

1

Between Coordination and Regulation – The Dual Functions of Voluntary Sustainability Standards

1.1. INTRODUCTION

Over the past three decades, voluntary sustainability standards (VSS) have presented consumers with the challenge of discerning which production practices correspond with the numerous sustainability standards in a given industry. In addition, these standards have been responsible for creating a conceptual challenge for legal scholars. VSS organizations differ from technical standards bodies like the International Organization for Standardization (ISO), and its regional and national affiliated bodies. They have different governance structures, often including membership opportunities for multiple types of stakeholders. While technical standards bodies limit their oversight to national standards, VSS organizations more often operate in transnational dimensions. Because of these differences, there is still no stable legal conceptualization of VSS. While the European Union uses the New Approach to guide the recognition and incorporation of technical standards in European Directives, as well as stipulating minimum governance requirements for standard setting bodies, the way that VSS organizations are treated by public authorities, civil society as well as private individuals and corporations, is better described as *ad hoc*, unsettled, and quickly developing at the moment.¹ There is a pressing need for transnational and socio-legal scholars to reflect on the functional character of VSS organizations in order to better evaluate the legal role that VSS organizations can best play to further the achievement of sustainable social and environmental justice.

¹ For the latest developments regarding the New Approach, see Harm Schepel, “The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law” (2013) 12 *Maastricht Journal of European and Comparative Law* 521.

In this chapter, it is argued that functional conceptualization of VSS organizations can be placed on a scale between regulation and coordination. In the following pages, a model of this scale is developed by assembling findings from both previous theoretical and empirical studies on sustainability standards, primarily from sociologists and political scientists, but also from the few bodies of legal theory that have addressed sustainability standards. It is shown that, on the one extreme, VSS organizations can be conceived as purely private business arrangements between companies that have found the collective action possibilities of shared marketing to be more favorable than developing the standards individually for themselves.² From this perspective on the *coordinative* character of VSS, the importance of positive market performance of the standard-users claims the top priority. Any improvements or developments to the social and environmental sustainability of firms are welcomed side effects, but derive only from changes among the preferences of consumers.

Alternatively, recent contributions in legal theory have argued that VSS organizations are better conceptualized as an emergent form of Transnational Private Regulation (TPR) as well as transnational (or sometimes global) law.³ According to this *regulatory* account, VSS organizations constitute an innovative organizational form reproducing democratic and consensual rulemaking to achieve (global) public values around social and environmental sustainability, which they implement through the regulation of corporate behavior. As the transnational laws of sustainability markets, the rules of VSS organizations prioritize the improvement of the social and economic performance of standard-users, and the multi-stakeholder participatory opportunities in setting transnational norms for how corporations ought to act.

There are apparent risks involved in this assessment of functional character that correspond, respectively, to the market-emphasizing coordinative and norm-emphasizing regulatory perspectives. On the one hand, if we insist that these are private contractual relationships between firms, constituting nothing other than competitive market behavior, we risk ignoring their potential

² Note that the marketing aspect of this does not necessarily face consumers. In the textile industry, for instance, large corporations largely prefer developing their own environmental and social sustainability marketing programs, but these are often still tied to standards that they share with other corporations, even though this is not immediately visible to the end consumer.

³ See for instance, Errol Meidinger, “Forest Certification as Environmental Law Making by Global Civil Society” in Errol Meidinger, Chris Elliott, and Gerhard Oesten (eds.), *Social and Political Dimensions of Forest Certification* (Forstbuch 2002); B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” (2009) 20 *European Journal of International Law* 23; Allison Loconto and Eve Fueilleux, “Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance” (2014) 8 *Regulation & Governance* 166.

influence and authority in the governance of social and environmental sustainability. That is to say, they might be influential regulatory bodies engaging in issues of the broader public's interest. On the other hand, if we insist that VSS organizations constitute an emerging global environmental law, we risk *green washing* activities that might be nothing more than marketing strategies. In turn, by ascribing them more regulatory capacities than they have in practice, we could very well continue postponing the development of comprehensive and capable regulatory structures for transnational environmental and social concerns.

These risks illustrate “what is at stake” in the functional conceptualization of VSS organizations, and this research aspires to navigate these risks by analyzing a series of exemplary cases to ascertain how companies experience their participation in VSS.⁴ Rather than the subjugation of one functional characteristic by the other, it is likely that the actions of VSS organizations, participating firms (standards users), and other affiliated actors result in complex and hybrid entanglements of the two. It is also likely that different groups and types of actors experience the functions of sustainability standards in different ways. If that is the case, tracing the connections and turning points between the two different functions is essential in order to classify the role and influence of VSS in global sustainability governance. In other words, this study evaluates the claims that VSS organizations constitute transnational, or global, legal phenomena with corresponding constituencies or affected communities.⁵

This chapter develops the two functional capacities of VSS organizations. First, the functional conceptualizations of VSS organizations are placed in a historical context by briefly summarizing the development of sustainability standards since the second half of the twentieth century and highlighting major organizations involved in the process. Then, Max Weber's foundational modern expression of the distinction between market behavior, on the one hand, and normative and legal behavior, on the other hand, is described.⁶ The challenges of marking the distinction between the semi-fluid concepts

⁴ Zumbansen emphasizes critical reflection on “what is at stake” in the distinction between law and non-law in transnational law and global governance. See Peer Zumbansen, “Transnational Legal Pluralism” (2010) 1 *Transnational Legal Theory* 141.

⁵ David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995); Meidinger, “Forest Certification as Environmental Law Making by Global Civil Society.”

⁶ Max Weber, in Guenther Roth and Claus Wittich (eds.), *Economy and Society: An Outline of Interpretative Sociology* (University of California Press 1978); Max Weber, trans. Edward Shils and Max Rheinstein, in Max Rheinstein (ed.), *Max Weber on Law in Economy and Society* (3rd edn., Harvard University Press 1969).

of behavior, norms, and laws, and the importance of perspective in this distinction, are further unfolded in comparing Weber's position to that of Niklas Luhmann's systems theory to help explain why neither pole can provide a full account, nor be completely ignored.⁷ This is followed by a brief critique of attempts to distinguish between normative and technical standards, which have thus far been the most common technique for explaining the differences between VSS organizations and the more common work of international, regional, and national standards bodies, such as the ISO.

The main theoretical framework for this research project is explained in the second half of this chapter through an account of the possible coordinative (facilitating economic cooperation between private actors) and regulatory (governing social and environmental relations in production processes with respect to public values) functions of VSS organizations. Following this account, the four dimensions of investigation utilized in the project are presented: the development process of sustainability standards (including who is involved, how they are decided on, and what the content consists of), the reasons for participation in VSS organizations, the effects of participation on standards users, and finally the content of conflicts and disputes within VSS organizations. These four dimensions constitute the areas investigated in each case study in order to assess the coordinative and regulatory functions of each VSS organization.

1.2. EARLY PIONEERS IN SUSTAINABILITY STANDARDS

Standards for products and services are centuries-old governance tools. Below the main façade of the thirteenth-century *Freiburger Münster*, a series of engravings in the shapes of bread loaves are visible. The collections of engravings illustrate the norms that products – ranging from the size of bread loaves to lengths of fabric – in Freiburg's market needed to meet throughout the centuries. Under the eaves of the minster, a special court heard disputes from consumers during the market, which relied on these engravings as normative tools. The engravings serve as a reminder that, firstly, product standards have long played a role in the relationships between producers, traders, retailers, and consumers in our markets, and secondly, the development and enforcement of product standards by organizations – commercial courts, in the case

⁷ Niklas Luhmann, trans. John Bednarz Jr. and Dirk Baecker, *Social Systems* (1st edn., Stanford University Press 1995); Niklas Luhmann, trans. Klaus A. Ziegert, *Law as a Social System* (Oxford University Press 2004); Niklas Luhmann, *Die Wirtschaft Der Gesellschaft* (6th edn., Suhrkamp Verlag 1994).

of *Freiburger Münster* – aligned to markets rather than territorial political communities, has deep historical roots.⁸

The standardization of production processes has become an essential, perhaps even defining, component of modern globalized trade.⁹ The current architecture of standardization for products and services was largely founded in the mid-twentieth century, and is structured around nationally affiliated standardization bodies, as well as some regional and international standardization bodies, such as the ISO. While the number of national and international standardization bodies has remained relatively stable, the amount of standards they have been producing has grown with incredible pace, leading to our current “world of standards.”¹⁰ Parliaments and administrative agencies extensively use standards produced by national standardization bodies, resulting in increased scrutiny of the procedures governing their development and maintenance.¹¹ As early as 1981, commentators questioned whether there should be a more substantial oversight of the standardization process by public authorities.¹² Despite these developments among national and international standardization bodies, the field of VSS has taken a remarkably different path.

In contrast to the lengthy history of product standards, the sustainability standards for production date back no earlier than the 1970s. In 1973, a few dozen organic farmers from California formed the California Certified Organic Farmers (CCOF) organization as a trade association; they had published their first set of standards by 1974.¹³ Organic agriculture was the first industry to develop a substantial body of sustainability standards to establish a common distinction between products, and the CCOF is generally considered the first example. In the 1990s, the plethora of (mostly regional or

⁸ For more on the history of legal systems situated around markets rather than political territories, see: Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2006) 493; Anne Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003) 326.

⁹ James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).

¹⁰ Nils Brunsson and Bengt Jacobsson, *A World of Standards* (Oxford University Press 2000).

¹¹ For a comprehensive study of both the European Union and the United States, see Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart 2005). See also Harm Schepel, “Constituting Private Governance Regimes” in Christian Jorges, Inger-Johanne Sand, and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* (Hart 2004).

¹² Michael Wines, “Should Groups That Set Standards Be Subjected to Federal Standards?” (1981) *National Journal*.

¹³ California Certified Organic Farmers, “Our History” <<http://ccof.org/ccof/history>> last accessed 24 February 2017.

local) organic agricultural standards in the United States was gradually replaced by growing state and federal legislation, culminating in the establishment of a uniform body of standards produced by the United States Department of Agriculture's National Organic Program Final Rule, issued in 2000.¹⁴ Similarly, the European Union also developed a harmonized system of organic agriculture standards in the early 1990s.¹⁵ Thus, organic agriculture standards, the earliest examples of VSS, subsequently evolved into national public standards in the United States, went through a process of "Europeanization" in the EU, and in the process transformed from mainly private and competitive standards into a single set of harmonized standards overseen by public authorities.¹⁶ Within the current structure, private associations and organizations that had previously developed standards before the 1990s are still involved in the certification process, as well as developing variations for particular regions or sub-industries.¹⁷ The centralization of organics standards has also been a subject of critique from those who claim that it is leading to less stringent requirements and a shift from counterculture farmers to industrial agricultural corporations playing the primary role in organic production.¹⁸

While the development of organic standards took the path of public regulation – which falls outside the scope of this project – the majority of sustainability standards continue to be developed, implemented, and enforced primarily by private organizations, much like during the early stages of the organics movement. In 1987, the Dutch organization *Stichting Max Havelaar* was established, marking the beginning what has become known today as the Fair Trade movement, with its corresponding standards and certificates. By 1988, Max Havelaar had begun certifying the first coffee produced in accordance with its standards.¹⁹ Similarly, the Rainforest Alliance was founded in

¹⁴ For an overview of the development of a federal organic agriculture standard, see Julie Caswell, "Variation in Organic Standards Prior to the National Organic Program" (2002) 17 *American Journal of Alternative Agriculture* 55.

¹⁵ Council Regulation (EEC) 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs [1991] OJ L198/1; Council Regulation (EEC) 2078/92 on agricultural production methods compatible with the requirements of protection of the environment and the maintenance of the countryside [1992] OJ L215/85.

¹⁶ Johannes Michelsen, "The Europeanization of Organic Agriculture and Conflicts over Agricultural Policy" (2009) 34 *Food Policy* 252.

¹⁷ See, for example IFOAM Organics International, "The IFOAM Family of Standards" <www.ifoam.bio/en/ifoam-family-standards> last accessed 24 February 2017.

¹⁸ Julie Guthman, "Regulating Meaning, Appropriating Nature: The Codification of California Organic Agriculture" (1998) 30 *Antipode* 135.

¹⁹ Max Havelaar, "Wie Zijn Wij" <www.maxhavelaar.nl/39/wie_zijn_wij> last accessed 24 February 2017.

1986 and, within two years, it had begun producing standards in sustainable forestry, banana farming, and other industries that affect rainforests worldwide. These early sustainability standards in the late 1980s were a precursor for what would develop in the next two decades.

Voluntary sustainability standards have proliferated since the late 1980s, covering an expansive field of industries, as well as developing competition between standards within single industries.²⁰ An Ecolabel Index maintaining a list of the sustainability standards and corresponding ecolabels operating across the world (including local, national, and transnational standards) currently includes 458 ecolabels, operating in 197 different countries, and across 25 different industry sectors.²¹ The industry sectors include industries often associated with sustainability concerns (agriculture, forestry, fisheries, and textiles) as well as industries recently engaging with sustainability, such as biofuels, watershed management, energy, and tourism. Research on VSS organizations has developed its own niche, with considerable attention given to the Non-State Market-Driven (NSMD) governance model, separate from research on standardization and trade law.²² Despite the transformation to public regulation that organics standards went through, the majority of sustainability standards remain private, often “multi-stakeholder,” platforms for establishing social and environmental performance requirements for producers, and communicating compliance to these requirements throughout supply-chains, and eventually to consumers. To the extent that nation states are involved in these modern VSS organizations, they do so without formal public authority, but instead as equals with the other actors. State-based public actors are also interacting with these new types of sustainability standards in a quite different manner than the referencing used to incorporate technical standards into new legislation and administrative policies, creating the need for an entire new framework for map these “transnational business governance interactions.”²³

²⁰ Juliane Reinecke, Stephan Manning, and Oliver von Hagen, “The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry” (2012) 33 *Organization Studies* 791.

²¹ “Ecolabel Index” <www.ecolabelindex.com/> last accessed 24 February 2017.

²² Benjamin Cashore, “Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority” (2002) 15 *Governance: An International Journal of Policy, Administration, and Institutions* 503.

²³ Burkard Eberlein et al., “Transnational Business Governance Interactions: Conceptualization and Framework for Analysis” (2014) 8 *Regulation & Governance* 1; Stephan Wood et al., “The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory” (2015) 6 *Transnational Legal Theory* 333.

1.3. A Sociological Jurisprudence of Sustainability Standards

27

Conceptually, the proliferation of sustainability standards has proven challenging for legal scholars. The difficulty lies in the nexus between, on the one hand, the importance of private actors in the VSS landscape – including trade associations, NGOs, corporations, and labor unions – and, on the other hand, the increasing attention given to public concerns and interests – such as water, air, and soil quality, workplace health and safety, and labor rights. We find the work of these private actors with regard to such public interests to be significantly different to the state-centric experiences of the twentieth century welfare state.²⁴

The conceptualization process is made all the more complex given the transnational dimensions of many VSS organizations, in which private actors from other countries oversee these public interests. Even the concept of *public interest* is problematized in this transnational setting in which it is fundamentally uncertain what or who is included in the public or constituency. In terms of the conceptualization of VSS, we – consumers and scholars alike – are left wondering what the certification logos on products signify. Do they signify a marketing strategy, compliance with trade association rules, or compliance with transnational laws of the particular industry? The growth and complexity of the VSS landscape makes the conceptualization process all the more pressing. In the following section, a review of different theoretical explanations of transnational regulation is presented to illustrate the various positions in which they frame VSS.

1.3. A SOCIOLOGICAL JURISPRUDENCE OF SUSTAINABILITY STANDARDS

Legal scholars have been attracted to the role that VSS and other comparable forms of standardization can play in the current era of “transnational new governance.”²⁵ In particular, legal scholarship has been attracted to the notion that transnational rule-making can operate according to the logics of markets rather than territorial jurisdictions, implying that transnational standardization constitutes a modern form of the *lex mercatoria*.²⁶ Indeed, market-based

²⁴ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edn., Butterworths LexisNexis 2002) 44–51.

²⁵ Kenneth W. Abbott and Duncan Snidal, “Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit” (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

²⁶ For transnational rule-making in the form of arbitration and standardized contracts see Ralf Michaels, “The True Lex Mercatoria: Private Law Beyond the State” (2007) 14 *Indiana Journal of Global Legal Studies* 447; Alec Stone Sweet, “The New *Lex Mercatoria* and Transnational

explanations of transnational governance have provided legal scholars with a strong position to theorize forms of global and transnational legal practice disconnected from the nation-state. However, this section argues that the focus on market-based explanations of VSS organizations and comparable transnational regimes have overshadowed important theoretical insights regarding the political foundations of these regimes. This section will describe the NSMD governance literature and the TPR literature as two bodies of scholarship that have received considerable attention from legal scholars. In addition, it will explore the extent to which legal theories of Global Administrative Law (GAL) and societal constitutionalism have incorporated market and political dimensions into their accounts of transnational regimes, like sustainability standards. Through examining these theoretical accounts of transnational regimes, it becomes clear that a sociological jurisprudence of transnational sustainability standards will require consideration of both market and political forces, and an emphasis on how these forces are experienced in the eyes of the standard-using producers.

1.3.1. *Institutions, Mechanisms, and Dynamics*

Building off the shift in regulatory governance literature toward “de-centered” “regulatory spaces,”²⁷ the theory of NSMD governance explains how private standard setting bodies can develop legitimacy despite not having any formal relationship with public authorities.²⁸ It sought to describe how the gradual development of market power, combined with involvement and consensus among civil society actors, could lead to the development of market-based governance actors perceived to be legitimate regulatory authorities despite their lack of state endorsement. This has also required more theoretical reflection on the evolving concept of legitimacy that best describes non-state

Governance” (2006) 13 *Journal of European Public Policy* 627; for specific discussion on sustainability standards see Meidinger, “Forest Certification as Environmental Law Making by Global Civil Society.”

²⁷ Julia Black, “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” (2001) 54 *Current Legal Problems* 103; Colin Scott, “Analysing Regulatory Space: Fragmented Resources and Institutional Design” (2001) 2001 *Public Law* 329; L. Hancher and M. Moran, “Organizing Regulatory Space” in Robert Baldwin, Colin Scott, and Christopher Hood (eds.), *A Reader on Regulation* (Oxford University Press 1988); Bettina Lange, “Regulatory Spaces and Interactions: An Introduction” (2003) 12 *Social & Legal Studies* 411; Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2012).

²⁸ Steven Bernstein and Benjamin Cashore, “Can Non-state Global Governance Be Legitimate? An Analytical Framework” (2007) 1 *Regulation & Governance* 347; Cashore.

governance actors.²⁹ NSMD governance literature has also elaborated on the ways in which NSMD governance systems can collaborate or support public regulatory action, and vice versa, how public regulatory action can support the expansion of NSMD governance systems.³⁰ The eruption of NSMD governance systems has also spawned studies on the dynamics of competition between different systems.³¹

Facing the situation in which states do not hold formal or institutional privileges in initiating or moderating cooperative action among civil society organizations the NSMD governance model presents a thorough approach to understanding how VSS organizations work – that is, the dynamics which make some succeed in developing a regulatory capacity while others fail.³² It has been particularly formative in surveying and explaining the consequences of various institutional designs, the patterns in which VSS organizations grow and expand, and the impacts of their (lacking) institutional relationships with public authorities.

The NSMD governance model is grounded in a thorough empirical study of the emergence of sustainable forestry standards in North America and Europe, evaluating how a national industry's position in the global economy, the structure of the industry, and historical position of forestry in public policy discourses influence the comparative success of the multi-stakeholder Forest Stewardship Council (FSC) versus its numerous industry-affiliated competitors.³³ While market dynamics play a key role in this model, it also acknowledges the role of political dynamics surrounding the influential support of environmental NGOs as a “core audience” that helped the FSC maintain its identity as a legitimate source of sustainability standards.³⁴ Furthermore, the study identifies strong variation in enrolment among producers based on the type of producers they were (industrial versus non-industrial), affirming

²⁹ Steven Bernstein, “Legitimacy in Intergovernmental and Non-state Global Governance” (2011) 18 *Review of International Political Economy* 17.

³⁰ Kelly Levin, Benjamin Cashore and Jonathan Koppell, “Can Non-state Certification Systems Bolster State-Centered Efforts to Promote Sustainable Development through the Clean Development Mechanism,” 44 *Wake Forest Law Review* 777; Lars H Gulbrandsen, “Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-state Certification Programs” (2014) 8 *Regulation & Governance* 74.

³¹ Reinecke, Manning and von Hagen “The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry.”

³² Cashore, “Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority,” 15.

³³ Benjamin Cashore, Graeme Auld, and Deanna Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-state Authority* (Yale University Press 2004).

³⁴ *Ibid.* 240–1.