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### Public play upon private standards

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

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*Chapter 1*  
*Introduction and methodology*

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# 1 The rise of voluntary sustainability standards

The ever-growing role of private parties in regulation at the transnational stage, including social and environmental issues, has been the focus of a broad corpus of scholarly research in the past decades. As a consequence of the inadequacy of the jurisdiction-based reach of State rules to address effectively trans-boundaries phenomena, private actors including companies and NGOs have stepped into the transnational domain to play a crucial regulatory role in global governance.<sup>1</sup> This leading role of private actors is particularly noticeable in the areas of global market governance where globalisation resulted in market failures, such as the troublesome mediation between economic and non-economic concerns, like trade on the one hand, and environmental and social protection on the other. Private actors created voluntary rules - either complementing or competing with public ones<sup>2</sup>- addressing a variety of phenomena ranging from the sustainable exploitation of forestry and fishery resources, to the provision of working conditions which are perceived as acceptable, to the reduction of polluting emissions in the production of goods. Certain transnational issue areas thus experienced increased legalisation, with clear rules, rights, duties, and allocation of responsibilities.<sup>3</sup>

Different from other areas,<sup>4</sup> the partial shift in authority from the public to the private and from the national to the transnational level, which is observable in the social and

<sup>1</sup> See, among the many and from different perspectives: Gereffi, G., Garcia-Johnson, R., Sasser, E. (2001) The NGO-industrial complex. *Foreign Policy* 125, 56-65; Scott, C. (2002) Private regulation of the public sector: A neglected facet of contemporary governance. *Journal of Law and Society* 29(1), 56-76; Cutler, A.C. (2003) *Private power and global authority: Transnational merchant law in the global political economy*. Cambridge: Cambridge University Press; Kingsbury, B. (2003) 'The international legal order'. In Cane, P., Tashkent, M. (Eds.) *The Oxford Handbook of legal studies*. Oxford: Oxford University Press, 283-284; Gereffi, G., Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78-104; Levi Faur, D. (2005) The global diffusion of regulatory capitalism. *The Annals of the American Academy of Political and Social Science* 598(1), 12-32; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) The emergence of Global Administrative Law. *Law and Contemporary Problems* 68(3), 15-62; Meidinger, E. (2006) The administrative law of global private-public regulation: The case of forestry. *European Journal of International Law* 17(1), 47-87; Vogel, D. (2008) Private global business regulation. *Annual Review of Political Science* 11, 261-282; Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42(2), 501-578; Abbott K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *The politics of global regulation*. Princeton: Princeton University Press, 50; Callies, G.P., Zumbansen, P. (2010) *Rough consensus and running code: A theory of transnational private law* Oxford: Hart Publishing; Cafaggi, F. (2011) New foundations of transnational private regulation. *Journal of Law and Society* 38(1), 20-49. Although not covering purely private forms of regulation, see also Pauwelyn, J., Wessel, R., Wouters, J. (Eds.) (2012) *Informal international lawmaking*. Oxford: Oxford University Press.

<sup>2</sup> Abbott K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.), *Supra* at 1, 66.

<sup>3</sup> Meidinger, E. (2007) 'Beyond Westphalia. Competitive legalisation in emerging transnational regulatory systems'. In Brutsch, C., Lehmkuhl, D. (Eds.) *Law and legalisation in transnational relations*. Oxford and New York: Routledge, 121-143.

<sup>4</sup> For example the domain of technical product standards and financial services standards. See, generally, Bühle, T., Mattli, W. (2012) *The new global rulers: The privatisation of regulation in the world economy*. Princeton:

environmental regulatory domain, is not a consequence of delegation of public regulatory powers on the basis of better expertise and efficiency of private regulatory actors.<sup>5</sup> The perception of constraints from international trade law in the regulation of processes,<sup>6</sup> and the difficulty to find a multilateral agreement over crucial global problems<sup>7</sup> contributed to the creation of regulatory gaps at the global level.<sup>8</sup> Transnational private systems of regulation have therefore been created,<sup>9</sup> where private actors have undertaken a dual 'gap-filling' role in the social and environmental domain and, at the same time, contributed to its fragmentation.<sup>10</sup> Also in the European Union (EU) private regulation either is triggered with the purpose of overcoming competence constraints,<sup>11</sup> or driven by explicit institutional preference.<sup>12</sup>

Indeed, the concept of self-regulation is useful to understand partially this phenomenon.<sup>13</sup> However, in certain cases, the creation of regulatory regimes consisting of permanent institutions for deliberative interest mediation, rule setting and enforcement, and redress mechanisms transcends the traditional understanding

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Princeton University Press. See also Bütthe, T., Mattli, W. (2005) Global private governance: Lessons from a national model of setting standards in accounting. *Law and Contemporary Problems* 68(3), in particular at 229-232.

- <sup>5</sup> Klabbers, J. (2013) 'Of round pegs and squared holes: International law and the private sector'. In Jurčys, P., Kjaer, P.F., Yatsunami, R. (Eds.) *Regulatory hybridisation in the transnational sphere*. Leiden and Boston: Martinus Nijhoff, 38.
- <sup>6</sup> Among the many see Howse, R., Regan, D. (2000) The product/process distinction - An illusory basis for disciplining 'unilateralism' in trade policy. *European Journal of International Law* 11(2), 249-289; Charnovitz, S. (2002) The law of environmental 'PPMs' in the WTO: Debunking the myth of illegality. *Yale Journal of International Law* 27(1), 59-110.
- <sup>7</sup> Krisch, N. (2014) The decay of consent: International law in an age of global public goods. *American Journal of International Law* 108(1), 38. See also Bodansky, D., Lawrence, J.C. (2009) 'Trade and environment'. In Bethlehem, D., McRae, D., Neufeld, R., Van Damme, I. (Eds.) *The Oxford Handbook of international trade law*. Oxford: Oxford University Press, 507.
- <sup>8</sup> Wouters, J., Marx, A., N. Hachez (2012) 'Private standards, global governance and international trade - The case of global food safety governance'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Private standards and global governance. Economic, legal and political perspectives*. Cheltenham and Northampton: Edward Elgar, 255-292; Levi, M., Adolph, C., Berliner, D., Erlich, A., Greenleaf, A., Lake, M., Noveck, J. (2012) Aligning rights and interests: Why, when and how to uphold labor standards. Background Paper for the World Development Report 2013.
- <sup>9</sup> Bartley, T. (2007) Institutional emergence in an era of globalisation: The rise of transnational private regulation of labor and environmental conditions. *The American Journal of Sociology* 113(2), 297-351; Dingwerth, K., Pattberg, P. (2009) World politics and organisational fields: The case of transnational sustainability governance. *European Journal of International Relations* 15(4), 707-743; Loconto, A., Fouilleux, E. (2014) Politics of private regulation: ISEAL and the shaping of transnational sustainability governance'. *Regulation and Governance* 8(1), 166.
- <sup>10</sup> Leebron, D.W. (1996) 'Lying down with Procrustes: An analysis of harmonisation claims'. In Bhagwati, J., Hudec, R.E. (Eds.) *Fair trade and harmonisation: Prerequisites for free trade? Vol. 1: Economic analysis*. Cambridge: MIT Press, 41.
- <sup>11</sup> Eberlein, B., Grande, E. (2005) Beyond delegation: Transnational regulatory regimes and the EU regulatory state. *Journal of European Public Policy* 12(1), 89-112.
- <sup>12</sup> Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 201-228.
- <sup>13</sup> Ayers, I., Braithwaite, J. (1992) *Responsive regulation: transcending the deregulation debate*. Oxford: Oxford University Press; Ogus, A. (1995) Rethinking self-regulation. *Oxford Journal of Legal Studies* 15 (1), 97-108; Black, J. (1996) Constitutionalising self-regulation. *Modern Law Review* 59(1), 24-55.

of industry's self-regulation of its activities. Transnational private regulatory regimes may take the form of a transnational, rule-oriented system made up of competing, and mutually adjusting, organisations and institutions.<sup>14</sup> They operate in the context of regulatory pluralism, where multiple and overlapping norms and legal regimes are put into place and compete for acceptance, trust, and utilization.<sup>15</sup>

Altruistic considerations about the 'right' behaviour are only a partial explanation for the creation of such transnational private regulation.<sup>16</sup> Equally strong forces behind the creation and enforcement of common rules are profit and efficiency-based rationales such as economic strategies, the need to differentiate products to meet consumer demand, and protection from liability.<sup>17</sup> Many private regulatory regimes are a response to externalities and collective action problems suffered by private actors.<sup>18</sup> Private environmental standards, for example, offer a practical solution to the free riding problem in environmental protection, as they link the higher cost incurred in the production of environmentally friendly goods to the promise of a competitive advantage.<sup>19</sup>

Among the many regimes in the domain of social and environmental protection, or sustainability,<sup>20</sup> voluntary sustainability standards (VSS) play an important role and

<sup>14</sup> Meidinger, E. (2006) *Supra* at 1, 67; Bernstein, S., Cashore, B. (2007) Can non-state global governance be legitimate? An analytical framework. *Regulation and Governance* 1(2), 348; Cafaggi, F. (2011) *Supra* at 1, 21; Bomhoff, J., Meuwese, A. (2011) The meta-regulation of transnational private regulation. *Journal of Law and Society* 38(1), 161.

<sup>15</sup> Teubner, G. (1997) Global Bukovina: Global pluralism in the World society. In Teubner, G. (Ed.) *Global law without a State*. Brookfield: Dartmouth, 3-28. More specifically with reference to transnational private regulation: Cafaggi, F. (2006) 'Rethinking private regulation'. In Cafaggi, F. (Ed.) *Reframing self-regulation in European private law*. Alphen aan den Rijn: Kluwer Law International, 36-38; Zumbansen, P. (2011) Neither 'public' nor 'private', 'national, nor 'international': Transnational corporate governance from a legal pluralist perspective. *Journal of Law and Society* 38(1), 50-75.

<sup>16</sup> Cashore, B. (2002) Legitimacy and the privatisation of governmental governance: How non-state market-driven (NSMD) governance systems gain rule-making authority. *Governance: An International Journal of Policy, Administration and Institution* 15(4), 522; Marx, A, Bécault, E., Wouters, D. (2012) 'Private standards in forestry: Assessing the legitimacy and effectiveness of the Forestry Stewardship Council'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra* at 8, 60-97.

<sup>17</sup> For example, in the domain of corporate codes and standards addressing social and environmental externalities see: Jenkins H., Yakovleva N. (2006) Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure. *Journal of Cleaner Production* 14(3-4), 271-284; Marx, A. (2008) Limits to non-state market regulation: A qualitative comparative analysis of the international sport footwear industry and the Fair Labour Association. *Regulation and Governance* 2(2), 253-273; McClusky, J., Winfree, J.A. (2009) Pre-empting public regulation with private food quality standards. *European Review of Agricultural Economics* 36(4), 525-539 Cohen Maryanov, D. (2010) Sweatshop liability: Corporate codes of conduct and the governance of labour standards in the international supply chain. *Lewis and Clark Law Review* 14(1), 400.

<sup>18</sup> Abbott, K.W., Snidal, D. (2001) International 'standards' and international governance. *Journal of European Public Policy* 8(3), 345-370.

<sup>19</sup> Fransen, L. (2011) Why do private governance organisations not converge? A political-institutional analysis of transnational labour standards regulation. *Governance: An International Journal of Policy, Administration and Institutions* 24(2), 359-360.

<sup>20</sup> The boundaries of 'sustainability' for the purpose of this research will be clarified in Section 2.2 of Chapter 2.

have been given considerable attention by political scientists.<sup>21</sup> VSS are here defined as voluntary (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing, directly or indirectly, and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods. VSS, as Chapter 2 will further illustrate, take forms as diverse as certification schemes, codes of conduct, and companies' contracting practices. Although a common feature of these instruments is a complete lack of public authority,<sup>22</sup> their impact and effects nevertheless can in certain cases be comparable to those of public regimes.

The regulatory dimension of VSS is not driven by forces connected to formal State authority; in fact, little connection with public bodies can be found. Rather, its causes must be found in forces which, on the market, are capable of generating effects comparable to public authority, such as market power of certain economic actors, consumer preference, strategic and efficiency-based considerations of the regime members, and risk avoidance strategies.<sup>23</sup> None of these drivers requires any form of public delegation, apart from a tacit State acquiescence. Some VSS boast a high degree of perceived legitimacy of their rules among the actors subject to them;<sup>24</sup> more often, others possess a strong *de facto* mandatory character because of the market share of the actors which support them and require their acceptance.<sup>25</sup> The relation between the VSS scheme-holder and the entity seeking certification is

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<sup>21</sup> Cashore, B. (2002) *Supra* at 16, 503-529; Kirton, J.J., Trebilcock, M.J. (Eds.) (2004) *Hard choices, soft law: Voluntary standards in global trade, environment and social governance*. Farnham: Ashgate Publishing; Campins Eritja, M. (Ed.) (2004) *Sustainability labelling and certification*. Madrid-Barcelona: Marcial Pons; Meidinger, E. (2006) *Supra* at 1; Cashore, B., Gale, F., Meidinger, E. and Newsom, D. (Eds) (2006) *Confronting sustainability: Forest certification in developing and transitioning countries*. New Haven: Yale Forestry School. Conroy, M.E. (2007) *Branded! How the 'certification revolution' is transforming global corporations*. Gabriola Island, BC, Canada: New Society. Marx, A. (2011) 'Global governance and the certification revolution: Types, trends and challenges'. In Levi-Faur, D. (Ed.) *Handbook on the politics of regulation*. Cheltenham: Edward-Elgar, 712-726; Overdevest, C., Zeitlin, J. (2012) Assembling an experimentalist regime: Transnational governance interactions in the forest sector. *Regulation and Governance* 8(1), 22-48; Marx, A., Maertens, M., Swinner, J., Wouters, J. (Eds.) *Supra* at 8; Marx, A. (2013) Varieties of legitimacy: A configurational institutional design analysis of eco-labels. *Innovation: European Journal for Social Science Research* 26(3), 268-287; Palekhov, D. (Ed.) (2015) *Voluntary standards systems. A contribution to sustainable development*. Berlin and Heidelberg: Springer; Marx, A., Sharma, A., Bécault, E. (2015) Voluntary Sustainability Standards. An overview. Acropolis Report - Klimos. Available at [https://ees.kuleuven.be/klimos/papers/marx\\_2015\\_voluntary\\_sustainability\\_standards.pdf](https://ees.kuleuven.be/klimos/papers/marx_2015_voluntary_sustainability_standards.pdf), 6.

<sup>22</sup> Vogel, D. (2008) *Supra* at 1, 262; Muchlinski, P. (2003) Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations. *Non-State Actors and International Law* 3, 127.

<sup>23</sup> Meidinger, E. (2007) *Supra* at 3, 121-143.

<sup>24</sup> Cashore, B. (2007) *Supra* at 14, 349-350. To understand legitimacy of transnational private regulatory actors along the same lines of democratic legitimacy is counterproductive and of limited assistance to understand the acceptance of certain regimes. It is suggested that legitimacy instead focuses on whether different actors affected by a private institution accept its authority and interact with its broader institutionalised norms in a given issues areas. Certain rules are therefore legitimate insofar as a community to which the rules apply cognitively accept and justify shared rules. Bernstein, S. (2011) Legitimacy in intergovernmental and non-state global governance. *Review of International Political Economy* 18(1), 17-51. See also Section 3 of Chapter 2.

<sup>25</sup> Wouters, J., Geraets, D. (2012) Private food standards and the World Trade Organisation: Some legal considerations. *World Trade Review* 11(3), 479-489.

frequently a hierarchical one.<sup>26</sup> In addition, certified companies are subject to sophisticated quasi-judicial monitoring and enforcement mechanisms ensuring the effectiveness of the regime,<sup>27</sup> of which one of the underlying rationales may even be the avoidance of State regulation.<sup>28</sup> Loss of competitiveness and market opportunities<sup>29</sup> and, from the perspective of international trade law and trade-barrier effects,<sup>30</sup> are threats which spur actors towards compliance. In spite of their private and voluntary nature, therefore, VSS deeply affect the freedom of individuals and economic operators.<sup>31</sup>

At the same time, other interests' representation, especially of weaker and vulnerable constituencies, remains often inadequate in transnational regulation.<sup>32</sup> Also because of this reason transnational private rules, certain VSS included, may generate direct effects on individuals and market participants other than the rule-drafters or regime-members. These are the actors which have not given their explicit consent to the rules they are subject to and, at the same time, are not *de facto* free to choose whether to join, or to leave, a regime.<sup>33</sup> This situation evokes an informal exercise of public authority. Both by acting under implicit or tacit delegation<sup>34</sup> and by

<sup>26</sup> Cafaggi, F., Iamicelli, P. (2015) 'Private regulation and industrial organisation: Contractual governance and the network approach. In Grundmann, S., Moslein, F., Riesenhuber, K. (Eds.) *Contract governance: Dimensions in law and interdisciplinary research*. Oxford: Oxford University Press, 346-347.

<sup>27</sup> Meidinger, E. (2007) *Supra* at 3, 124; Cafaggi, F. (2012) 'Enforcing transnational private regulation: Models and patterns'. In Cafaggi F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham and Northampton: Edward Elgar, 77.

<sup>28</sup> Diller, J. (1999) A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives. *International Labour Review* 138(2), 101.

<sup>29</sup> Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting processes. Paper Prepared for FAO/WHO Codex Alimentarius Commission; International Trade Center (2012) When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV. Geneva: ITC.

<sup>30</sup> Chang, S.W. (1997) GATTing a green trade barrier. Eco-labelling and the WTO Agreement on Technical Barriers to Trade. *Journal of World Trade* 31(1), 137-159; Lopez-Hurtado, C. (2002) Social labelling and WTO law. *Journal of International Trade Law* 5(3), 719-746; Joshi, M. (2004) Are eco-labels consistent with World Trade Organisation Agreements? *Journal of World Trade* 38(1), 69-92 (2004); Bonsi, R., Hammet A.L., Smith, B. (2008) Eco-labels and international trade: Problems and solutions. *Journal of World Trade* 42(2), 407-432.

<sup>31</sup> Cafaggi, F. (2011) *Supra* at 1, 21. See also, generally, Cafaggi, F., Renda, A., Schmidt, R. (2013) Transnational private regulation. OECD - International regulatory cooperation: Rules for a global World Vol. 1; Fuchs, D., Kalfagianni, A., Havinga, T. (2011) Actors in private food governance: The legitimacy of retail standards and multi-stakeholder initiatives with civil society participation. *Agriculture and Human Values* 28(3), 353-367.

<sup>32</sup> Stewart, R.B. (2014) Remedying disregard in global regulatory governance: Accountability, participation, and responsiveness. *American Journal of International Law* 108(2), 211-270.

<sup>33</sup> Cafaggi, F. (2011) *Supra* at 1, 22.

<sup>34</sup> It has been claimed that the involvement of broad constituencies in transnational regulation operates under implicit delegation to regulate on behalf of disperse communities. Delegation would 'take place' where the subject matter to be regulated makes it difficult or impossible to identify a specific regulatory power 'wielder'. See Cafaggi, F. (2012) Transnational private regulation and the production of global public goods and private 'bads'. *European Journal of International Law* 23(3), 697-698. See also for a discussion of delegation to agents in the lack of principals: Cohen, J., Sabel, C. (2006) Global Democracy? *New York University Journal of International Law and Politics* 37(2), 763. It shall not be forgotten that governments can also delegate by omission by leaving regulatory space to be filled in by private parties. This act of omission shall be considered as a policy decision, for which States are accountable in the competent fora. See Mavroidis, P.C., Wolfe, R. (2016) Private standards and the WTO: Reclusive no more. EUI Working Paper RSCAS 2016/17, 8.

performing public functions broadly defined, transnational regulatory regimes end up affecting individual rights as protected by international treaties, constitutions, regulatory and administrative norms.<sup>35</sup>

Also from the perspective of the State such changes in global governance have been profound to the point of turning public bodies and administrative agencies into rule-takers in domains where public policy-making is affected by rules drafted by non-public actors.<sup>36</sup> More relevant for our purposes, recent research has instead highlighted reciprocal influence between private regimes and, especially, between public and private regimes.<sup>37</sup> Through a variety of means, public bodies attempt to steer, influence and coordinate a variety of actors at the transnational stage included private regimes, by means of substantive and procedural requirements of good administration.<sup>38</sup> This book concerns the role played by legal provisions, particularly those of international and European economic law, in the influence and regulation of VSS, with the aim to eliminate trade barrier effects and consumer confusion often generated by transnational private regulation in the field of sustainability.

## 1.1 The regulatory effects of VSS

Private regulatory activity at the transnational stage in the social and environmental domain is intimately linked to the employment of regulatory instruments taking the form of product standards.<sup>39</sup> Also legal research has, somehow belatedly, addressed the different facets of standardisation, including its peculiar features, the actors involved, the different types of outcome, and the legitimacy and accountability

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<sup>35</sup> Benvenuti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Supra* at 27, 136. See also Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1, 23-24; Bernstein, S. (2011) *Supra* at 24, 27.

<sup>36</sup> Braithwaite, J., Drahos, P. (2000) *Global business regulation*. Cambridge: Cambridge University Press, 421; Vandenberg, M.P. (2005) The private life of public law. *Columbia Law Review* 105(7), 2029-2096; Cafaggi, F. (2009) Private Regulation in European Private Law. EUI Working Papers 2009/31

<sup>37</sup> This is generally the approach of the regulatory governance perspective. See generally Scott, C. (2010) 'Regulatory governance and the challenge of constitutionalism'. In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State: Constitutional implications*. Oxford: Oxford University Press. More specifically see Cafaggi, F. (2011) *Supra* at 1, 42. From a legal sociology perspective: Bartley, T. (2011) Transnational governance as the layering of rules: Intersections of public and private standards. *Theoretical Inquiries in Law* 12(2), 517-542. Political scientists and regulation scholars have recently focused on a very broad array of tools, and not limited to legal instruments, by means of which private-private and public-private interactions take place. See Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) Transnational business governance interactions: Conceptualisation and framework for analysis. *Regulation and Governance* 8(1), 1-21; Bartley, T. (2014) Transnational governance and the re-centred state: Sustainability or legality. *Regulation and Governance* 8(1), 93-109; Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) The interactive dynamics of transnational business governance: A challenge for transnational legal theory. *Transnational Legal Theory* 6(2), 333-369.

<sup>38</sup> Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1.

<sup>39</sup> See generally, Abbott, K.W., Snidal, D. (2001) *Supra* at 18.

issues.<sup>40</sup> More recently, particular attention has been devoted to international standardisation.<sup>41</sup> Standards are trade catalysts, insofar as they reduce transactional costs by providing information about products, bringing efficiency and an optimal degree of order in their domain of application.<sup>42</sup> Technical standards drafted within the International Organisation for Standardisation (ISO) system define technical features of products. This type of standardisation is the textbook example of private regulation justified by technocratic legitimacy.<sup>43</sup> Other standards drafted outside the ISO regime such as VSS possess a much more normative character.<sup>44</sup> Owing both to its technical features and its voluntary character, standardisation has largely escaped public scrutiny.<sup>45</sup> Generally, standardisation epitomises an increased uneasiness in defining the boundaries of what is 'law': standard setters operate between public and private, between norm and regulation.<sup>46</sup>

A closer look at VSS exposes the typical features and objectives of standardisation, altogether with an undeniable and somehow 'public', regulatory flavour - at least for some of them. However, it is not only regimes that are transparent and open on non-discriminatory basis for accession from new members that exercise regulatory functions. Also corporate governance and bilateral contracting practices of companies reveal an important public dimension.<sup>47</sup> Within this framework, VSS do not just respond to a logic of self-interest, however 'enlightened', but provide a

<sup>40</sup> See Joerges, C., Schepel, H., Vos, E. (1999) The law's problem with the involvement of non-governmental actors in Europe's legislative process: The case of standardisation under the 'New Approach'. EUI Working Paper LAW No. 99/9; Vos, E. (1999) *Institutional frameworks of community health and safety regulations Committees, agencies and private bodies*. Oxford: Hart Publishing; Morth, U. (2004) *Soft law in governance and regulation. An interdisciplinary analysis*. Cheltenham: Edward Elgar; Schepel, H. (2005) *The Constitution of private governance. Product standards in the regulation of integrating markets*. Oxford: Hart Publishing; Peters, A., Koechlin, L., Forster, T., Zinkernagel, G.F. (Eds.) (2009) *Non-state actors as standard-setters*. Cambridge: Cambridge University Press; Higgins, V., Larner, W. (2010) *Calculating the social. Standards and the reconfiguration of governing*. Basingstoke: Palgrave Macmillan; van Gestel, B., Micklitz, H.W. (2013) European integration through standardisation: How judicial review is breaking down the club house of private standardisation bodies. *Common Market Law Review* 50(1), 145-181; Berliner, D., Prakash, A. (2013) Signalling environmental stewardship in the shadow of weak governance: The global diffusion of ISO 14001. *Law and Society Review* 47(2), 345-372; Mataija, M. (2016) *Private regulation and the Internal Market. Sports, legal services and standard setting in EU economic law*. Oxford: Oxford University Press.

<sup>41</sup> Pauwelyn, J., Wessel, R., Wouters, J. (Eds.) (2012) *Supra at 1*; Trebilcock, M.J., Epps, T. (Eds.) (2013) *Research Handbook on the WTO and Technical Barriers to Trade*. Cheltenham: Edward Elgar; Delimatsis, P. (Ed.) (2015) *The law, economics and politics of international standardisation*. Cambridge: Cambridge University Press;

<sup>42</sup> See, generally, Link, A.N. (1985) Market structure and voluntary product standards. *Applied Economics* 15(3), 393-401.

<sup>43</sup> Cabral, L., Kretschmer, T. (2007) 'Standards battles and public policy'. In Greenstein, S., Stango, V. (Eds.) *Standards and Public Policy*. Cambridge: Cambridge University Press, 329-344.

<sup>44</sup> Abbott, K.W., Snidal, D. (2001) *Supra at 18*, in particular at 351-354; Cafaggi, F. (2011) *Supra at 1*, 29.

<sup>45</sup> Abbott, K.W., Snidal, D. (2000) Hard and soft law in international governance. *International Organization* 54(3), 441.

<sup>46</sup> Delimatsis, P. (2015) 'Continuity and change in international standardisation.' In Delimatsis, P. (Ed.), *Supra at 41*, 4. See also Vogel, D. (2008) *Supra at 1*, 261.

<sup>47</sup> Vandenberg, M.P. (2007) The new Wal-Mart effect: The role of private contracting in global governance. *UCLA Law Review* 54(4), 913-970; See also Scott, C., Cafaggi, F., Senden, L. (2011) The conceptual and constitutional challenge of transnational private regulation. *Journal of Law and Society* 38(1), 10.

practical bottom-up response to the long-lasting quest for mediation between market and non-market concerns.<sup>48</sup> In addition, VSS directly contribute to achieving two - very public - regulatory objectives intimately connected to their form of standards. The first goal is the elimination of externalities resulting from production or consumption processes that include pollution, health and safety risks, and a host of 'moral externalities'. However difficult to quantify, the latter are suffered by certain concerned consumers, and include moral considerations deriving, for example, from inadequate animal welfare and poor working conditions.

The second objective is the elimination of information asymmetries between producers and consumers concerning hidden product features. Without accurate and trustworthy information, a market for environmentally-friendly goods could not operate. If it is impossible for consumers to differentiate between 'green' and 'brown' products, the producers of non-environmentally-friendly goods would outcompete the producers of green products, and possibly even drive the latter out of the market.<sup>49</sup> VSS which employ a label<sup>50</sup> pursue the objective to correct information asymmetries, very often in combination with the other objective of externality abatement.

For example, the Forestry Stewardship Council (FSC) aims at eliminating externalities resulting from unsound environmental, social and economical forestry management by promoting 'environmentally appropriate, socially beneficial, and economically viable management of the world's forests'.<sup>51</sup> The FSC scheme employs labelling on products derived from wood from certified forests, with the purpose of ensuring that consumers receive accurate information. It thereby allows a market for sustainable forestry products to function properly. Other schemes certify that a company's labour practices and workplace conditions are decent, in line with international instruments, and a plan is in force for continuous improvement.<sup>52</sup> VSS employing a label constitute a specific, and privately created, form of market-based instruments of regulation. Such regulatory tools direct market forces towards the correction of specific market externalities, and can take many forms. Market-based friction-reduction instruments, such as certification and labelling schemes, communicate to consumers information about certain non-visible product features.<sup>53</sup>

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<sup>48</sup> Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1, 52.

<sup>49</sup> Akerlof, G.A. (1970) The Market for 'lemons': quality uncertainty and the market mechanism. *Quarterly Journal of Economics*, 84(8), 488-500.

<sup>50</sup> Indeed, also VSS which do not utilize labels, and are instead employed in business-to-business relations, can be seen as correcting information asymmetries between the producer and the purchaser of goods, which can have incomplete information about certain product features.

<sup>51</sup> Forestry Stewardship Council. Principles and criteria. Available at <https://us.fsc.org/en-us/what-we-do/mission-and-vision>

<sup>52</sup> Social Accountability 8000. International Standard. Available at [http://sa.intl.org/\\_data/n\\_0001/resources/live/SA8000%20Standard%202014.pdf](http://sa.intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf)

<sup>53</sup> Hockenstein, J.B., Stavins, R.N., Whitehead, B.W. (1997) Crafting the next generation of market-based environmental tools. *Environment: Science and Policy for Sustainable Development* 39(4), 12-33; Keohane, N.O.,

Alternatively, and from a perspective closer to international law than that of regulation, VSS can be portrayed as *sui generis* implementing instruments of international legal obligations. In an era of challenge to the traditional understanding of international law and institutions,<sup>54</sup> private regimes have the effect of 'hardening' soft-law obligations or complementing treaty rules,<sup>55</sup> which are both much-needed devices - particularly in the trade domain.<sup>56</sup> This perspective emphasises VSS' potential to turn broad international environmental and social rules into readily applicable provisions. At times ratification and implementation of multilateral treaties are lagging behind; these agreements would then not be directly applicable to individuals, and impossible to comply with in the absence of further specifications. Social standards are a fitting example, as they transpose ILO Conventions' requirements into an easily enforceable, effectively monitored, and directly applicable form for private economic operators. The traditional role of public authorities in giving effect to international law provisions is thereby bypassed. Another example is the international environmental law regime, based on a relatively small core of very generic international instruments, which are subsequently made operative by different groups of actors by means of a network of other instruments and institutions that include private actors and private rules.<sup>57</sup> For example, the Marine Stewardship Council (MSC) standards are based on the UN-FAO Code of Conduct of Responsible Fisheries - a framework instrument for sustainable fishing activities.<sup>58</sup> Other private regimes were instead explicitly established as a gap-filling response to the failure of treaty-based solutions.<sup>59</sup>

This implementing capacity of VSS should not be surprising. Many regulatory instruments taking the form of standards play such an implementing role, especially

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Reeves, R.L., Stavins, R.N. (1998) The choice of regulatory instrument in environmental policy. *Harvard Environmental Law Review* 22(2), 313-367; Rademaekers, K., van der Laan, J., Smith, M., van Bruegel, C., Pollitt, H. (2011) The role of market-based instruments in achieving a resource efficient economy. Brussels: European Commission - DG Environment.

<sup>54</sup> Slaughter, A.M. (2004) *A new World order*. Princeton: Princeton University Press.

<sup>55</sup> Affolder, N.A. (2009) The private life of environmental treaties. *American Journal of International Law* 103(3), 510-525; Affolder, N.A. (2010) The market for treaties. *Chicago Journal of International Law* 11(1), 159-195.

<sup>56</sup> Pauwelyn, J. (2014) Rule-Based Trade 2.0? The rise of informal rules and international standards and how they may outcompete WTO Treaties. *Journal of International Economic Law*, 17(5), 749. See also Delimatsis, P. (2011) The fragmentation of international trade law. *Journal of World Trade* 45(1), 87-116. On private actors' unconventional 'implementation' of international agreement, see Cafaggi, F. (2012) *Supra* at 34, 711, where it is argued that the empirical reality, especially concerning agreement in the environmental sphere, suggests that private actors regulatory activities are functionally linked with public international regimes, and transcending traditional public-private divides.

<sup>57</sup> See generally: Abbott, K.W. (2011) The transnational regime complex for climate change. *Environment and Planning C: Government and Policy* 30(4), 571-590. For the European Union case, see De Cendra de Larràgan, J. (2009) 'Regulatory dilemmas in EC environmental law: The ongoing conflicts between competitiveness and the environment'. In Cafaggi, F., Muir Watt, H. (Eds.) *The regulatory function of European private law*. Cheltenham: Edward Elgar, in particular at 118-128.

<sup>58</sup> Gulbrandsen, L.H. (2014) Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs. *Regulation and Governance* 8(1), 84. See also <https://www.msc.org/about-us/standards/fisheries-standard>.

<sup>59</sup> This is the case regarding several private regimes in the forestry domain. See Meidinger, E. (2006) *Supra* at 1.

when they operate in tandem with public authority. This is the case of technical standards, which transform general and broad requirements into detailed and readily applicable rules. This is the very principle of the New Approach to standardisation in the EU. The EU legislator only sets general mandatory requirements for product safety. The implementation is then left to European Standardisation Bodies (ESBs) which, under a mandate from the Commission, draft European standards voluntarily employed by producers. As European standards give rise to a presumption of conformity with the Directives' requirements, they have quickly become the most utilized means for producers to prove compliance with the latter.<sup>60</sup>

## 1.2 VSS and problems on the market

Transnational private regulation may generate negative effects typical of public regulation, especially where it takes the form of product standards such as VSS. This is particularly evident when market consequences are taken into account. The quick growth and increased popularity of VSS brought to the fore problems typical of non-tariff barriers and regulatory instruments relying on consumer preference. Two broad groups of problems deserve analytical and, possibly, regulatory attention: market access difficulty for producers, and consumer confusion. The severity of these problems is commensurate to the perceived mandatory character of the standards, and the proliferation of schemes addressing similar externalities.

In the first place, the trade barrier effect of additional, sometimes divergent, regulatory regimes cannot be underestimated. Standards defining product characteristics and production processes are particularly prone to generate this concern. As tariffs are at their lowest since the inception of the multilateral trading regime, and are even being eliminated altogether in combination with all quantitative restrictions in a trading block such as the EU, the largest obstacle to trade is the difference in regulatory regimes, consisting of both public and private rules.<sup>61</sup> One third of the global trade in goods is affected by divergent regulatory standards across different jurisdictions, whose complete harmonisation would result in a seven percent reduction in tariffs.<sup>62</sup> Global standardisation, also in the sustainability domain, should therefore be welcomed - and indeed it is mandated by international economic law. Art. 2.4 of the TBT Agreement requires that WTO Members base their national regulation on international standards, provided that they exist and are appropriate for the fulfilment of a legitimate policy objective pursued. On a level of positive integration, EU law has explicitly delegated private

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<sup>60</sup> Joerges, C., Schepel, H., Vos, E. (1999) *Supra* at 40.

<sup>61</sup> Commission Communication COM(2012) 22 final, on trade, growth and development. Tailoring trade and investment policy for those countries most in need.

<sup>62</sup> Büthe, T., Mattli, W. (2012) *Supra* at 4, 8.

entities the task of drafting standards,<sup>63</sup> albeit not so extensively in the social and environmental domain.

Generally, and at any domain, standardisation is rarely about reaching a compromise among different approaches to regulation. It is instead a highly politicised battle for the pre-eminence of one regulatory approach, or technical solution, over another.<sup>64</sup> All standards create 'winners' and 'losers'. Often, certain economic operators manage to take advantage of the newly created regulatory regime, either because they are better suited for compliance, or because the agreed-upon standard closely resembles the practice they already employ. This happens either because of a successful regulatory capture, or by exploiting a stronger market position.<sup>65</sup> Conversely, other producers risk incurring higher costs which may undermine their economic performance. The outcome of standardisation may not be beneficial to society as a whole. A suboptimal outcome may prevail, which brings about higher costs for producers which exceed the overall gains for consumers, or by society at large in case the standard's objective is externality abatement.<sup>66</sup> A standard may also result in considerable gains for producers without contributing to similar gains for consumers which, for example, occurs when standards restrict competition.<sup>67</sup>

Standards provided for in certification schemes and codes of conduct addressing social and environmental aspects of the production of goods are prone to being set without due regard to all local specificities. VSS scheme-holders sometimes proudly state that their standards are applicable globally, with a single set of standards for all producers, as this ensures uniformity in products and outcomes.<sup>68</sup> Such standards, however, may be unfit for application to another country, region, or even producer. The effects can be very detrimental for producers. This occurs frequently for many agricultural producers in developing countries. Their main concern is not just entering a specific market, as tariffs are generally low and their products price-competitive, but fulfilling a host of complex requirements to enter a supply chain.<sup>69</sup>

<sup>63</sup> Schepel, H. (2005) *Supra* at 40.

<sup>64</sup> Marquez, P. (2007) Standardisation and capture: The rise of standardisation in international industrial regulation and Global Administrative Law. *Global Jurist* 7(3); Staiger, R., Sykes, A. (2011) International trade, national treatment and domestic regulation. *Journal of Legal Studies*, 40(1), 149; Büthe, T., Mattli, W. (2012) *Supra* at 4, 11; Swinnen, J., Vandemoortele, T. (2012) Trade and the political economy of standards. *World Trade Review* 11(3), 390.

<sup>65</sup> Olson, M. (1965) *The logic of collective action*. Cambridge: Harvard University Press, 49. Godfrey, J.M. (2005) Regulatory capture in the globalisation of accounting standards. *Environment and Planning* 37, 1975-1993.

<sup>66</sup> Beghin, J., Disdier, A.C., Marette, S., van Tongeren, F. (2012) Welfare costs and benefits of non-tariff measures in trade: A conceptual framework and application. *World Trade Review* 11(3), 356-375.

<sup>67</sup> Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264.

<sup>68</sup> This is for example the case of Tesco with its Nurture program for fruit and vegetables certification. <http://www.tesco.com/nurture/?page=nurtureScheme>

<sup>69</sup> Henson, S. (2008) The role of public and private standards in regulating international food markets. *Journal of International Agricultural Trade and Development* 4(1), 76.

In such a scenario, allegations of disguised protectionism are justified.<sup>70</sup> VSS challenge the very basis of the central tenet on which the multilateral international trade regime is built, which holds that different regulatory regimes are part and parcel of a country's comparative advantage.<sup>71</sup>

The costs of certification and auditing verifying compliance are high, but even more expensive are the required changes in production processes, internal management and organisational procedures required to ensure conformity to the standard. The lack of infrastructure and human and technical expertise in developing countries increases the perceived cost of compliance. Nonetheless, the cost of non-compliance, if they are excluded from a crucial market for their products, is much higher.<sup>72</sup> Further, multiple, overlapping regimes regulating the same phenomenon increase firms' transactional, implementation, and operational costs, and create the possibility for opportunistic forum shopping.<sup>73</sup> Suppliers in sectors vulnerable to consumer pressure are also exposed to requests from downstream companies to comply with, for example, a retailer code, a sectoral code, as well as one or more NGO schemes. Unfortunately, the obligations of similar regimes may not be perfectly aligned, and in some cases, even conflict with each other.<sup>74</sup> Finally, for certain schemes, the producers voluntarily applying for certification are often those which will have to face lower compliance costs, or which already possess higher skills and the resources to fulfil all the requirements of the standard.<sup>75</sup> Thus, the cost of compliance is a major challenge, and the overall net societal impact of some schemes is questionable, as many of the producers whose practices would have to be improved substantially, more often opt out.

The actual 'voluntary' character of standardisation is also exposed as fictional, for some standards more than others.<sup>76</sup> This is particularly the case when powerful retailers establish codes of conduct and certification schemes, compliance with which is, in certain markets, essential for entering into a distribution contact with a large

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<sup>70</sup> Bhagwati, J. (2001) 'After Seattle: Free trade and the WTO'. In Porter, R.B. (Ed.) *Efficiency, equity, and legitimacy: The multilateral trading system at the Millennium*. Washington: Brookings Institution Press, 60-61; Gandhi, S.R. (2005) Regulating the use of voluntary environmental standards within the World Trade Organisation level regime: Making a case for developing countries. *Journal of World Trade* 39(5), 855-880.

<sup>71</sup> For a modern application of the classic Ricardo's propositions see Krugman, P., Obstfeld, M. (2008) *International economics: Theory and policy*. New York: Prentice Hall, 27-36.

<sup>72</sup> Maertens, M., Swinner, J.F.M. (2008) Standards as barriers and catalyst for trade, growth and poverty reduction. *Journal of International Agricultural Trade and Development* 4(1), 50-51.

<sup>73</sup> Abbott, K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *Supra* at 1, 44-88.

<sup>74</sup> Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through Transnational New Governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42, 551.

<sup>75</sup> International Trade Centre (2012) When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV. Geneva: ITC.

<sup>76</sup> Also the Court of Justice of the European Union (CJEU) acknowledged that technical standards can become *de facto* mandatory for the purpose of market access. See C-171/11 *Fra.bo v DVGW* [2012], ECR I-0000, paras 29-30, and Section 2.2.3 of Chapter 3 for further discussion.

retailer holding *de facto* gate-keeper power for market access. In such a scenario, the decision to comply with a standard or a retailers' code, under unfavourable and possibly even unfair terms, is to a large extent influenced by external conditions like the market power of the retailer.<sup>77</sup> Suppliers in developing countries are usually passive players, and are normally merely given a code of conduct when a supply contract is signed, told to comply with it and then informed that they will undergo periodic audits.<sup>78</sup> Furthermore, the voluntary nature of VSS is fundamentally challenged at its basis by national regulations providing incentives to companies which behave in a socially responsible manner,<sup>79</sup> as well as by a policy preference for market-based instruments to address, in particular, environmental issues.<sup>80</sup> Consumer preference also renders acceptance of a scheme less of a really voluntary choice, especially if producers want to enter the profitable 'quality' market for certified products.<sup>81</sup> For example, certification in sectors like forestry and fisheries is increasingly essential to market a product at all, as markets for 'regular' products are shrinking.<sup>82</sup>

As VSS increase in popularity and initiatives proliferate,<sup>83</sup> consumers, the real movers behind the diffusion of VSS, can suffer negative consequences which could threaten

<sup>77</sup> Diller, J. (1999) *Supra* at 28, 100-101.

<sup>78</sup> Jiang, B. (2009) Implementing supplier codes of conduct in global supply chains: Process explanations from theoretic and empirical perspectives. *Journal of Business Ethics* 85(1), 78.

<sup>79</sup> Sobczak, A. (2006) Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law. *Business Ethics Quarterly* 16(2), 168; Cafaggi, F. (2011) *Supra* at 1, 22.

<sup>80</sup> For example, in the EU see Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

<sup>81</sup> In 2014, Dutch consumers alone spent more than € 2.6 billion in 'sustainable food', a 20% increase from the previous year. See Logatcheva, K. (2015) Monitor duurzaam voedsel 2014. Consumentenbestedingen. LEI Wageningen UR. Available at <http://edepot.wur.nl/361052>. A recent estimate of the global market for low-carbon goods and services sets it at € 4.2 trillion, the EU accounting for a fifth of it. Department for Business, Innovation & Skills (2013) Low carbon environmental goods and services. Report for 2011/11. Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/224068/bis-13-p143-low-carbon-and-environmental-goods-and-services-report-2011-12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224068/bis-13-p143-low-carbon-and-environmental-goods-and-services-report-2011-12.pdf).

<sup>82</sup> In 2014, 75% of the timber sold on the Dutch market was certified as 'sustainable'. Similarly, the market share of sustainably-certified paper and paperboard has increased from 32% to 47% between 2011 and 2013. Such market shares do not identify anymore a situation where certified product are a niche in which producers may want to tap, but rather show that certification is less and less of a choice if entrance on the market for *general* timber products is sought. See Oldenburger, J., de Groot, C., Winterink, A., van Benthem, M. (2015) Almost 75% of timber on the Dutch market sustainably produced. *Bosberichten* 2015-3. Available at [https://www.unece.org/fileadmin/DAM/timber/Forest\\_Information\\_Billboard/BB\\_2015\\_03\\_English.pdf](https://www.unece.org/fileadmin/DAM/timber/Forest_Information_Billboard/BB_2015_03_English.pdf). It is foreseeable that a similar situation would occur in the near future on the market for sustainable seafood, at least with respect to certain fisheries. In 2015, 14% of the global production of seafood was certified. From 2003 to 2015, sustainable seafood growth at a rate of 35% a year, which is ten times faster than the growth of the global seafood industry. Potts, J., Wilkings, A., Lynch, M., McFatrige, S. (2016) State of sustainability initiatives review: Standards and the blue economy. International Institute for Sustainable Development. Available at <http://www.iisd.org/sites/default/files/publications/ssi-blue-economy-2016.pdf>.

<sup>83</sup> For a comprehensive overview: Marx, A., Wouters, J. (2014) Competition and cooperation in the market of voluntary sustainability standards. United Nations Forum on Sustainability Standards Discussion Paper Series No. 3. Available at [https://unfss.files.wordpress.com/2013/02/unfss-dp-no-3-final-version-15april\\_full.pdf](https://unfss.files.wordpress.com/2013/02/unfss-dp-no-3-final-version-15april_full.pdf).

the very functioning of these schemes.<sup>84</sup> Consumers are often confused by the proliferation of standards resulting from the rapid increase in popularity of labels and codes of conduct, and it is difficult to differentiate and to compare apparently similar regulatory regimes that may be characterised by completely different standards, stringency, and efficacy.<sup>85</sup> The impact of VSS on the objective pursued varies considerably. Some schemes merely 'hold the bar', by only ensuring compliance with the applicable legal obligations, for example by providing that certified products must comply with all relevant law and regulations. This type of scheme is on the rise, as some initiatives that were previously aiming at pursuing ambitious sustainability goals are transforming into schemes for the verification of legality of the certified products.<sup>86</sup> Other VSS 'raise the bar', by going beyond the applicable regulatory regime. Because of their stringency, such VSS have in theory a more profound impact and are drivers of change, but are also potentially more trade-restrictive.<sup>87</sup> The stringency of a scheme is in many cases difficult to identify because of the presence of standards whose operationalisation is left to the entity seeking certification.<sup>88</sup> As shown in the forestry certification sector, large differences persist among labelling schemes applying to the same issue, not only in terms of stringency of standards, but also of legitimacy and accountability practices within the organisation, connection with the industry and its agenda, and even the strictness and independence of the audit and certification process.<sup>89</sup> End-consumers are normally not aware of all these issues, nor are they well-positioned to evaluate the claims made by different scheme-holders.

Adding to consumer confusion, some standards employ a selective approach in the inclusion of internationally recognised fundamental principles or rights, in particular in the area of labour rights protection.<sup>90</sup> This does not just go against the universality of labour rights,<sup>91</sup> but also shows that firms enforce their codes according to concerns that are industry or sector-specific. Certain labour rights such as the prohibition of child labour are frequently included in the standards, arguably because their infringement leads to negative publicity. Conversely, other rights such

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<sup>84</sup> Abbott K.W., Snidal D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *Supra* at 1, 44-88.

<sup>85</sup> For examples in the field of ethical coffee certification, see Ponte, S. (2005) Standards and sustainability in the coffee sector. A global value chain approach. United Nations Conference on Trade and Development and the International Institute for Sustainable Development; Reynolds, L.T., Murray, D., Heller, A. (2007) Regulating sustainability in the coffee sector: A comparative analysis of third-party environmental and social certification initiatives. *Agriculture and Human Values* 24(2), 147-163.

<sup>86</sup> Bartley, T. (2014) *Supra* at 37.

<sup>87</sup> Reynolds, L.T., Murray, D., Heller, A. (2007) *Supra* at 85, 148.

<sup>88</sup> See Section 5.4 of Chapter 2 for further discussion.

<sup>89</sup> Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palgrave Macmillan.

<sup>90</sup> Bartley, T. (2011) *Supra* at 37, in particular at 534-541.

<sup>91</sup> The universality of labour rights remains, however, a debated concept that developing countries in particular tend to reject. See for example Bhagwati, J. (1995) Trade liberalisation and 'fair trade' demands: Addressing the environmental and labour standards issues. *The World Economy* 18(6), 759.

as freedom of association are rather excluded because their enforcement would be particularly costly for the company.<sup>92</sup>

Consumers are not in the position to assess the truthfulness of a claim about a product's quality or production methods but, at the same time, the proper functioning of labelling schemes and codes is based to a large extent on their trust.<sup>93</sup> A debate on the trustfulness, and consequently on the effectiveness of sustainability standards as well as their perception by consumers has sprouted also among non-specialist audiences.<sup>94</sup> Companies also are reacting to allegations of deceptive practices in the certification process, and withdraw from schemes that, for different reasons, are reported not to achieve their objective or are not independent.<sup>95</sup> Surveys indicate that consumers can be skeptical about the sustainability claims of retailers, companies and even public governments.<sup>96</sup> This skepticism is partially due to a prolonged exposition to 'greenwashing' practices, a phenomenon that has proliferated during the Nineties, and which uses public relations tools to make corporations appear to be sensitive to the environment while, in fact, they are not.<sup>97</sup> Although the trend is changing, the lack of independent monitoring, and the lax - if not absent - certification practices of some codes, still raise doubts on whether they are drafted as a genuine attempt to pursue sustainable practices and improve workers conditions, or simply aimed at modifying stakeholders' perceptions.<sup>98</sup> Indeed some initiatives are described as little more than 'empty, corporate-sponsored public relations rhetoric'.<sup>99</sup>

<sup>92</sup> Diller, J. (1999) *Supra* at 28, 112-113; Boiral, O. (2003) The certification of corporate conduct: Issues and prospects. *International Labour Law Review* 142(3), 333.

<sup>93</sup> Chon, M. (2009) Marks of rectitude. *Fordham Law Review* 77(5), 2319.

<sup>94</sup> Eilperin, J. (2012, April 23) Some question whether sustainable seafood delivers on its promise. *Washington Post*, available at [http://www.washingtonpost.com/national/health-science/some-question-whether-sustainable-seafood-delivers-on-its-promise/2012/04/22/gIQAauyZaT\\_story.html?wpisrc=emailtoafriend](http://www.washingtonpost.com/national/health-science/some-question-whether-sustainable-seafood-delivers-on-its-promise/2012/04/22/gIQAauyZaT_story.html?wpisrc=emailtoafriend) retrieved online on June, 12th 2013.

<sup>95</sup> This is, for example, the case of a number of companies, including five from the Fortune 500 list, withdrawing from the Sustainable Forestry Initiative (SFI), a certification program for sustainable managed forests, after a report exposed several false claims by SFI, and in particular its close connection with large timber companies which undermined its independence. See <http://forestethics.org/fortune-500-companies-drop-misleading-eco-label>.

<sup>96</sup> A report of the Dutch competition authority shows that Dutch consumers are considerably confused about quality labelling, including social and environmental labelling, and some schemes are simply seen as marketing strategies. Almost 50% of Dutch consumers believe that there are too many labels, and around 40% believe that the presence of a label is a mere excuse to increase prices. See Autoriteit Consument & Markt (2016) ACM over keurmerken. Available at <https://www.acm.nl/nl/publicaties/publicatie/15163/ACM-over-keurmerken/> See also Home, R. (2009) Limits to labels: The role of eco-labels in the assessment of product sustainability and routes to sustainable consumption. *International Journal of Consumer Studies* 33(2), 181; Lamb, H. (2008) Fairtrade: Working to make markets fair. In International Trade Centre. What If? New Challenges in Export Development: Consumers, Ethics and Environment, 59.

<sup>97</sup> Muchlinski, P. (2007) *Multinational enterprises and the law*. Oxford: Oxford University Press, 550.

<sup>98</sup> Entine, J. (2013) Ecolabels - The Wild West of labelling. Ethical Corporation. Available at: <http://www.ethicalcorp.com/environment/ecolabels-wild-west-labelling>.

<sup>99</sup> Bartley, T. (2003) Certifying forests and factories. States, social movements, and the rise of private regulation in the apparel and forest products fields. *Politics and Society* 31(3), 435.

Finally, consumers do not always understand the claims associated with certain VSS, or misunderstand what claims entail. A relatively common misunderstanding, for example, concerns the alleged 'better' health and safeness features, and richness in nutritive values, of organic products versus non-organic. Scientific studies point towards the lack of any difference between organic and non-organic products, except that non-organic products may present traces of pesticide residues.<sup>100</sup> Similar consumer misunderstandings have arisen with respect to food-miles and, generally, locally sourced products. While consumers certainly enjoy a sacred prerogative to decide what to purchase, 'local' should not be equated with 'greener', or 'more efficient'. It has been demonstrated that the non-mechanised and non-intensive agricultural practices in certain developing countries more than offset the carbon emission in transportation, and thus caused less polluting emission per unit than agricultural products gathered in the vicinity of the place of consumption, for example, in Europe.<sup>101</sup>

As will be seen in Section 3 of Chapter 3, many elements of consumer confusion are difficult to address by means of traditional instruments of consumer protection. It is nevertheless essential that consumers understand clearly the claims of a scheme, and that their trust towards VSS is not hindered. Regulators have adopted measures to ensure that certain private schemes adhere to a publicly determined standard of trustworthiness.<sup>102</sup> More substantive public intervention may be necessary in the future to address proliferation though. Mechanisms of mutual recognition and equivalence are hardly in the interest of private schemes competing on a standardisation market which, as any market, values diversity of its products.

## 2 Methodology

In light of the above, it is not surprising that the nature of VSS is controversial and, as seen in some cases, explicitly contested. If these rules were drafted by public authorities, they would be particularly contentious under both EU and WTO law. In part this explains why private actors are responsible for their creation. Under EU law, provided that the field is not harmonised by EU legislation, State measures restricting market access risk being struck down by the Court of Justice of the European Union (CJEU). State measures may aim at protecting the environment, or consumers, but the outcome of the Court analysis, which balances between

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<sup>100</sup> See the report from the Italian consumer association Altroconsumo (2015) Non crediamo in Bio. Available at <http://www.altroconsumo.it/alimentazione/prodotti-alimentari/news/prodotti-bio>.

<sup>101</sup> Weber, C.L., Matthews, H.S. (2008) Food-miles and the relative climate impacts of food choices in the United States. *Environmental Science and Technology* 42(10), 3508–3513.

<sup>102</sup> For example, the EU intervened in setting baseline requirements for organic certification that all schemes in that domain must comply with. See Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1. This issue will be further discussed in Chapter 2 and in Section 3.2.1.1 of Chapter 3.

economic and non-economic concerns, has on occasion shown to privilege the former. WTO law considers discrimination sufficient to trigger a *prima facie* breach; this may occur systematically for costly environmental measures which negatively affect producers from countries with a lower level of environmental protection. A *prima facie* breach can be justifiable, but WTO dispute settlement bodies have performed extensive inquiries over the overall even-handedness and necessity of the regime in a fashion that curtails public autonomy and requires a careful crafting of regulatory measures.

The private, transnational and formally voluntary character of VSS makes them particularly elusive to the reach of regulators. The international trade regime applies directly only to public measures.<sup>103</sup> The negative effects of VSS are felt in countries that can neither affect the scope of such regimes, nor the preferences of the actors that support them. The traditional enforcement tools of private regulation available at the national level for national courts are of limited effectiveness with respect to transnational private regulatory regimes.<sup>104</sup> Even in the mostly Western countries where such schemes are established, voluntary private measures in certain areas may be considered as belonging to the protected domain of private autonomy, thereby limiting their review.<sup>105</sup>

This book is generally concerned with the alternatives available to public authorities to exercise control, coordination and review over transnational private regulation, and specifically over VSS. A need arguably exists to bring public authority back into transnational regulation to unlock its full potential.<sup>106</sup> Therefore, an appraisal is necessary of the extent to which transnational private regulatory instruments can be supervised and influenced by public authorities in order to maximise their effectiveness and lessen their negative effects. A novel and promising conceptual framework and theoretical approach to assess the interplay between public and private authority will be employed, which takes a broad look at the types of private regulatory regimes mechanisms over which influence and control can be exercised by public actors.<sup>107</sup> Following the Transnational Business-Governance Interaction (TBGI) framework of analysis, the different forms of interaction between public and private authority must therefore be carefully studied to understand the multi-faceted and possibly subtle influence exerted by public regimes over private ones.

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<sup>103</sup> The WTO rules of attribution and the scope of measures covered by the WTO Agreements are discussed in Chapter 5.

<sup>104</sup> Benvenisti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Supra* at 35, 140-141.

<sup>105</sup> Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra* at 27, 91.

<sup>106</sup> Abbott, K.W., Snidal, D. (2009) *Supra* at 1, 577.

<sup>107</sup> Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra* at 37; Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) *Supra* at 37.

Legal literature acknowledges that coordination, meta-rules, and procedural requirements can be suitable tools to that purpose, as they improve both the quality and legitimacy of transnational regulatory regimes, including those established by private actors.<sup>108</sup> By meta-regulation and meta-rules, we mean a set of 'light' normative requirements on the basis of which private actors are required to institutionalise the process and the substance of their regulatory efforts.<sup>109</sup> In addition to coordination, meta-rules, and procedural requirements, legal review of certain privately designed regimes should not be excluded *a priori*.<sup>110</sup> This is not to say that private rules, especially those which may become essential to market a product, should always be legally challengeable, for example because they are in obstruction of the freedom of movement under EU law. Courts are ill-positioned to review the complex technical features often possessed by private standards, and may generate chilling effects over private regulation.

However, as in the same manner domestic courts have attempted to establish jurisdiction over the actions of international institutions,<sup>111</sup> it is neither unconceivable, nor *per se* undesirable, that national courts may attempt to establish (albeit limited) jurisdiction over the activities of some transnational private regulators, especially in the presence of rules that apply almost mandatorily to private actors and bring about distributional effects.<sup>112</sup> This already occurs under EU law for professional self-regulation and certain sport rules, which can be reviewed under the Treaty freedoms

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<sup>108</sup> Black, J. (1996) Constitutionalising self-regulation. *Modern Law Review* 59(1), 24; Freeman J. (2000) The private role in public governance. *New York University Law Review* 75(3), 543-675; Schepel, H. (2005) *Supra* at 40, 247; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1; Pauwelyn, J., Wessel, R.A., Wouters, J. (2012) 'Informal international lawmaking: An assessment and template'. In Pauwelyn, J., Wessel, R.A., Wouters, J. (Eds.) *Supra* at 1, 528-529. It has been noted that the proliferation of private regimes, at least at the national level, has not created a situation where independent regimes operate, but stronger coordination is made necessary by the actual interdependence of private regimes with public rules. Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 204.

<sup>109</sup> Jordana, J., Levi-Faur, D. (2004) *The politics of regulation: Institutions and regulatory reforms for the age of governance*. Cheltenham: Edward Elgar, 6-7.

<sup>110</sup> Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra* at 27, 128.

<sup>111</sup> See, for example, the Bosnian Constitutional Court's review of the activity of the UNHR, or the outcome of the *Kadi* saga under EU law.

<sup>112</sup> Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1, 31-32. On a similar position also the International Public Authority perspective. It recognises that certain private activities may be as much in the public interest as public activities. Certain private regulatory activities can be seen as functionally equivalent to activities undertaken on a public legal basis. Private activity which directly affects public goods, or which is carried out where colliding fundamental interests of different social groups are at stake would be covered. Such activities should thus be subject to the same legal requirement applicable to functionally equivalent exercises of public authority by public actors, in the sense they unilaterally determine others and reduce their freedom. See von Bogdandy, A., Dann, P., Goldmann, M. (2010) 'Developing the publicness of public international law: Towards a legal framework for global governance activities'. In von Bogdandy, A., Wolfrum, R., von Bernstorff, J., Dann, P., Goldmann, M. (Eds.) *The exercise of public authority by international institutions. Advancing international institutional law*. Heidelberg: Springer, in particular at 14-15. The 'unilateral determination' in question, is arguably understood as implying a formally mandatory character of the rules at hand, thereby excluding rules which, under various means, become *de facto* mandatory.

and/or competition law.<sup>113</sup> Such scrutiny also addresses institutional and procedural features of the regulating body, such as its composition, the presence of appeal mechanisms and the proportionality of sanctions.<sup>114</sup>

The application of certain legal principles - among which proportionality, non-discrimination and less trade-restrictiveness, typical of international and EU economic law - constitutes a form of control, or a legal accountability mechanism with the potential to increase the legitimacy and effectiveness of private regulatory activity.<sup>115</sup> More fundamentally, legal review and legal principles will insure that the mediation between trade and societal concerns offered by certain private regimes is performed under at least a degree of scrutiny from the democratic institutions which are traditionally legitimised to undertake such a goal. Legal review, however episodic, which finds a transnational regulatory body in breach of certain provisions, has the potential to greatly improve the practice of many other private regulators, even in different domains.<sup>116</sup>

## 2.1 Research questions

Among the several possible forms of transnational private regulation, the focus here is on VSS. VSS possess many features common to transnational private regulation, including some particularly problematic ones. VSS take the form of product standards; they have a markedly transnational component and application; they mediate between values which can be conflicting and located among different constituencies; they generate distributional concerns; they have a practical impact on everyone's life by determining and affecting consumer purchase patterns. Some VSS appear to be at least relatively successful in pursuing their stated objective.<sup>117</sup> They have therefore become an important and rather emulated instrument of global governance in the area of trade and sustainability, which is potentially in line with the goals pursued by public authorities as well.

<sup>113</sup> C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653; C-36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR I-1406; C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921; Joined Cases C-51/96, C-191/97, *Deliège v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549.

<sup>114</sup> Mataija, M. (2016) *Supra* at 40, 261.

<sup>115</sup> Mattli, W., Büthe, T. (2005) Global private governance: Lessons from a national model of standard setting in accounting. *Law and Contemporary Problems* 68(3), 226; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra* at 1, 37-41; Cassese, S. (2005) Administrative law without the State? The challenge of global regulation. *New York University Journal of International Law and Policy* 37(4), 669; Esty, D.C. (2006) Good governance at the supranational level: Globalising administrative law. *Yale Law Journal* 115(7), 1527-1536; Harlow, C. (2006) Global administrative law: The quest for principles and values. *European Journal of International Law* 17(1), 189-207.

<sup>116</sup> Stewart, R.B. (2014) *Supra* at 32, 250.

<sup>117</sup> See for a recent review of the effects of certification initiatives in the paper products, agrifood, apparel and electronic supply chains: Bartley, T., Setrini, G., Summers, N., Koos, S., Samel, H. (2015) *Looking behind the label: Global industry and the conscientious consumer*. Bloomington: Indiana University Press.

Among the possible legal tools for supervision and influence, those offered by European and international economic law are here selected because they are *prima facie* particularly suitable for the task at hand. Certain economic law provisions, for example EU competition law, expressly apply to private agreements in the presence of economic operators like VSS. Its effect-based jurisdiction<sup>118</sup> is particularly effective to catch phenomena at the transnational stage. Other rules, such as EU freedom of movement, have instead the potential to apply to private rules as well which hinder fundamental economic rights. While VSS have been devoted almost no academic attention under EU law, under WTO law a debate has flourished over private standards. WTO law is particularly well-positioned to deal with private instruments taking the form of standards, as the TBT Agreement provides for meta-rules of governance and, particularly important for our purpose, of substance, applicable to certain private standardising bodies and their standards.

Certain provisions of economic law consider and affect both the effects and substance of a measure; they constitute therefore rather sophisticated tools for discerning lawful measures from unlawful ones. Among all effects generated by the schemes in question, here the focus is on the effects which are the most relevant under international and EU economic law provisions, which are generally trade-barrier effects. Although EU competition law is predominantly concerned with the welfare of consumers, trade-barrier effects are also important as, to a certain point, they determine the extent of competition in a market. In addition, consumer confusion is taken into account as a means by which to include both the effects generated on consumers by the schemes and their proliferation, and also to attempt to include considerations about their effectiveness. The contribution of VSS towards the objectives they pursue, as will be seen, matters less under Art. 34 TFEU and WTO law, but has more relevance under EU competition provisions.

The overarching question this dissertation attempts to answer is the extent to, and the conditions under which, EU and WTO economic law regimes can control and review, and also coordinate and influence VSS, with the purpose of remedying their trade barrier effects and consumer confusion. This book can be seen as a case study over a relatively uniform subset of transnational private regulation generating specific regulatory concerns, and which investigates the possible reach of a set of legal provisions as a possible solution. As further explained in Section 4 of Chapter 2, the conceptual framework of analysis offered by the Transnational Business Governance Interactions (TBGI) approach is employed for this purpose. The legal rules considered, i.e. the tools by means of which such interactions between public and

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<sup>118</sup> *United States v Aluminium Co. of America* 148 F.2d 416 (1945), 443; In the EU see the similar approach which focuses on the implementation of an agreement between undertakings in the EU territory. See Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85. *Ahlström v Commission (Wood Pulp)* [1988] ECR I-5233, paras. 12-13.

private authority take place, are a host of diverse economic law provisions applicable, or potentially applicable, to private standards - some of which constitute somewhat of a grey legal area, both at the EU and the WTO level.

Art. 34 TFEU is among such rules. It provides that measures having equivalent effects to quantitative restrictions in the internal market are prohibited. Albeit applying in principle to public measures, its application to private rules is not to be excluded, as the practice of the Court seems to confirm in particular with respect to product standards. As VSS may qualify as agreements between undertakings, and the restrictions to market access generated may have an impact on consumer welfare and on market parameters, the EU competition regime, in particular under Articles 101 and 102 TFEU, is obviously relevant. Finally, the WTO Agreements - especially the TBT Agreement - include provisions indirectly affecting private parties' trade-restricting activities in the regulatory domain, by prohibiting discrimination and unnecessary trade-restrictiveness of their standards. The form of these obligations can be described as meta-rules but, by being imposed on WTO Members, at least theoretically can be enforced against Members in WTO dispute settlements. Such requirements set a uniform approach for national public regulators' oversight over private standards, and establish minimum requirements on which private standards must be based.

This book is also concerned with other legal provisions. Particularly important are rules which result in forms of interaction between private bodies and EU regulators in the exercise of their market regulatory functions. These interactions, either directly or indirectly, influence the substance of VSS and thereby affect, and possibly reduce, market access and consumer confusion by establishing regulatory arrangements. They therefore fall squarely within the remit of the research question. These rules take different forms such as harmonisation measures and meta-rules. They deserve attention also from the perspective of international trade law since, by establishing a link between private and public authority, they may have the effect of resulting in attribution and State responsibility for private measures under WTO law. In that event, WTO provisions may be applicable to the substance of a VSS as it was a public measure.

The aim of the analysis here undertaken is three-fold. The first objective is to understand the extent of the possible reach of EU and international economic law as it stands, and certain regulatory measures, over a specific subset of private regulatory regimes. Our goal is to offer tangible legal solutions to problems VSS might cause to market participants. Since legal areas considered here are underdeveloped, as a second related objective this book suggests normative approaches to certain legal tests in order to extend public control and influence over VSS to address the specific problems here discussed, both under Art. 34 TFEU and

under the TBT Agreement, and also under the relevant competition law tests under Art. 101 TFEU. Such normative tests are embedded in the overall teleological structure of the legal norms considered, and mediate between private autonomy, market access obligations, and fundamental public policy objectives. As a third objective, this book aims at empowering VSS standard-setting bodies to design instruments in full compliance with applicable EU and international economic law rules. It also aims at informing all relevant stakeholders of the consequences certain legal provisions already generate on VSS, or may generate in the future under certain conditions.

## 2.2 Structure of this book

This Chapter has framed the emergence of VSS within the broader trend of transnational private regulation, and discussed some of the problems engendered by private schemes. Chapter 2 complements Chapter 1 by discussing at length the main features of VSS, beginning with an accurate definition of the subject matter. Chapter 2 illustrates the boundaries of the broad domain of 'sustainability', and the role of third-party certification both in ensuring effectiveness and amplifying trade-barrier effects. VSS are defined broadly, not just in terms of their area of coverage, but also *vis-à-vis* their institutional set-up. It is therefore possible to appraise the possibilities for public influence with respect to an entire domain of global governance pursuing sustainability by means of product standards. Subsequently, with the assistance of political science literature, three ideal-typical categories of VSS are designed, in order to facilitate and fine-tune the legal analysis, and to identify which should be the role of public authority *vis-à-vis* each of these groups. Such categories identify transnational private rules as public, club or private goods, all of which contribute to different extent to the production of global public goods.

Literature on global public goods also offers a normative frame for public intervention. In order to stimulate the creation of global public goods, as well as a desirable output, public authority should put facilitations into place to support and encourage the aggregate effort of the actors involved. Closer intervention is however required where global public goods result in distributional concerns. The role of public authority should therefore be a controlling and coordinating role, which could be exercised by means of legal review, for example under Art. 34 TFEU and competition law, through meta-rules such as those contained in the TBT Agreement, and by means of several forms of interaction with private regulatory authority aiming at influencing its procedures and substance.

With respect to this issue, the Chapter lays down a framework for classifying forms of interaction between public and private authority grounded on the transnational business-governance interactions (TBGI) literature. The framework indeed

encompasses the broad interactions between public authorities and VSS and is exercised by means of legal provisions such as Art. 34 TFEU, the EU competition law regime, and the TBT Code of Good Practice. The TBGI approach is also used more specifically to identify a host of EU regulatory initiatives affecting at different degrees VSS and their substance, on which we will return in Chapter 3 and Chapter 5. Finally, several features of VSS are discussed in preparation for the legal analysis. These include formal features such as the forms of the standards, the presence of a label, and the stringency of the scheme. Importantly, relevant differences between VSS and technical standards are highlighted and explained.

Having clarified the conceptual and normative background, Chapter 3 begins the legal analysis with an assessment of VSS under Art. 34 TFEU, and under other EU secondary rules which become directly applicable on, or indirectly affect, VSS as a consequence of EU market regulation. The possibility of applying Art. 34 TFEU to private rules requires an analysis of its scope, including the substantive coverage of the obligation. The Chapter clarifies the concept of restriction to market access, with specific reference to private regulatory instruments based on standards. Subsequently, the scope *ratione personae* of Art. 34 TFEU is analysed, by connecting Art. 34 case-law with that under the freedom of circulation of persons (Articles 45, 49 and 56 TFEU). Although the Court has repeatedly stated that Art. 34 TFEU applies to public measures only, to understand case law within a framework that considers Art. 34 as prohibiting third-party interference in intra-EU contracts shows that private rules can be covered too. Further, the case-law's recent evolution resulted in the application of Art. 34 to a private standard-setter in the presence of elements of connection with a Member State. The practice of the Court of Justice of the European Union to elevate the principle of non-discrimination to a fundamental right is discussed as a possible avenue to subject private rules to the Treaties' provisions. On the basis of this normative framework, Art. 34 TFEU is applied to VSS. In order to conciliate private autonomy and market access, the analysis includes the design of a substantive test applying to the specificities of private quality standards, and discusses specific elements required in the justification of private rules.

Finally, the Chapter addresses cases of interactions between private authority and EU regulators. Three situations are discussed, altogether with their consequences on the market impact of VSS: the direct employment of VSS in EU legislation as it occurs under the Renewable Energy Directive; forms of indirect influence on VSS exercised by EU legislation; and employment of VSS by EU Member States. These interactions may result in a number of potential consequences such as coordination of regulatory effects whereby the implementing role of VSS is brought to the fore; influence on the procedures and the substance of the schemes which are recognised; control by public bodies of whether certain requirements are complied with; and even Court review of the VSS body's compliance with good administration principles. For each

instance of interaction the likely consequences on trade restrictive effects and consumer confusion will be discussed.

Chapter 4 addresses the other side of an increasingly untenable divide between public and private rules, and discusses VSS under the EU competition regime. It shows that multi-stakeholder and sectoral VSS can be seen as horizontal agreements between undertakings, to which applies the prohibition of entering into agreements which have the object or effect of restricting competition. The Chapter preliminarily discusses the possibility to exclude VSS from competition scrutiny, insofar as they may be considered as exercising forms of public authority. Subsequently, by employing empirical research on the market impact of standards and VSS, as well as economic literature, it illustrates object and effect restrictions to competition generated by VSS. Similarly, pro-competitive effects of VSS are explained. It is demonstrated that, differently from technical standards, certain pro-competitive effects normally associated with standardisation agreements do not occur.

The implications of this finding are assessed within the framework for balancing pro- and anti-competitive effects of an agreement as interpreted and applied by the Commission. The Chapter also discusses the practice of national competition authorities, and suggests a normative approach under Art. 101 TFEU to address market access and consumer confusion concerns. Chapter 4 also discusses the residual situation under which company VSS constitute vertical agreements between undertakings, and a more relevant scenario under which a scheme can be seen as a dominant undertaking operating on the market for sustainable standardisation. The Chapter also appraises whether recognition of a VSS instrument suffices to exclude the application of competition rules as it normally occurs with respect to State measures.

Chapter 5 changes perspective and moves to the domain of public international law and, mostly, international trade law. The aim of the Chapter is to investigate i) the possibility of attributing VSS to a WTO Member, ii) under which circumstances, and iii) to understand the resulting obligation imposed on the State, in particular under the TBT Agreement. At first, the relevant rules for attribution of private conduct are elucidated, as provided for in the Articles on State Responsibility for Internationally Wrongful Acts. Subsequently, WTO case law where private party activity was at hand is discussed, with the objective of appraising the extent of consonance of the WTO/GATT tests for attribution and the rules of public international law, and to identify the relevant standard under which private conduct is attributable under the GATT. After having comprehensively outlined the WTO framework for attribution under the GATT, the analysis turns to the appraisal of VSS against such framework. The specific categories for interaction identified in Chapter 2 and discussed in Chapter 3 are employed again to assess whether VSS employment in legislation will

give rise to attribution, and under which conditions attribution can arise for other, less structured, interactions.

The Chapter then addresses the TBT Agreement, which can be depicted as a regime containing special rules for attribution for standardising bodies. The establishment of a standardising body in a Member's territory imposes an obligation on the Member not to encourage deviations from the provisions contained in the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (the 'TBT Code of Good Practice', or the 'TBT Code'), and to take reasonable measures which may be available to ensure its compliance. The remainder of the Chapter discusses whether VSS bodies - and, if so, which types - are considered as standardising bodies in the meaning of the TBT Agreement. It sheds light over the extent of the obligation imposed on WTO Members, and which measures must be taken to ensure compliance. It also investigates whether some VSS can be considered as relevant international standards over which Members must base their measures. Finally, the Chapter briefly addresses the SPS Agreement, and whether a possibility exists that VSS are considered as measures subject to its scope.

Chapter 6 clarifies the substantive provisions of the meta-rules of the TBT Code of Good Practice. As the Appellate Body (AB) has never provided interpretive guidance over these provisions, the extent of these obligations is unknown. It is therefore unclear which types of breaches by standardising bodies WTO Members have an obligation to remedy by taking reasonably available measures. Is non-discrimination for private standards to be assessed against the same test for non-discrimination as for public mandatory technical regulations? The aim of Chapter 6 is to identify the meaning of three crucial provisions of the TBT Code of Good Practice by suggesting normative tests for certain substantive obligation.

Firstly, the Chapter assesses whether the definition of standards provided in Annex 1 of the TBT Agreement covers VSS. It then appraises the implications of the expansive interpretation provided by the AB over certain definitional elements. Secondly, the Chapter discusses substantive and procedural provisions of the TBT Code of Good Practice. The analysis focuses on the former. This is not to deny that procedural obligations concerning transparency in the standard-setting are crucial; quite the opposite, their importance is acknowledged and taken into utmost account. Nonetheless, this study focuses on obligations whose content is particularly elusive and in need of clarification, and capable of having an effect on the substance of the scheme. These obligations are that standards do not discriminate, do not create unnecessary barriers to trade, and are based on the relevant international standards.

The AB's interpretation of similar provisions of the TBT Agreement concerning technical regulations offers valuable guidance in structuring the obligations for

standards. The peculiar nature of private standards, and in particular quality standards such as VSS, must be acknowledged. Crucial elements that must accommodate the specificities of quality standards such as VSS include i) the objectives pursued which are to be accepted as legitimate, ii) the implications stemming from the application of the treatment-no-less-favourable standard to measures structurally resulting in the distortion of competitive opportunities, and iii) whether the detrimental impact generated from a standard stems exclusively from a legitimate regulatory objective, also known as the even-handedness test. Also the concept of 'necessity' of a standard, as will be seen, is rather different from 'necessity' used elsewhere in the WTO Agreements. Finally, for analytical completeness, Chapter 6 addresses the main provisions of the SPS Agreement which are more problematic for VSS which may be covered by its scope of application.

Chapter 7, finally, draws some conclusions concerning the possible means offered by certain provisions of economic law to influence the outcomes of private regulatory instruments in the form of VSS, both positively and normatively. It shows the possibility to interpret certain EU and international economic law provisions with the effect of applying to VSS and addressing the issues on the market level discussed here. It shows the presence of links between the different regulatory levels and identifies features with respect to which economic law still demonstrates a certain uneasiness.

### 2.3 Relevance and novelty

VSS have been extensively studied by political scientists but not comprehensively yet under EU and international economic law, in spite of their potential contribution to the mediation between free trade and sustainability and their possible problematic consequences. By linking political science literature with legal literature and legal analysis, this dissertation fills a gap in scholarly research by exposing the potential of the economic law regime, and of specific rules thereof, to substantively influence a subset of transnational private regulation, and how this process unfolds in practice. This study appraises how certain provisions of economic law can be used and interpreted not just to review, but also to influence and coordinate, transnational private regulatory regimes to allocate regulatory competences and effects in the regulatory governance process. This dissertation therefore provides a practical solution to expand the reach of public authority over a crucial subset of private regulation, and aims at elaborating a ready-to-use legal toolbox to serve for that purpose.

More specifically, transnational private regulation has been studied by several perspectives, but it has hardly been approached comprehensively from the angle of economic law. This is regretful. Certain private regulatory regimes such as VSS are

either expressly under the scope of its provisions (as under competition rules, or the explicit WTO approach towards private standards), or the private regulatory instruments feature striking similarities with public ones, which are normally under the scrutiny of these legal regimes. This dissertation constitutes the first attempt to analyse a sub-group of transnational private regulatory instruments such as VSS under EU law, and both under EU and WTO provisions. Recent interpretive developments under the TBT Agreement make this contribution particularly timely. Finally, this book attempts to identify a normative legal framework applicable to product standards that is not just technical, but instead generates structural distributional concerns.

By directly connecting to the TBGI framework of analysis, this book aims to contribute to the debate over interactive mechanisms between different forms of regulatory authority located at different regulatory levels. This is also the first study that comprehensively identifies and illustrates the economic law provisions and principles applying or potentially applying to VSS, with which scheme-holders should be familiar and in compliance.