and the established principles of international environmental law, which they embody, are playing a key role. The same holds true for the GATT. Integrating these standards with one another under the ‘roof’ of the regulatory objective of SD certainly remains a central challenge.²²⁷

Third, apart from the question what instruments currently are of the greatest significance for TCL and the regulation of commodity activity, one can also distinguish between different ICAs *sensu lato* according to how *close* they are to commodity activity. *Closeness* in this connection can arise either from the *factual scenarios* the agreements are designed to govern or their *normative contents*. Naturally, in many cases both will coincide.

For instance, the Convention on the Law of the Non-navigational Uses of International Watercourses (New York Convention) in view of the many commodity-related uses of watercourses as well as potential corresponding damage will regularly be concerned with commodity activity. Non-navigational uses of watercourses are *factually* close to commodity activities. Given that commodities represent a share of roughly 25% of international goods trade,²²⁸ the same holds true for the GATT. Yet, the latter also contains several commodity-directed provisions as we have seen above. Therefore, the GATT is also *normatively* close to commodity activity, albeit not qualifying as an ICA *sensu stricto*.²²⁹ Likewise, also the International Bill of Human Rights in the form of the right to freely dispose over natural resources (RFD) contains a central commodity-directed provision. Given the many forms and dimensions of commodity activity that Human Rights cover, it also appears fair to speak of ‘closeness’ in this respect.

The Energy Charter Treaty (ECT), and the emerging field of international energy law in general,²³⁰ exhibit significant overlaps with TCL in both respects. This is mostly due to the *fact* that most energy worldwide is still being produced through so-called combustibles, especially oil, gas, coal, or fuel wood, which of course are commodities; also nuclear energy relies on the commodities uranium or plutonium, renewable energy technologies require i.a. Rare Earth Elements and several other minerals, including lithium and cobalt.²³¹ How closely related these emerging legal

²²⁷ On this challenge, see already Sect. 5.1.2 above. See Chi (2017) with regard to international investment law; also, Hilpold (2011) and Bartels (2013) with regard to HR and WTO law; on the related—or perhaps rather preceding—debate on the general *fragmentation* of international law, Koskenniemi and Leino (2002).

²²⁸ WTO (2018), p. 42. According to WTO estimates, fuels and mining products accounted for 15%, agricultural products for 10% of world merchandise exports in 2017, *ibid*.

²²⁹ On the blurred boundaries between these categories, see already n 224 above.

²³⁰ Viñuales (2013).

²³¹ Cf. Espaa and Oehl (2018), p. 6.

fields are also with regard to their *normative* frameworks, is i.a. reflected in Article 1(4) and the corresponding annex EM of the Energy Charter Treaty (ECT), which define ‘Energy Materials and Products’. The list almost exclusively includes commodities, notably except i.a. electrical energy itself. Article 18(1) ECT reaffirms the permanent sovereignty of member states over *energy* resources. According to Article 18(3) ECT, each state shall

continue[] to hold [...] rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.

Furthermore, according to Article 18(4) ECT, the parties

undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

Both provisions essentially cover issues of commodity governance. For what end uses commodities are being exploited, whether it is used for energy or non-energy purposes, naturally does not impact challenges that are associated with the *removal of an item from earth*.²³² Thus, from the perspective of international legal scholarship, it would make little sense to conceptualise a field of international energy law without doing the same for commodity activity. Whereas the latter should be confined to the ‘removal activity’ and associated activities along the commodity value chain, international energy law would cover all uses of commodities, which serve the purpose of energy generation.

Nevertheless, according to the parameters we have established above, the ECT does *not* constitute an ICA *sensu stricto*, but an ICA *sensu lato*. This is because—apart from a few provisions—it is not *explicitly* directed at commodities. Instead, commodity activity here is being observed from the prism of energy activity—commodity extraction as the necessary precondition of the generation, trade and sale of electrical energy. While one may read the provisions in Article 18 ECT as reflecting a ‘conscious consideration’ of the specificities of commodity activity, it more precisely rather appears to be an expression of the great overlap of energy and commodity activity. This distinction is important, since from the ‘energy perspective’ one may arrive at different normative judgments than from the ‘commodity perspective’. The focus on the end use of energy generation could for instance lead to the extraction aspect being seen as rather a ‘prefix’. Therefore, one may e.g. overly emphasise the perspective of energy consumers over the one of energy commodity producers. However, naturally the differences here may prove to be nuances. Yet, the example of the ECT and emerging international energy law ultimately

²³²Cf. Sect. 3.2.2.1 above.

demonstrates that conceptualising TCL is an obvious step towards elaborating an effective legal framework for GCG.

Examples of agreements exhibiting a lesser degree of closeness to commodity activity are Additional Protocols I and II to the Geneva Convention, despite their commodity-directed provisions. This is due to the fact that—at least ideally—armed conflict constitutes an abnormal situation for commodity activity to occur. Consequently, they also constitute ICAs *sensu lato*. The more ‘remotely’ agreements operate from commodity activities, the more likely they will constitute ICAs *sensu latissimo*.

5.2.1.4 Interim Conclusion: Relevance of Current ICAs for GCG

To conclude, we can ascertain that the relevance of International Commodity Agreements (ICAs) *sensu originali* for Global Commodity Governance (GCG) today is very limited. Albeit displaying a comprehensive approach, tackling an entire sector and seeking to foster sustainable development (SD), their objectives are not being pursued with significant ‘bite’ due to a lack of corresponding substantive obligations. ICAs *sensu stricto*, to the contrary, often exhibit a narrow scope, which is focused on a clear-cut, somewhat ‘singular’ objective. As such, they may quite intensively regulate some specific activities associated with commodity operations in some specific sectors, such as oil spill incidents or timber trade between two parties. While some regional instruments, such as the ASEAN Agreement on the Conservation of Nature and Natural Resources (ACNR), African Convention on the Conservation of Nature and Natural Resources (AfCNR) and the Southern African Development Community (SADC) protocols, address challenges of GCG more comprehensively and recent EU Free Trade Agreements (FTAs) demonstrate a trend to consciously consider specificities of commodity activity, there are only considerably few ICAs *sensu stricto* that provide guidance on how to balance commodity interests. Where they do, these provisions are often rather aspirational or soft and rarely entail concrete obligations.

This status quo basically describes a scenario, in which commodity activities are only in few instances covered by law reflecting a ‘conscious consideration’ for corresponding regulatory challenges, i.e. by direct Transnational Commodity Law (TCL). Consequently, at present ICAs *sensu lato* clearly are of the greatest significance for GCG. As repeatedly discussed throughout this book, the fact that these agreements have been designed for regulatory objectives, which are not explicitly targeting commodities, leaves behind an incoherent transnational legal framework.²³³ As a result, there is close to no guidance with legally binding value, which addresses states’ decision to extract and concretises, what sustainable use requires.

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²³³ Cf. i.a. Sects. 4.2.1 and 5.1 above.

5.2.2 ICAs *De Lege Ferenda*

To the close of this book, the following section shall provide an outlook on potential future ICAs, which could help remedy the current deficits of the legal framework of TCL.²³⁴ Generally speaking, ICAs *de lege ferenda* shall serve to transform the obligations that apply to commodity activities under the various legal instruments into commodity-directed tools. ICAs *de lege ferenda* extract those provisions, which are relevant in a commodity context, from ICAs *sensu lato* and incorporate them in a comprehensive ICA *sensu stricto*. In addition, they include those best practices, which have emerged from transnational standard setting.

This leads to the following central functions of ICAs *de lege ferenda*: First, they codify balancing norms and thus specify what sustainable use means (Sect. 5.2.2.1). Second, they define SD as their object and purpose (Sect. 5.2.2.2). Third, they reinforce the rule of law in the commodity sector and promote international equity (Sect. 5.2.2.3). The section closes with some reflections on formal questions regarding the design of ICAs *de lege ferenda* (Sect. 5.2.2.4), before illustrating how all of these functions ultimately promote a functional, sustainable commodity sector and therefore SD in general (Sect. 5.2.2.5).

5.2.2.1 ICAs as Instruments Codifying Balancing Norms

ICAs *de lege ferenda* can serve to specify what the sustainable use principle, as the central balancing norm of TCL requires. Fundamentally, it obliges states to balance commodity policy trade-offs in the way, which is most conducive to SD.

5.2.2.1.1 General Idea: Qualifying the Policy Space Available to States

In view of their permanent sovereignty over natural resources (PSNR), states generally dispose of the competence to set the parameters on how they balance the five interests that make up the organisational framework of TCL.²³⁵ However, under an ICA *de lege ferenda* states could establish self-imposed qualifications of their PSNR, which require them to prioritise certain interests in specific scenarios. ICAs *de lege ferenda* could introduce legal rules that effectively coordinate the various

²³⁴On this approach of ‘updating’ existing ICAs, see already Krajewski (2012); also, Nowrot (2013) on the German commodity partnership agreements as ‘new regulatory instruments’ (my translation). Wilts and Bleischwitz (2012) propose an International Commodity Covenant, which addresses incomplete global material cycles, i.a. by promoting recycling.

²³⁵However, from the perspective of commodity policy trade-offs, defining commodity deposits as ‘common heritage of humankind’ in fact appears to be an approach worth considering. Regardless of such enterprise being politically far from realistic, it could help resolve potential conflicts between global, national, and local SD policies. States are of course at all times free to define all or certain types of commodities as ‘common heritage’. On the concept cf. Wolfrum (2009).

interests, which characterise commodity activity, in a way that is most conducive to SD. Thus, states would commit themselves to effectively foster a functional commodity sector.

Balancing the five interests associated with commodity activity requires defining in which scenarios which one of them antecedes the other. Proceeding in this way, the global community could, little by little, define concrete parameters for sustainable commodity activity. These parameters would effectively constitute conflict rules, which could either apply to the ‘big picture’ of sustainable commodity activity or to individual subsectors alone. Moreover, corresponding parameters could serve to identify those commodity subsectors, which are most critical for SD. They could establish different parameters for different sectors. Yet, ultimately, they would all reflect the ultimate objective of SD.

5.2.2.1.2 Principle of Proportionality

Without unduly restricting the policy space of states, ICAs *de lege ferenda* could specify the balancing requirements, which sustainable commodity use entails, by introducing a principle of proportionality. According to its general rule, all five commodity interests would need to be observed in all decisions of a state, which affect commodity activities, thus particularly its decision(s) to extract as well as the overall design of its legal framework applicable to commodity operations.

Contouring its normative content further, the principle of proportionality would require that the degree to which one or more commodity interests are being neglected in a respective state measure needs to be proportionate to the significance of the other interests, which that very measure is intended to foster. For example, where an individual commodity project requires extensive environmental destruction as well as the relocation of several villages, including an indigenous community, it would only be lawful, where these phenomena are proportionate to the economic gain and/or development benefits it promises.

This obligation to carry out a sophisticated balancing exercise between the five interests associated with commodity activity, would go hand in hand with a transparency obligation: the respective state or government would be required to disclose its concrete considerations, balancing method, as well as reasons for its weighting of the different factors.

Moreover, to further specify what constitutes proportionality, ICAs *de lege ferenda* could define that purely economic objectives constitute subordinate aims to the objective of development.²³⁶ As a consequence, they would carry less weight within the balancing exercise to be performed and would generally only be considered where they serve the social advancement of the respective state’s society. This

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²³⁶Cf. in this respect also Krajewski (2017), pp. 25–26 who is suggesting a clause, which establishes ‘supremacy’ of human rights over trade and investment treaties.

step would enhance the dogmatic significance of socio-ecological development in relation to the economic pillar of SD.²³⁷

5.2.2.1.3 Prevention of Irreversible Effects

The principle of proportionality could be further qualified by a rule, according to which irreversible effects caused by commodity activity—e.g. for the natural environment or human livelihoods—should generally be prevented. Weighting results, which violate this rule, would not be proportionate. The rule would thus set a boundary to a state's margin of discretion in weighing the five commodity interests.

For example, this rule could require states to assess whether or not by means of mine closure measures, a certain area can be sufficiently reinstated after commodity extraction has taken place. Where such is unlikely, the objectives of environmental protection and participation would prevail over economic interests. The same principle could also guide decisions to extract with regard to the threat of climate change. Where overall CO₂ emissions already threaten to cause irreversible effects for planet and human species, a decision to extract a large volume of combustibles may be deemed to be a violation of this rule emanating from SD.

However, irreversible effects—in this case particularly for the human species—may of course also impend with regard to the socio-economic pillars of SD. Where for instance economic turmoil or a famine would result from a decision *not* to extract (or plant), commodity activity may in fact be required under such kind of rule.²³⁸

5.2.2.1.4 Obligation for States to Detail Terms of Sustainable Use in National Regimes

These rules and principles concretise rather abstractly how the balancing exercise required by the sustainable use principle needs to be performed. Another avenue to specifying what is required to achieve commodity equilibrium lies in detailing the terms of the sustainable use principle. An ICA *de lege ferenda* could *fully integrate* concrete sustainability guidelines and best practices, which states would be obligated to implement within commodity-directed legal regimes of their national frameworks.

Generally speaking, the twelve precepts of the Natural Resource Charter can serve as a signpost regarding what aspects the commodity-directed national regime

²³⁷ On 'Mickey Mouse' sustainability, cf. already Sect. 4.3.2 above.

²³⁸ Naturally, a significant share of the effects conducive to SD that this kind of provision would bring about will depend on the respective norm addressee's readiness to take their decisions based on *reason* and available *facts*. Wherever they seek to obscure their actual intentions behind pretended reasoning, it will regularly be difficult to 'convict' them of their doing. Nevertheless, what the provision and SD as a regulatory objective generally achieve, is to set SD as *the* point of reference for really any political decision that one may be deliberating to take. See already Oehl (2019), p. 28.

should address, including rights allocation, tax regime, and the offsetting of environmental and social costs of extraction.²³⁹

Taking up incidents of balancing norms, which can be found in ICAs *sensu stricto*, the national framework could establish the principle of adaptive management, which is based on science as well as traditional and local knowledge (principle #4(a) of the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (AAPG)).²⁴⁰ Moreover, it could provide for the internalisation of the social and ecological costs of commodity activity ‘within the area of management’ and the reflection of these costs in the ‘distribution of the benefits from the use’ (principle #13 AAPG).²⁴¹ Measures to be reflected in this instance could relate to the pricing in of negative externalities caused by commodity activities, including CO₂ emissions.²⁴² In line with Article 2(1) of the ASEAN Agreement on the Conservation of Nature and Natural Resources (ACNR), states could be required to treat the conservation and management of NR ‘as an integral part of development planning’.

Furthermore, the national system could necessitate the elaboration of resource management plans applicable to individual commodities, as provided for in Article 4(1) ACNR. Going beyond the obligation to prevent irreversible effects of commodity activity, the national framework could require the prevention of alterations to the ecosystem, which are ‘not reversible over a reasonable period of time’ in line with Article 4(1)(d) ACNR. In addition, an ICA *de lege ferenda* could require states to implement within their national regimes a system of community-based resource development, as suggested by Article 12 of the Southern African Development Community Protocol on Forestry (SADCPF); as well as measures fostering the active participation of women in commodity management (Article 13 SADCPF).

Apart from these general principles, ICAs *de lege ferenda* could obligate states to detail the terms of sustainable use also in the context of individual commodity sectors. For example, with regard to the mining sector, states could be required to demonstrate that they are implementing the IGF Mining Policy Framework and to subject themselves to regular review under the World Bank MInGov tool. In addition, they could be obliged to envisage the mandatory use of the Model Mine Development Agreement (MMDA) in all mining-related investor-state contracts. A respective rule could be designed as follows:

Article x: States shall take all measures necessary to ensure a sustainable mining sector. For that purpose, they shall implement all standards referred to in annex A in their own acts and policies. With regard to stakeholders referred to in annex B, they shall require by law that their commodity activities be conducted in conformity with the following standards: . . .

It shall be noted here that commodity-directed, comprehensive instruments addressing the mining sector, such as the Berlin II Guidelines, the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) Mining

²³⁹ NRG (2014), pp. 4, 7–35; on the NRC, cf. already Sect. 2.2.5 above.

²⁴⁰ Secretariat of the CBD (2004), p. 11.

²⁴¹ Secretariat of the CBD (2004), p. 20.

²⁴² Cf. Nordhaus (2007).

Policy Framework, the Initiative for Responsible Mining Assurance (IRMA) Standard for Responsible Mining IRMA-STD-001, or the MMDA exhibit a remarkable degree of *content coherence*, i.e. coherence with regard to what contents need to be covered in order to sufficiently regulate commodity activities.²⁴³ The Berlin II Guidelines as well as the IGF Mining Policy Framework as instruments addressing states for instance both provide guidance on the domestic regulatory framework, including mining and environmental legislation as well as licensing, environmental management, policy coherence, mine closure, and artisanal and small-scale mining. The IRMA standard and the MMDA share contents such as environmental and social impact assessment, local community development and health, labour standards, and mine closure.

With regard to the oil and gas industry, the national framework could require the elimination of routine flaring during oil production, the identification and reduction of methane emissions in the gas value chain, waste minimisation, and the developing and sharing of scalable sustainability systems.²⁴⁴ Corporations could be obligated to collaborate with the public and non-profit sector in order to foster the socio-economic development of local communities i.a., through building local workforce capacity, sharing health and safety innovations and fostering healthcare provision by means of developing new applications of e.g. renewable energy technologies.²⁴⁵ Further best practices have been elaborated in the guidance documents issued by the International Association of Oil and Gas Producers (IOGP) as well as the International Petroleum Industry Environmental Conservation Association (IPIECA).²⁴⁶

While portraying sector-specific best practices in more detail lies beyond the scope of this book, an overview of relevant standards is provided in the TCL outline in the annex.

As a side benefit of this obligation for states to detail the terms of sustainable use in their national frameworks, ICAs *de lege ferenda* would help aligning regulation on the global, national, and local levels. They would be setting the standards on the global level, which would subsequently be influencing legislation and regulation on national as well as local levels, ideally leading to harmonisation and coherence. As such, the standards set by ICAs *de lege ferenda* would ‘trickle down’ to the individual commodity activity at hand. Commodity contracts detailing the terms of the respective activity would be embedded in this aligned framework.²⁴⁷ Thus, potential power asymmetries between corporate and government actors would have less influence on the negotiated terms given the applicable binding national framework.²⁴⁸

²⁴³ What they are exhibiting to a considerable lesser extent is *norm coherence*—a quality, which SD defined as the object and purpose of TCL would foster.

²⁴⁴ Cf. UN GC (2017), p. 9.

²⁴⁵ UN GC (2017), p. 9.

²⁴⁶ IOGP (2017); IPIECA (2017).

²⁴⁷ Cf. NRG (2014), p. 13.

²⁴⁸ Cf. AU (2009), pp. 17–18.

For example, states could be required to legally oblige companies under national law to fully integrate the Voluntary Principles on Security and Human Rights for the Extractive and Energy Sectors (VPSHR) in their contracts with private security providers.²⁴⁹ Moreover, states could be held to collect sufficient technical data in order to gain ‘a good understanding of the resource base’.²⁵⁰ Also, the licensing regime applicable to extractive industries should allow for post-exploration reductions of particular licenses in size in order to ensure that not too large of a share of the resource base falls under one license; and that the state can benefit from potential land value increases following respective commodity discoveries.²⁵¹ In terms of the procedure of allocating rights to third parties, the Natural Resource Charter advises states to rely on ‘well-designed auctions’ rather than ‘direct negotiations on a license-by-license basis’.²⁵²

5.2.2.2 ICAs as Instruments Incorporating SD as Their Object and Purpose

ICAs *de lege ferenda* can contribute significantly to the coherence of the framework of TCL. They can do so especially by incorporating SD as their regulatory objective—and therefore confirming its respective status under the TCL framework overall.

As described above, this would have a twofold effect:²⁵³ For one, all rules contained in the ICA would have to be interpreted in light of SD. For the other, SD would guide international, regional, supranational, and national legislators whenever they are designing rules intended to balance commodity policy trade-offs as part of their commitment to give effect to their obligations under the ICA. Reconciling the various standards, which serve as benchmarks specifying the normative contents of the sustainable use principle, under the ‘roof’ of the ICA and therefore its regulatory objective of SD would over time foster the coherence of all of TCL. In applying the various obligations, addressees, legislators, and international judges would gradually elaborate an arrangement of the applicable norms, which is most conducive to SD—thus balancing its three (social, environmental and economic) pillars in a commodity context.

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²⁴⁹ VPSHR (2000), p. 6.

²⁵⁰ NRG (2014), p. 13.

²⁵¹ NRG (2014), p. 13.

²⁵² NRG (2014), p. 14. Competitive bidding as part of an auction is however only advised whenever there are more than three competitors; otherwise ‘a licensing round with strict minimum technical criteria’ should be the procedure of choice, NRG (2014), p. 14. For further guidance on the design of commodity contracts, see Elaw (2013); Cotula (2010); Mandelbaum et al. (2016); Kienzler et al. (2015); Smaller (2014); CCSI (2019) Guides to land contracts, <http://ccsi.columbia.edu/work/projects/guides-to-land-contracts/> (last accessed 14 May 2021); Wilson and Kuszewski (2011); and Gathii (2014).

²⁵³ See already Oehl (2019), pp. 14–15.

5.2.2.3 ICAs as Instruments Reinforcing the Rule of Law in the Commodity Sector

ICAs *de lege ferenda* can reinforce the rule of law in the commodity sector by clarifying, expanding, and aligning it. The first function is as simple as essential. ICAs *de lege ferenda* serve to summarise and confirm commitments of states under TCL. As such, they illustrate that the international community is aware of the vital importance of the commodity sector and the need to establish a coherent legal framework for GCG. In view of the many instruments of TCL, ICAs *de lege ferenda* serve as the ‘normative scaffolding’, which provides clarity regarding the interplay and application of the TCL framework.

Moreover, ICAs *de lege ferenda* can fill gaps in the regulatory framework. Gaps are being created whenever a subset of norms regulates a certain aspect of commodity activity yet fails to provide guidance with regard to a facet of the latter. As we have seen in Chap. 4 above, TCL exhibits several gaps, e.g. when it comes to addressing potential clashes between global, national, and local SD objectives, or protecting natural resources against unsustainable uses during an international armed conflict or non-international armed conflict.²⁵⁴ ICAs *de lege ferenda* can build on these observations and address gaps in the current framework in a targeted manner.

Besides, ICAs *de lege ferenda* can also serve as instruments for expanding the current framework of TCL by covering additional topics. For instance, concrete guidance could be elaborated with regard to local procurement,²⁵⁵ antitrust law particularly dealing with commodity TNCs, or licensing and certification of various commodity sub-activities, including exploration, exploitation, and processing. Also, an ICA *de lege ferenda* could set specific parameters for the admission and protection of commodity investments.²⁵⁶

In general, ICAs *de lege ferenda* could constitute important tools for fostering *international equity* with regard to the commodity sector. Given the great dominance of TNCs, they could develop rules of a commodity-directed transnational corporate civil liability law.²⁵⁷ Moreover, with regard to imbalances in the global trade system, they could help specify the rights of Commodity Dependent Developing Countries (CDDCs) under the GATT. They could serve to expand the current infant-industry promotion and trade and development provisions e.g., by requiring more concrete

²⁵⁴ Cf. Sect. 4.4 above.

²⁵⁵ The guidance could thus detail the requirements set forth in Article 9(1) CAC, cf. Sect. 4.2.1.5 above, for a local context; cf. moreover already the so-called Local Procurement Reporting Mechanism (LPRM), Mining Shared Value (2019) LPRM <http://miningsharedvalue.org/mininglprm/> (last accessed 14 May 2021), which could provide a basis for future regulatory approaches in the *mining* sector.

²⁵⁶ Guidance on how these parameters could serve to foster SD is provided i.a. by UNCTAD (2015). See also VanDuzer et al. (2012); cf. Sect. 4.3.1.2 above.

²⁵⁷ Cf. Muchlinski (2016), pp. 58–59. As such, for instance, the provision of Article 3(1) ECLC, cf. Sect. 4.2.1.5 above, could be adapted to a commodity context and spell out concrete guidelines of what constitutes an action giving rise to liability as well as regarding the damages to be awarded.

concessions from developed country members as well as allowing more deviations from WTO disciplines for these commodity-dependent countries—thus counteracting detrimental effects arising from the strict liberalisation approach contained therein.²⁵⁸ In addition, taking up the global multilateral benefit-sharing mechanism mentioned in Article 10 of the Nagoya Protocol, ICAs *de lege ferenda* could consider the elaboration of a benefit-sharing mechanism applicable to non-genetic resources.²⁵⁹

Also, with regard to dispute settlement mechanisms, ICAs *de lege ferenda* could implement rules, which are particularly conducive to fostering international equity in the commodity sector. This may for one include implementing those reforms of investor-state dispute settlement (ISDS), which have been suggested by various institutions and scholars, such as: limiting ISDS to particular claims (excluding those against measures that were taken to protect the environment or Human Rights); requiring the exhaustion of local remedies; incorporating a ‘u-turn’ and ‘fork in the road’ clause; setting forth strict limitation periods; encouraging alternative dispute resolution mechanisms; or allowing counterclaims for the host state when the investor breaches domestic law or other obligations.²⁶⁰

²⁵⁸ Naturally, under the current political reality, this approach would presumably not exactly meet the agreement from WTO members and/or institutions. However, on the long run, it may contribute to a world trade system, which is concerned primarily with contributing to SD and not particularly promoting liberalisation. The latter should always be understood as a subsidiary aim, which is intended to foster SD. Where it is deemed to not have this effect, it should be abandoned. See in this respect, a policy paper i.a. co-authored by former WTO Director General Pascal Lamy, Global Progressive Forum (2018), which reads on p. 6: ‘The traditional approach, which argues that “trade is good, but we need to work on the side effects,” is out-dated. In today’s changing world, “business as usual” does not work. Progressives must guarantee that global trade and investment benefit the many and not the few. Progressives must ensure they promote sustainable development, reduce global poverty, neutralise structural inequalities that exclude certain genders and populations from the global economy, and raise living and welfare standards. Between the faithful and unconditional promoters of free trade and the populist critiques defending protectionist and nationalist visions of the world, there is a critical political space for progressive forces to defend a regulated vision of globalisation. There is political responsibility in safeguarding an even distribution of trade’s positive effects both within our societies and between developed and developing countries. It no longer suffices to wait to realise long-promised trickle-down effects or to offer paltry compensation to those disadvantaged by global trade. [...] Trade and investment must be embedded in a broader economic development strategy in order to create added value for our economies. At the same time, trade should be complemented by a new social contract, one that ensures equitable distribution of trade’s benefits through adequate and extensive social policies and redistribution mechanisms.’

²⁵⁹ The provision reads: ‘Parties shall consider the need for and modalities of a global multilateral benefitsharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally’, CBD (2011) Nagoya protocol, <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last accessed 14 May 2021).

²⁶⁰ All of the above, see also Muchlinski (2016), pp. 61–2; cf. Sect. 4.3.1 above.

Moreover, with regard to procedural and institutional questions, ICAs *de lege ferenda* could incorporate an ISDS appellate mechanism, e.g. as the one envisaged by the EU Investment Court System (ICS),²⁶¹ open proceedings to *amicus curiae* and other stakeholders, including potential victims of corporate activity,²⁶² or joint interpretation mechanisms between the parties to the international investment agreement.²⁶³ In addition, remedies could be limited to monetary compensation, thus henceforth excluding modification or removal of the regulation in question. Also, the calculation of what constitutes an ‘equitable’ compensation could take into account the host state’s level of development.²⁶⁴

Apart from that, ICAs *de lege ferenda* could also implement the mechanism suggested above, according to which in general only investors that comply with HR, environmental, and other applicable standards, which are relevant for commodity activity, shall benefit from investment protection.²⁶⁵ ICAs *de lege ferenda* could step up home state obligations for corporations investing abroad e.g., with regard to transparency standards.²⁶⁶ As such, they could incorporate for example the benchmarks for responsible commodity investments elaborated by the UN Principles for Responsible Investment (UN PRI).²⁶⁷

What would furthermore foster international equity in the commodity sector would be granting victims of corporate activities access to home state courts. This could help remedy situations in which harm caused by corporations remains effectively uncompensated in judicial proceedings as prominently reflected in the *Kiobel* case. ICAs *de lege ferenda* could envisage concrete commitments of states to assume jurisdiction over extraterritorial claims arising from commodity activities.²⁶⁸ This would allow the claimant to bring her case before the courts of those countries, where typically considerable volumes of the commodities that have been sourced in her country are being consumed and often processed. It would add an important element to the mosaic of a globalised society, which addresses violations across borders and beyond potential capacity boundaries when it comes to the implementation of the rule of law.²⁶⁹

²⁶¹ Muchlinski (2016), p. 62; fundamentally Bungenberg and Reinisch (2018), p. 25.

²⁶² With a similar suggestion with regard to Bilateral Arbitration Treaties (BATs), Gaffney J (2018) Could BITs and BATs be combined to ensure access to human rights remedies? Columbia FDI Perspectives, 2 July 2018, <http://ccsi.columbia.edu/files/2016/10/No-229-Gaffney-FINAL.pdf> (last accessed 14 May 2021); Muchlinski (2016), p. 62.

²⁶³ Muchlinski (2016), pp. 62–63.

²⁶⁴ Muchlinski (2016), pp. 62–63.

²⁶⁵ Cf. Sect. 4.3.1.5 above.

²⁶⁶ Bürgi Bonanomi et al. (2015), p. 51.

²⁶⁷ Bürgi Bonanomi et al. (2015), p. 51; cf. also the Responsible Investor’s Guide to Commodities, UN GC (2011).

²⁶⁸ Cf. Sect. 4.4 above.

²⁶⁹ See in this respect the excerpt from the Nobel Lecture given by Nobel Peace Prize Laureate 2018 Denis Mukwege, 10 December 2018, Oslo, which features as the prelude to this book above. The full speech is available at The Nobel Prize (2021) Denis Mukwege—Nobel lecture, <https://www.nobelprize.org/en/laureates/2018/mukwege-lecture.html>.

5.2.2.4 Reflections on Formal Questions

Having discussed potential normative contents of ICAs *de lege ferenda*, we shall briefly also touch upon some rather ‘formal’ questions regarding their design.

As has been suggested by other authors before, one option would lie in introducing a multilateral commodity convention.²⁷⁰ Such a ‘classical’ international instrument would typically be of legally binding nature and seek to reconcile the greatest number of member states possible. While such an approach is certainly appealing with regard to the desired outcome of reinforcing the regulation of the commodity sector so as to foster its SD, it appears highly unlikely to be successful in view of the state of play in international relations at the time of writing.

This is especially due to the continued, intense antagonism between Global North and Global South, which significantly coincides with the antagonism between commodity consumers and producers.²⁷¹ In view of this pervasive conflict, which appears to stretch across manifold areas of global trade and economic cooperation,²⁷² also non-binding, voluntary multilateral ‘accords’ or ‘compacts’ on commodities appear to stand little chance of finding the support of a majority of states.

An alternative would be an ‘open’ bilateral approach towards introducing ICAs *de lege ferenda*. Two—or more—states could negotiate and conclude a commodity-directed international agreement and explicitly provide that other states could join the treaty at their will at all times.²⁷³ This would allow for an evolution of commodity-directed regulation, which may over time gradually transcend the current antagonism.

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nobelprize.org/prizes/peace/2018/mukwege/55721-denis-mukwege-nobel-lecture-2/ (last accessed 14 May 2021).

²⁷⁰ See especially Wilts and Bleischwitz (2012); arguably, with her call for a Commodity Organisation, also Feichtner (2014), p. 284.

²⁷¹ The intensity of this opponency is most prominently reflected in the ‘deadlock’ of the Doha Development Agenda, which until today has not been successfully adopted. On the reasons why it is in fact far from it, cf. i.a. Sects. 2.2.4 and 2.2.5.

²⁷² It appears to be ultimately also reflected in the attempts of especially developing countries to push for the introduction of international instruments on corporate liability, UN (2003) Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Sub-Commission on the Promotion and Protection of HR, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, <https://undocs.org/en/E/CN.4/Sub.2/2003/12/Rev.2>; UN HRC (2014) Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Resolution 26/9 of 26 June 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>; the revised draft of 16 July 2019 is provided by OHCHR (2019) Legally binding instrument, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (all last accessed 14 May 2021); cf. Sect. 5.1.3 above.

²⁷³ Cf. on the ‘open treaty’ approach especially Griebel (2009) as well as Griebel (2010), who advocated for a ‘Europe Based Open Investment Treaty’; Bungenberg (2011), p. 237; cf. moreover e.g. the option for non-UNECE states to accede to the Aarhus Convention as provided for in its Article 19(3).

The actor, which would be somewhat ‘predestined’ to be the driving force behind such an open treaty approach, is the EU. Apart from the fact that it constitutes the largest trading bloc worldwide and therefore disposes of substantial standard setting power in international economic relations,²⁷⁴ it according to Article 21(2)(f) TEU has also committed to

help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development[.]

According to Article 207(1) TFEU, this obligation applies particularly also to its Common Commercial Policy. Introducing ICAs *de lege ferenda*, which clarify, reinforce, and cohere the current framework of TCL would allow the EU to live up to these commitments it has made under its own constitutional framework. The fact that the EU according to Article 21(1) TEU has also committed to ‘promot[ing] multilateral solutions to common problems, in particular in the framework of the United Nations’, does not prevent it from seeking alternative approaches whenever a multilateral solution does not appear to be viable. Given that the ‘open treaty’ approach is intended to ultimately result in a *de facto* multilateral instrument, pursuing the latter, would explicitly *not* constitute a departure from seeking multilateral solutions, but rather constitute a way of circumventing respective ‘roadblocks’.²⁷⁵

Instead of introducing ICAs *de lege ferenda* as stand-alone agreements, one option would also be to incorporate their normative contents as a commodity-directed chapter in other agreements, such as Free Trade Agreements (FTAs), Preferential Trade Agreements (PTAs), or Bilateral Investment Treaties (BITs). Particularly PTAs, including the Economic Partnership Agreements with the African, Caribbean and Pacific (ACP) states, appear to be well suited in terms of content and *telos* for the inclusion of a commodity-directed chapter.²⁷⁶ These chapters could

²⁷⁴European Commission (2018) Celebrating the Customs Union: the world’s largest trading bloc turns 50, 30 June 2018, http://europa.eu/rapid/press-release_IP-18-4265_en.htm (last accessed 14 May 2021); on the competition of economic law systems, fundamentally Meessen (2005); on implications that this power has had on EU policy choices, cf. already Oehl M (2016) The regulatory dimension of TTIP and the global competition of economic systems. Reflections on the on-going dispute over Europe’s external trade policy, *Völkerrechtsblog*, 24 February 2016, <https://voelkerrechtsblog.org/the-regulatory-dimension-of-ttip-and-the-global-competition-of-economic-systems/> (last accessed 14 May 2021).

²⁷⁵In this respect, see also the current EU practice of concluding various bilateral FTAs, EU (2019) Negotiations and agreements, <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/> (last accessed 14 May 2021).

²⁷⁶For a list of the current EU preferential trade arrangements in place, European Commission (2019) Arrangements list, https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list_en#preferential (last accessed 14 May 2021); on the different types of agreements, cf. Oehl (2018b), p. 325.

build particularly on the trade and SD chapters, which have been provided for in recent EU FTAs.²⁷⁷

Lastly, when it comes to the *mode* of how ICAs *de lege ferenda* should be elaborated, it seems natural that such endeavour should be pursued based on a multi-stakeholder approach. Being paradigmatic for the concept of governance,²⁷⁸ a large share of the commodity standards, which we have analysed in this book, has been developed in this vein. Since, as we have discussed with regard to the ILO tripartite approach above, the involvement of the Governance Triangle, consisting of states, businesses, and civil society, may well constitute an important ingredient for successful transnational regulation,²⁷⁹ the same procedure appears to be advisable when it comes to the elaboration of ICAs *de lege ferenda*.

5.2.2.5 Interim Conclusion: ICAs as Tools Fostering a Functional Commodity Sector

To conclude, ICAs *de lege ferenda* constitute tools, which foster a functional commodity sector. They do so by specifying what sustainable use means, defining SD as their object and purpose, and reinforcing the rule of law in the global commodity sector. As a result, they clarify, confirm, cohere, and align the TCL framework.

The codification of TCL through a multilateral commodity convention appears to be appealing in an ‘academic utopia’ yet is currently a little realistic option in view of the *Realpolitik* in times of nationalist rhetoric from powerful political blocs. What appears to be more functional under the current geopolitical conditions, however, is the incorporation of gradually more commodity-directed rules—and eventually chapters—in the FTAs and PTAs particularly of the EU. Moreover, also an ‘open treaty’ approach to the elaboration of commodity-directed or -specific bi- or plurilateral agreements may be worth considering.

²⁷⁷ See chapter 16 EU-Japan FTA; chapter 12 EU-Singapore FTA; chapter 13 EU-Vietnam FTA; as well as chapter 22 CETA; cf. Sect. 3.3.1.2 above. See also Article 25.4 CETA, which introduces the Bilateral Dialogue on Raw Materials—a discussion forum for ‘cooperation in the field of raw materials’, for the exchange of respective best practices and regulatory policies.

²⁷⁸ Cf. Sects. 2.1.4, 2.2.5, and 3.3.1 above.

²⁷⁹ Cf. Sect. 5.1.3 above. What may moreover bear inspiration in the ILO approach for future regulatory endeavours regarding the commodity sector is the great number of specific instruments, which detail labour rules in the contexts of individual (sub-)sectors or even activities. Starting with a ‘commodity framework convention’, which clarifies, confirms and amends the fundamental rules and principles of TCL, subsequent instruments could tackle more specific aspects of commodity activity in a more detailed manner.

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