Introduction

1 The Rise of Voluntary Sustainability Standards

Through their labels and logos competing for the interest of consumers, voluntary sustainability standards (VSS) are a visible feature in supermarkets and shops. With a few exceptions such as the European Union (EU) Ecolabel and some national equivalents, most of these schemes are set up by private actors such as non-governmental organisations (NGOs), producer organisations and even single corporations establishing social and environmental requirements for their suppliers. The emergence of VSS is traditionally associated with the establishment of the Sustainable Forestry Initiative (SFI) and the Forest Stewardship Council (FSC), and the rise of transnational civil society movements pressuring apparel brands over the labour conditions of their suppliers.1

The difficulty in reaching global agreement between States in remedying the ‘tragedy of the commons’, in particular depletion of natural resources and transboundary pollution, in combination with the jurisdictional limits of unilateral conduct, has led private actors to intervene in the regulation of social and environmental externalities connected to global production.2 The need to protect a reputation from scandal and NGO pressure, and to avoid liability and comply with applicable provisions, as well as creating new markets, have been equally strong.

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contributing factors. Since the early 1990s the proliferation of schemes in sectors spanning agriculture to fisheries, and biofuels to jewellery has been unstoppable. From bird-friendly coffee production to acceptable working conditions in the garment sector, very few sustainability and corporate responsibility-related issues are not addressed by private standards. The most comprehensive database identifies 463 standards operating in 199 countries and in 25 sectors. Most of these standards are private, and the focus of this book will be limited to those.

The popularity of VSS is not just measurable through their proliferation and the appearance of new initiatives. Uptake by producers and retailers and, as it will be discussed in this volume, VSS integration into public policies indicate that VSS have become a key component in regulating product features and relations between retailers and producers. In 2017, around 23 per cent of global coffee production was compliant with schemes such as Fairtrade, 4C, UTZ or Rainforest Alliance. Certified global production of cocoa, tea and palm oil is around 25 per cent, 16 per cent and 12 per cent respectively. In 2017, almost 11 per cent of forestry land worldwide was certified as sustainably managed under requirements set by FSC, SFI, the Program for the Endorsement of Forestry Certification (PEFC) and other standards. In 2015, 14 per cent of global seafood production was certified mostly under Marine Stewardship Council (MSC) standards. In 2018 organic farming covered 6.7 per cent of the agricultural land in the EU, on the basis of private standards in line with EU baseline requirements.

VSS do not just address social and environmental concerns in agri-food value chains; factory certification of acceptable labour practices also expanded considerably. More than 2,700 garment factories in producing countries are certified under Fair Wear Foundation standards. Almost 4,800 facilities are certified under Social Accountability International’s SA8000 – one of the most popular certification schemes addressing

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working practices. At least in certain countries, these standards no longer identify niche markets but have become mainstream. In 2014, 75 per cent of the timber sold on the Dutch market originated from managed forests certified as sustainable. Similarly, the market share of sustainable paper and paperboard has increased from 32 per cent to 47 per cent between 2011 and 2013.

2 The Implications of Voluntary Sustainability Standards

VSS share a hybrid, novel, regulatory form at the intersection of market-based instruments, information-based regulation and voluntary private governance. By defining sustainability-related features of products and responsible production practices, VSS have come to play a crucial function in the transnational regulation of production processes and sustainability/responsibility in global value chains (GVCs). Even public actors, especially in the EU, have started to make use of VSS. This occurred in the context of measures regulating reporting obligations, public procurement, GVCs such as those of biofuels, ‘conflict minerals’ and forestry products. The importance of VSS in the transnational regulation of production increased

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8 https://sa-intl.org/resources/sa8000-certified-organizations/.
accordingly. As human rights due diligence is being made mandatory in EU Member States and at the EU level, firms’ need for social and environmental risk management tools is likely to be fulfilled at least partially by VSS.

VSS are appealing to public regulators because of their capacity to mediate between economic and non-economic concerns and to bring legalisation and rule-enforcement into GVCs. At least in multi-stakeholder schemes, standards are set with the involvement of different interests and groups. As Chapter 2 will illustrate, their requirements are often grounded on human rights and environmental conventions, international agreements and protocols, as well as soft law instruments such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) and various Guidelines for responsible business conduct by the Organisation for Economic Organisation for Economic and Development (OECD). Positive accounts of VSS highlighted thus their complementarity with public rules and their capacity to implement, interpret, monitor and enforce international obligations in need of being operationalised to apply to specific instances, or to be directly applicable by firms and producers. Such ‘implementing’ functions are, however, not without economic motives. As Chapters 1 and 2 will discuss, a functional conceptualisation of VSS which focuses on their regulatory capacity obfuscates the varying rationales and motives behind the actors involved in standard-setting, as well as the far-reaching implications of VSS on trade opportunities especially for producers in developing countries.

While VSS may sound like a successful story of harnessing market forces towards a greener, fairer and better world, the implications of these schemes for firms and workers in GVCs may be overlooked by the (mostly Western) consumers who purchase ‘responsibly’ and corporate actors disciplining their GVCs by means of VSS. The outcome of standard-setting also reflects power relations among economic actors

and the interests of powerful entities. Weaker actors face considerable representation challenges in standardising bodies.²² In spite of a formally voluntary character, access to certain markets has become de facto conditional upon obtaining certification due to economic drivers such as retailer and consumer preference. Such pressures are further exacerbated for agri-food producers, especially in Africa, Asia and Latin America who, albeit price competitive, have to adjust their production to the burdensome requirements of large Western retailers in order to enter their much-needed distribution channels. Producers have lamented a high cost of compliance which dampens their comparative advantage. At the World Trade Organization (WTO), developing countries portrayed VSS as a disguised form of protectionism, or ‘eco-imperialism’.²³ Small producers in developing countries are confronted with limited opportunities to affect the process of drafting the rules they have to comply with, as even the supposedly most inclusive multi-stakeholder standard-setters in fact show a strong preference towards Western economic interests.²⁴

Furthermore, despite their proliferation and success, evaluating the social and environmental impact of VSS remains complex.²⁵ VSS remain exposed to accusations of greenwashing in light of their limited effectiveness and the challenges auditors face in monitoring compliance.²⁶ Measuring and comparing impact is complicated not just by the large number of schemes pursuing similar – but not identical – objectives, but also by the frequent employment of management standards. The operationalisation of these requirements varies from producer to producer thus affecting the overall effectiveness of a scheme. The emergence of several VSS pursuing similar goals with the employment of different standards begs the question of which one is the most effective or would provide the most rigorous requirements. In the presence of a market for standards, the question is also whether proliferation engenders a ‘race to the bottom’ or a ‘race to the top’ among competing schemes,²⁷ and

²⁵ On knowledge and insights on the impact of market-based approaches to sustainability see: https://evidensia.eco.
whether consumers, businesses and public authority can discern effective standards from more relaxed ones.

3 Approach of This Book

This book takes seriously the potential of VSS to mediate between market and non-market values. In view of ensuring that VSS can be effectively considered a trustworthy transnational regulatory tool, it is important to explore how to allocate regulatory competences between public and private authority, and how the former can generally influence the latter. It has been suggested that public authority should steer standards in line with public goals to allow their full regulatory potential.28 This book is concerned with this steering and regulatory capacity of public authority vis-à-vis VSS to address some of the problems ‘on the ground’ such as limited effectiveness and trade barriers and attempt to ratchet up standards. It explores the possibilities of exercising control and coordination both through direct means connected to legal review, and through less direct means encompassing incentives generated by various forms of public employment of VSS. Legal review too can play a steering function, as well as policy guidance in the domain of competition law.

VSS are arguably too ingrained in corporate use and practices to be disregarded by regulators. In other words, VSS are here to stay and, however they may evolve in different forms, this book suggests that their potential complementarity with public rules can be harnessed and utilised. This notwithstanding, with VSS generating distributional impacts and uncertain positive effects on trade and the achievement of their professed goals, any further association with public authority and legitimisation of their regulatory functions must go through more, and not less, control and supervision. While the interplay between legal regimes and technical standards has been studied from a legal perspective, Chapter 1 illustrates that there are considerable differences between


3 APPROACH OF THIS BOOK

The book studies the extent to which formally voluntary, transnational private regimes can be affected by legal provisions in the field of economic law at the international and the EU level. This project also scrutinises how obligations at different levels, i.e. at the WTO and EU level, impart meaning on each other in light of specific interactions of public authority with VSS. In unpacking the interplay between various normative orders, the book provides fresh insights on the intersection of public authority at the international and regional levels with forms of transnational private regulatory authority, and offers a road map for the regulation of VSS.

VSS are defined as voluntary, market-based, regulatory schemes designed by private actors within a permanent institutional setting, and with the purpose of addressing – directly or indirectly, and by means of third-party certification of products and processes – the social and environmental impact of production. Food safety schemes and their distinct treatment are excluded from the scope of the analysis. This book employs a broad understanding of VSS in order to capture possible variations in legal treatment stemming from their institutional differences. Also bilateral contracting practices of companies reveal a public dimension and transnational regulatory effects. For this reason, this conceptualisation of VSS does not only include certification schemes established by multi-stakeholder organisations and sectoral standards, but also sustainability provisions defined and incorporated in single companies’ contracting practices. These standards fall under the scope of this book as long as they are certifiable via third-party auditing, and provided that they apply to retailers and other business entities across GVCs. While the inclusion of company VSS is broader than other generally accepted conceptualisations of VSS, it is required for completeness of analysis in light of the legal provisions here considered and to provide nuance about forms of public intervention commensurate

to the purpose and the actors behind a scheme. In the context of WTO obligations, following practice in WTO Committees, the term private standards will be used to encompass a broader set of standards including not just VSS, but also food safety regimes. When discussing WTO obligations, the term VSS will be used with reference to specific obligations and legal tests for VSS.

4 Relevant Legal Frameworks and Research Questions

Provisions of international and European economic law are central to our inquiry because of their potential to intersect, directly or indirectly (i.e. through the mediation of public measures), with the transnational sphere of VSS. In addition, they share the potential to affect substantive and procedural features of VSS and thus contribute to their publicisation. The WTO Agreements, and in particular the Technical Barriers to Trade (TBT) Agreement, contain substantive and procedural meta-rules indirectly applicable to standards established by private bodies through prescribed behaviour from Member States. EU competition law applies to agreements between undertakings. Private standards, including in the domain of sustainability, are covered by Art. 101 of the Treaty on the Functioning of the European Union (TFEU) on horizontal agreements and Art. 102 TFEU where a standard-setter enjoys a dominant position in a market for standards. EU measures regulating GVCs and expressly recognising or permitting the use of VSS can have a substantial effect on private schemes by incentivising their alignment with public requirements. These measures may also result in attribution to the EU of WTO-inconsistent effects of VSS. Finally, EU internal market provisions apply to restrictions to market access, including, on occasions, those created by voluntary private rules such as standards. The choice of the EU level in addition to the international dimension lies in the more extensive use of VSS made in public measures than in other jurisdictions.

These legal areas and measures are capable of affecting both substance and procedures of private regimes – with potentially profound

consequences for producers, consumers and the goals pursued by the standards. For example, EU competition rules discussed in Chapter 3 provide for a ‘safe harbour’ to standard-setting in line with certain procedural requirements of good administration and inclusiveness, and are in addition capable of evaluating various impacts generated by VSS on prices, quality and consumers. WTO provisions studied in Chapter 6 encompass not only a procedural dimension, but also a substantive dimension through non-discrimination and necessity obligations with which the content of the standards must be aligned.

The areas of contact between public regimes at the international and European level and VSS remain, however, under-explored in legal research. At the EU level, despite a lively debate on competition law and sustainability, the extent of competition review over VSS remains uncertain, as well as the possible application of free movement provisions to standards formally disconnected from public authority, including their justification. A debate touching upon the broader concept of ‘private standards’, including private food safety standards, has unfolded at the WTO in recent years. The term private standards was used to highlight the difference with standards established by non-governmental standardising bodies covered by the TBT Agreement, and often in support of their exclusion from the WTO regime. Within this debate it is unsettled what would be the expected behaviour of WTO Membership vis-à-vis VSS. It is also unclear how WTO substantive provisions as interpreted for State measures can be transposed to private standards in general and, in particular, VSS. Also, various modalities of public use of VSS in market regulation, and their possible employment in other domains such as trade policy, require mapping and analysis to assess how competences are allocated and how public influence can be exerted over VSS.

These interactions between public and private, and between the international/regional and the transnational levels also beg the question of the possible influence stemming from the WTO level to the EU given the connections established with VSS. The most notable case concerns public use of VSS and the ramifications under WTO law from ‘using’ standards in ways that do not fit the categories for delegation and attribution of private conduct under international law. Regardless of how public authority employs VSS in their measures, for example by formally recognising standards or by allowing standards to be used to demonstrate regulatory compliance, what are the obligations applicable to WTO Members in these cases? Are there any obligations that require WTO Members to use certain standards under certain conditions?

In light of the relevance for VSS of EU and international economic law regimes and by the instruments of market and GVC regulation, this book studies the extent to which, and the conditions under which, EU and WTO law can review, coordinate and influence VSS standards, ratcheting up requirements and, possibly, scaling up their impact. In preparation for the legal analysis, Chapter 1 elaborates an ideal–typical categorisation of VSS to capture variations due to their formal, institutional substantive and procedural features. The categorisation illuminates and flags specific institutional arrangements and types of VSS, including procedural requirements in standard-setting and standardising bodies’ governance features. Chapter 2 then frames VSS substantive requirements in relation to the existing public rules at the international and regional/national level that may find their way into the standards.

Political science and socio-legal research have shown the influence of EU requirements in steering private regimes that want to be ‘used’ by public authority. EU measures enacted in the regulation of GVCs and product sustainability are thus relevant in influencing VSS. As Chapter 2 and Chapter 4 will further illustrate, these measures include public use of VSS, where standards are formally recognised, and public facilitation, where measures in the area of market regulation are

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