



UvA-DARE (Digital Academic Repository)

Public play upon private standards

Partiti, E.D.

[Link to publication](#)

Citation for published version (APA):

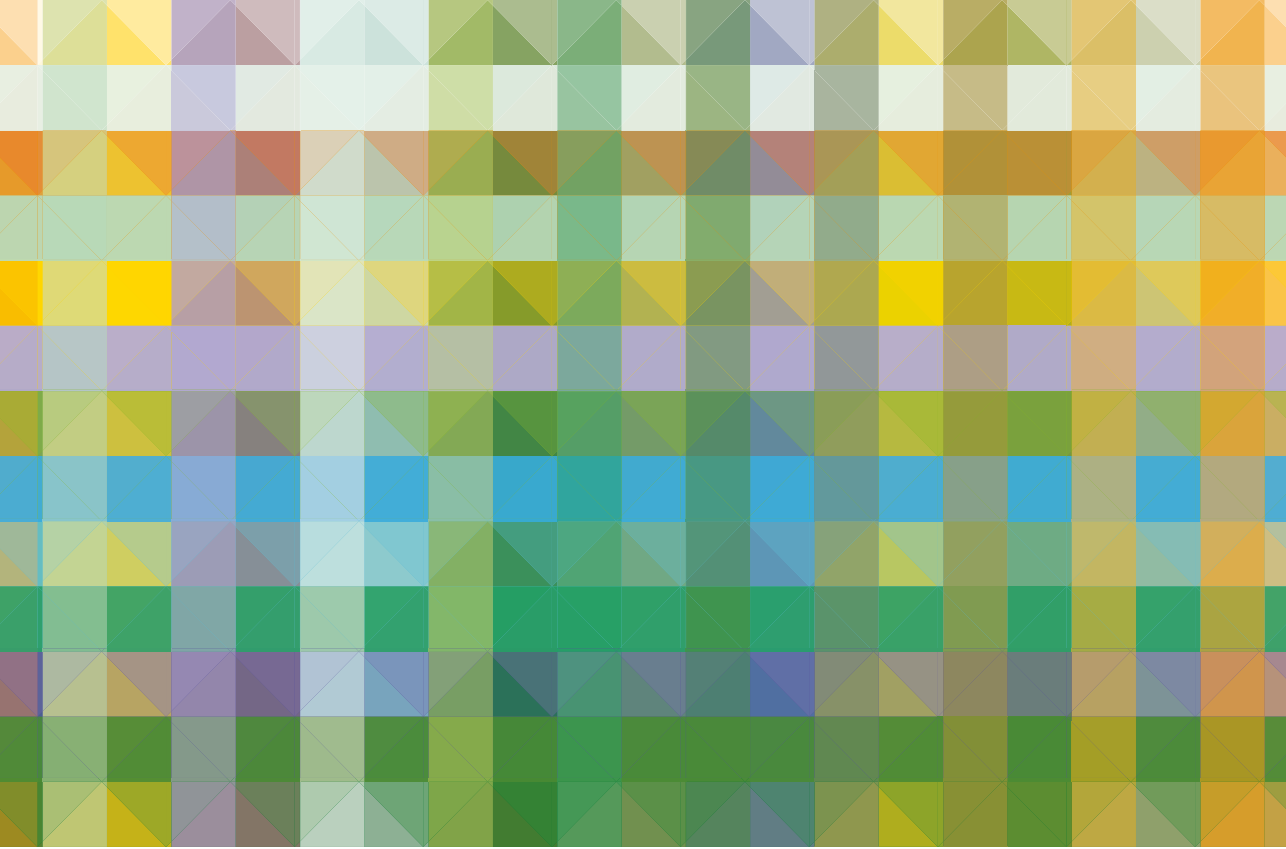
Partiti, E. D. (2017). Public play upon private standards: How European and international economic law enter into voluntary regimes for sustainability

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <http://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



PUBLIC PLAY UPON PRIVATE STANDARDS

How European and International
Economic Law Enter into Voluntary
Regimes for Sustainability

Enrico Partiti

PUBLIC PLAY UPON PRIVATE STANDARDS

*How European and international economic law enter
into voluntary regimes for sustainability*

Enrico Partiti

Copyright 2017 by Enrico Partiti

All rights reserved

Cover: Vigeik Winters-Skogerbø at Studio Skogerbø

Printed by: IPSKAMP Printing, Enschede

For obvious reasons this book has been printed on FSC certified paper



**Public play upon private standards
How European and international economic law enter into
voluntary regimes for sustainability**

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
mw. prof. dr. ir. K.I.J. Maex
ten overstaan van een door het College voor Promoties ingestelde commissie,
in het openbaar te verdedigen in de Agnietenkapel
op de dag 20 April 2017, te 12:00 uur

door
Enrico Domenico Partiti

geboren te Savigliano, Italië

Promotores:

dhr. prof. dr. P.J. Kuijper Universiteit van Amsterdam
mw. prof. dr. A.A.M. Schrauwen Universiteit van Amsterdam

Copromotor:

dhr. dr. J.H. Mathis Universiteit van Amsterdam

Overige leden:

dhr. prof. dr. M.C.E.J. Bronckers Universiteit Leiden
dhr. prof. dr. R.J.M. Lefeber Universiteit van Amsterdam
dhr. prof. dr. R. Wesseling Universiteit van Amsterdam
mw. dr. D. Prévost Universiteit Maastricht
dhr. dr. I. Venzke Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid

A mamma e papà

Table of content

- Chapter 1 1**
- Introduction and methodology 1**
 - 1 The rise of voluntary sustainability standards 3**
 - 1.1 The regulatory effects of VSS 8
 - 1.2 VSS and problems on the market 12
 - 2 Methodology 18**
 - 2.1 Research questions 21
 - 2.2 Structure of this book 24
 - 2.3 Relevance and novelty 28
- Chapter 2 31**
- Classifying VSS 31**
 - 1 Introduction 33**
 - 2 The boundaries of the subject matter 35**
 - 2.1 Standards and certification 36
 - 2.2 Areas of 'sustainability' 38
 - 3. Institutional arrangement of VSS bodies and their output 42**
 - 3.1 VSS and global public goods 42
 - 3.1.1 Multi-stakeholder VSS 45
 - 3.1.2 Company VSS 48
 - 3.1.3 Sectoral VSS 50
 - 3.2 Institutional desirability? 52
 - 4. Public role and specific forms of interaction with VSS 55**
 - 4.1 Public authorities as users of VSS 57
 - 4.2 Public authorities as facilitators of VSS 58
 - 4.3 Public authorities as supporters of VSS 59
 - 5. Formal features of VSS 60**
 - 5.1 Form of the standards 60
 - 5.2 VSS and technical standards 65
 - 5.3 Employment of a label 66
 - 5.4 Stringency of the standards 66
 - 5.5 Local adaptation, recognition, overlap 69
 - 6 Conclusion 71**
- Chapter 3 77**
- VSS in the internal market 77**

Art. 34 TFEU and specific forms of interaction in the domain of market regulation	77
1. Introduction.....	79
2. Direct application of freedom of movement provisions to VSS .	82
2.1 The substantive scope of Art. 34 TFEU.....	83
2.1.1 The notion of market access.....	84
2.1.2 The limits of a market access approach	86
2.2 Scope <i>ratione personae</i> of Art. 34 TFEU <i>vis-à-vis</i> private parties.....	89
2.2.1 Personal scope of the free movement of persons.....	89
2.2.2 Case-law on private bodies covered by Art. 34 TFEU.....	93
2.2.3 Art. 34 TFEU and measures in the lack of a connection with Member States.....	95
2.2.4 A normative venue for review I: interfering with third-party contractual preferences.....	97
2.2.5 A normative venue for review II: a ‘fundamental freedom’ approach to Art. 34 TFEU.....	99
2.3 Application of Art. 34 TFEU to VSS.....	102
2.3.1 Personal application	103
2.3.2 Substance thresholds for market access breach.....	104
2.3.3 Justification and proportionality.....	107
3. Interactions, recognition, and indirect forms of influence at the EU and at the Member State level	112
3.1 EU use of VSS and its legal consequences	114
3.2 EU facilitation as indirect form of influence	119
3.2.1 Harmonisation efforts	120
3.2.1.1 The organic products Regulation.....	120
3.2.1.2 The single market for green products initiative	121
3.2.2 Meta-rules.....	122
3.2.2.1 The public procurement Directive	122
3.2.2.2 The Commission Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs	125
3.2.2.3 The forest law enforcement, governance and trade (FLEGT) scheme.....	126
3.2.2.4 The Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings	126
3.2.2.5 The unfair commercial practices Directive	127
3.3 EU support of VSS.....	128

3.4 Use of VSS by Member States	129
4. Conclusion.....	131
Chapter 4.....	139
VSS in the internal market	139
Competition law rules	139
1 Introduction.....	141
2 VSS under Art. 101 TFEU	145
2.1 VSS and economic activity	146
2.1.1 Standard setting as an economic activity	146
2.1.2 Multi-stakeholder and sectoral VSS as horizontal agreements between undertakings or decisions of an association of undertakings affecting trade between Member States.....	151
2.2 Exclusion from Art. 101(1) TFEU	152
2.3 Restrictions of competition generated by multi-stakeholder and sectoral VSS.....	158
2.3.1 Object and effects restrictions.....	158
2.3.2 Market definition	160
2.3.3 Standardisation agreements and VSS under the Commission Guidelines.....	161
2.3.4 Safe-harbour requirements.....	162
2.3.4.1 Unrestricted and non-discriminatory participation	165
2.3.4.2 Transparency.....	166
2.3.4.3 Voluntary nature of the standards.....	167
2.3.4.4 FRAND terms	169
2.3.5 Assessment of restrictions to competition generated by VSS.....	169
2.3.5.1 Exclusion and negative effects on competition	170
2.3.5.2 Negative effects on other market parameters.....	172
2.4 Assessment of pro-competitive effects under Art. 101(3) TFEU	174
2.4.1 Accountable efficiencies after the modernisation of EU competition law	174
2.4.2 Positive efficiencies generated by VSS.....	178
2.4.2.1 Market creation by means of provision of information	179
2.4.2.2 Positive effects on other market parameters	181
2.4.2.3 Externality abatement.....	181
2.4.2.4 Efficiencies not generated by VSS.....	182
2.4.2.5 Indispensability of the restriction and substantial elimination of competition.....	184
2.4.3 Balancing pro- and anti-competitive effects of VSS	185

2.5 Company VSS as vertical agreements under Art. 101 TFEU.....	189
3 VSS under Art. 102 TFEU	191
3.1 Exploitative abuses	192
3.2 Exclusionary abuses	195
4 Member States use of VSS and application of competition rules to State measures	198
5 Conclusion.....	200
Chapter 5.....	209
VSS and WTO law	209
Attribution of private conduct and the extent of the obligation for WTO Members.....	209
1 Introduction.....	211
2 Relevant Articles on State Responsibility for Internationally Wrongful Acts.....	214
2.1 Article 4 - Conduct of organs of a State	215
2.2 Article 5 - Conduct of persons or entities exercising elements of governmental authority.....	215
2.3 Article 8 - Conduct directed or controlled by the State.....	216
2.4 Article 11 - Conduct acknowledged and adopted by the State as its own	218
3 The WTO rules on attribution: VSS under the GATT	219
3.1 WTO law and the Articles on State Responsibility.....	220
3.2 Private and public elements of a measure and its effects.....	222
3.3 WTO law and private parties' actions	225
3.3.1 WTO law and private parties - Situations falling under Art. 5 ASR .	226
3.3.2 WTO law and private parties - Situations falling under Art. 8 ASR .	227
3.3.3 WTO law and private parties - Situations falling under Art. 11 ASR	231
3.3.4 WTO law and local governmental bodies - Situations falling under Art. 4 ASR	234
3.4 Attribution of VSS to a Member under the GATT.....	235
3.4.1 WTO Members as users	236
3.4.2 WTO Members as facilitators	238
3.4.3 WTO Members as supporters and lack of interaction.....	240
4 VSS under the special rules of attribution of the TBT Agreement	242
4.1 Mandatory versus voluntary character of a measure.....	244
4.2 Bodies covered by the Agreement.....	247

4.2.1 Which bodies can draft technical regulations? The extent of the 'personal' scope in Art. 3 of the TBT Agreement.....	248
4.2.2 Which bodies can draft standards? The extent of the 'personal' scope in Art. 4 of the TBT Agreement and State responsibility obligation	250
4.2.2.1 Recognised standard-setting bodies	251
4.2.2.2 Companies as recognised standard-setting bodies	253
4.2.2.3 Extent of the obligation imposed on Members.....	255
4.2.2.4 Reasonable measures which may be available for compliance	256
4.2.3 Which bodies can draft international standards?	260
4.3 VSS bodies under the TBT Agreement.....	261
4.3.1 VSS under Articles 3 and 4 of the TBT Agreement	262
4.3.2 VSS as international standardising bodies under Art. 2.4 of the TBT Agreement.....	263
5 VSS under the SPS Agreement.....	266
5.1 Personal scope of application of the SPS Agreement	267
5.2 Art. 13 of the SPS Agreement.....	267
5.3 Private standards within the SPS Committee	268
6 Conclusion.....	270
Chapter 6.....	277
VSS and WTO law	277
Relevant rules under the TBT Agreement and the SPS Agreement	277
1 Introduction.....	279
2 Applicability of the TBT Agreement and relevant provisions of the TBT Code of Good Practice.....	281
2.1 VSS as standards under the definitions in Annex 1.....	283
2.1.1 Second sentence and labelling requirements	284
2.1.2 First sentence and all other types of standards.....	286
2.1.3 Consequences of an expansive PPM-scope	289
2.2 The provisions of the TBT Code of Good Practice	292
2.2.1 Substantive provisions.....	292
2.2.2 Procedural provisions	293
2.3.3 Different types of standards under the TBT Code of Good Practice	294
3 Annex 3.D of the TBT Code of Good Practice - Non-discrimination	297
3.1 Guidance offered by Art. 2.1 TBT and the GATT	298
3.1.1 Likeness	299
3.1.2 Treatment no less favourable	301

3.1.2.1 MFN in Article I:1 of the GATT	302
3.1.2.2 National treatment in Article III:4 of the GATT	303
3.1.2.3 Treatment to less favourable under Art. 2.1 TBT.....	304
3.1.2.4 Even-handedness of the regulatory distinction	306
3.1.2.5 Even-handedness and the Chapeau of Art. XX GATT	310
3.2 Towards a non-discrimination test for standards and its application to VSS	314
3.2.1 Legitimate objectives pursued by VSS	314
3.2.2 VSS and treatment no less favourable.....	318
3.2.3 Even-handedness inquiry for VSS.....	320
4 Annex 3.E of the TBT Code of Good Practice - Necessity	324
4.1 Guidance offered by Art. 2.2 TBT	325
4.2 Necessity in the subparagraphs of Art. XX GATT	327
4.3 Towards a necessity test for standards and its application to VSS	330
4.3.1 The problem with a 2.2-like necessity test for VSS.....	330
4.3.2 Identifying a necessity test for standards and its application to VSS	332
5 Annex 3.F of the TBT Code - Obligation to use international standards	334
5.1 Guidance offered by Art. 2.4 TBT	334
5.2 Application to VSS of the Art. 2.4 test	336
6 VSS as attributable measures under the SPS Agreement	337
6.1 The substantive scope of the SPS Agreement.....	338
6.2 Relevant provisions of the SPS Agreement.....	339
6.3 Issues in the application of the SPS Agreement to VSS.....	341
7 Conclusion.....	342
Chapter 7	349
Conclusion	349
1 A multi-level system of control	351
1.1 Normativity in the application of the legal provisions	352
1.2 Variations due to different VSS' rationales.....	353
2 Structural difficulties	355
2.1 Voluntary character	356
2.2 Pursuing sustainability through management system standards	357
2.3 Normative standards.....	357
3 Implications for VSS	358
4 Towards ad hoc solutions?	359
Bibliography.....	363

Summary	407
Samenvatting.....	411
Acknowledgments	415