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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 2*  
*Classifying VSS*

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# 1 Introduction

The field of private standards for sustainability issues is comprised of schemes and initiatives which deeply differ. A full-fledged market for certification exists,<sup>1</sup> where more than 450 different sustainability labels compete with each other.<sup>2</sup> Within this group, inclusive multi-stakeholder organisations have set up labelling schemes which are well-established and recognisable by market actors.<sup>3</sup> A growing number of sectoral standards address, for example, labour practices, and even food health and safety schemes contain provisions addressing environmental protection.<sup>4</sup> Many sectoral organisations and individual firms set standards containing specific social and environmental requirements, which are then imposed upstream on their suppliers by means of codes of conduct.<sup>5</sup> Firms even design sustainable product lines on the basis of such requirements.<sup>6</sup> Several reporting and benchmarking initiatives assess, compare and make public suppliers' performance.<sup>7</sup> It is therefore important to limit the field of research to a workable amount of relatively comparable VSS, and then describe their features which are more relevant for legal analysis.

This Chapter aims at providing definitional clarity, at first, by defining in Section 2 the concept of voluntary sustainability standards (VSS). It does so by identifying the boundaries of the concept of sustainability, and by employing a clear-cut criterion such as the presence of third-party certification differentiating hortatory from enforceable initiatives. This study, therefore, does not cover self-certificatory schemes. Subsequently, Section 3 identifies three types of VSS, on the basis of their institutional setting and the output of the standardisation process. To a large extent, such a division consists of ideal-types; in the real world, VSS might possess different features. The aim of this Chapter is rather modest; it does not aim at describing all VSS

<sup>1</sup> Reinecke, J., Manning, S., von Hagen, O. (2012) The emergence of a standards market: Multiplicity of sustainability standards in the global coffee industry. *Organisation Studies* 33(3), 791.

<sup>2</sup> 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>3</sup> Around 97% of those 450 initiatives draft standards by consensus. However, only around half of these labels contemplate third party certification. See Marx, A. (2013) Varieties of legitimacy: A configurational institutional design analysis of eco-labels. *Innovation: European Journal for Social Science Research* 26(3), 274-275.

<sup>4</sup> Henson, S., Reardon, T. (2005) Private agri-food standards: Implication for food policy and the agri-food system. *Food Policy* 30(3), 241-253.

<sup>5</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.

<sup>6</sup> See for examples the initiatives of Carrefour and Tesco. <http://www.carrefour.com/cdc/commerce-responsible/securite-et-qualite-des-produits/>; <http://www.tesco.com/nurture/>.

<sup>7</sup> The most popular of which is probably the United Nations' Global Compact, which engages the business world to cooperate with the UN in partnership with other NGOs, to promote good corporate practices based on ten universal social, labour, environmental and anti-corruption principles. The objective of the Global Compact is 'to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships'. Criticism of the Global Compact - that can indeed be extended to many similarly designed instruments - has focused on its lack of a legal binding nature, explicit performance criteria and independent monitoring and compliance mechanisms. The Global Compact is instead understood as a 'learning forum'. <http://www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/index>.

characteristics, but only those relevant for an analysis under certain EU and WTO economic law rules.

The division between multi-stakeholder, sectoral and company VSS, which is suggested in Sections 3.1.1, 3.1.2 and 3.1.3, however, is firmly based on literature from different disciplines, and supported by a thorough empirical review of around thirty VSS schemes of different kinds. Regulatory and political science literature suggests that such a classification does not simply highlight different constituencies in the standard-setting, but also reveals a considerably different degree of consent and legitimacy which, in turn, identifies (or not) certain forms of collective governing. Similarly, the outputs of these three types of institutions also differ. As Section 3.1 and 3.2 explain, the standards drafted by multi-stakeholder, sectoral and company VSS result in a varying degrees of exclusion of the actors which want - or have to - accept them, thereby allowing us to frame the standards as the public, club, or private goods.

This perspective allows us to draw a close connection with private autonomy, a feature which is more closely connected to private goods than to public goods. The tripartition retains important considerations about the institutional set-up of the standard-setting organisation. As the following Chapter demonstrates, the application of certain legal provisions is a feature of a standard-setting body. The categorisation also allows us to normatively identify the role public authorities should play *vis-à-vis* such transnational rules in the form of global public goods, or producing global public goods. The State should be a coordinator and facilitator, and possibly ensure supervision in cases where distributional concerns are at hand. Section 4 discusses different types of interplay between public authorities and private authorities with respect to VSS with the objective of clarifying how public authorities coordinate or facilitate private actors' standard-setting. Three specific forms of interactions will also be identified - and employed in the analysis under EU law and WTO law - where public regulators, to different degrees, make use of VSS in their regulations or, directly and indirectly, allow them to affect their substance.

Section 5 of this Chapter analyses important formal features of VSS which will be relevant in the legal analysis. At first, Section 5.1 discusses certain formal features of standards which are relevant under WTO provisions. Subsequently, the differences between VSS and technical standards is explained in Section 5.2.; at several junctures in this book a comparison will be drawn between these two private instruments. Sections 5.3, 5.4 and 5.5 address, respectively, the different dynamics of schemes which entail a label, the varying stringency of the standards, and a host of features affecting market access and consumer confusion, such as local adaptation, recognition and overlap of the standards. Finally, Section 6 concludes.

## 2 The boundaries of the subject matter

VSS are 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.<sup>8</sup> Such schemes take the form of standards, an elusive concept with several meanings ranging from ‘a guide for behaviour and for judging behaviour’,<sup>9</sup> or ‘a voluntary best-practice rule’.<sup>10</sup> For our purposes, a standard can be seen as a provision proscribing the characteristics of certain features concerning a product and/or a process that brought it into being. The ISO (International Organisation for Standardisation), the global authority in the domain of technical standardisation, defines a standard as a document which ‘provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.’<sup>11</sup>

Standards are drafted by a host of different actors, with different purposes. A very general classification of standard-setters identifies four main groups.<sup>12</sup> International or intergovernmental organisations, such as OECD and ILO perform standard-setting functions in their respective domains. National or supranational regulators arguably play the most prominent role in standardisation. These bodies can be either public, such as the Codex Alimentarius Commission, or private, such as standard-setting bodies like ISO. Finally, a diverse group of actors such as companies, NGOs, industry associations, research institutions and multi-stakeholder coalitions, operates in competition on the market for standards. The actors drafting and enforcing VSS are located within this broad group.<sup>13</sup>

<sup>8</sup> For comparison, the definition of VSS given by the United Nation Forum on Sustainability Standards reads: ‘standards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others’. See UNFSS (2013) Voluntary sustainability standards. Today’s landscape of issues and initiatives to achieve public policy objectives. United Nations Forum on Sustainability Standards. Available at [https://unfss.files.wordpress.com/2013/02/unfss\\_vssflagshipreport\\_part1-issues-draft1.pdf](https://unfss.files.wordpress.com/2013/02/unfss_vssflagshipreport_part1-issues-draft1.pdf). Different from the UNFSS’s, our definition highlights the private character of VSS, restricts their application to the domain of goods, and adds the requirement of third-party certification.

<sup>9</sup> Abbott, K.W., Snidal, D. (2001) International ‘standards’ and international governance. *Journal of European Public Policy* 8(3), 345.

<sup>10</sup> Kerwer, D. (2005) Rules that many use: Standards and global regulation. *Governance: An International Journal of Policy, Administration, and Institutions* 18(4), 611.

<sup>11</sup> ISO Guide 2:2004, Art. 3.2. This definition is broader than the definition of standard for the purposes of the TBT Agreement. See Section 4 of Chapter 5 and Section 2.1 of Chapter 6 for in-depth discussion.

<sup>12</sup> Büthe, T., Mattli, M. (2012) *The new global rulers. The privatisation of regulation in the world economy*. Princeton: Princeton University Press, 25-29.

<sup>13</sup> It should be noted that ISO drafts standards such as the ISO 14000 series and the ISO 26000 addressing, respectively, environmental and social performance of certified entities, which could qualify as VSS. Given the peculiar role of ISO, its very structured relations with certain public regulators, its special role conferred upon it by

## 2.1 Standards and certification

A fundamental feature of standards is, by definition, their voluntary character. This element is also acknowledged by the definition of standard in the relevant international agreement, the TBT Agreement,<sup>14</sup> and constitutes the differentiating element with mandatory technical regulations, which are normally set by public bodies.<sup>15</sup> Such a voluntary character is, however, always understood formally, and not factually. This is to say that the definition of standards ignores that certain standards are *de facto* mandatory in order to market a certain product or to enter a certain supply chain or distribution system.<sup>16</sup> As discussed in Section 1.2 of Chapter 1, a great deal of the detrimental impact generated by VSS is due to their actual or increasingly mandatory character. This is all the more evident for codes of conduct with which upstream suppliers have to comply in order to do business with a powerful retailer or company.<sup>17</sup> Certain schemes, such as those addressing agricultural practices in agri-food production, have become a *de facto* requirement for the marketing of certain products in Western countries, and the requirements are particularly stringent for and difficult to comply with by developing countries.<sup>18</sup> Consumer preferences play a profound role as well, and VSS certification can be the only means to enter a specific product market.

Both the trade-restrictive and *de facto* mandatory character of VSS are exacerbated by the presence of strict verification and enforcement mechanisms ensuring that products and production methods are in compliance with the standards. A growing number of schemes contemplate third-party certification. Third-party certification is a form of enforcement under which an accredited third-party certifier verifies compliance with the standards provided for in the VSS. Certification is a non-judicial enforcement mechanism, which combines the traditional public law functions of administrative inspection and adjudication.<sup>19</sup> Certification is capable of generating real market access problems if compliance cannot be achieved, as producers cannot 'cheat' and claim they are compliant when, in fact, they are not. Moreover, legal consequences might

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the TBT Agreement, and the presence, among the national committees drafting standards at the central level, of public national standardising bodies, ISO's standards are not covered by the scope of this research.

<sup>14</sup> See Annex I of the TBT Agreement.

<sup>15</sup> See Section 4.2.1 of Chapter 5 for discussion on whether also public bodies can set, enforce and implement technical regulations.

<sup>16</sup> In WTO dispute settlement, complaining parties have advanced with no success the argument that the concept of 'mandatory', describing the compulsory character of technical regulation, relates to whether compliance with a measure is mandatory to enter a market. This issue is elucidated in Section 4.1 of Chapter 5.

<sup>17</sup> Jiang, B. (2009) Implementing supplier codes of conduct in global supply chains: Process explanations from theoretic and empirical perspective. *Journal of Business Ethics* 85(1), 78.

<sup>18</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.

<sup>19</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, 124.

arise as well, especially in the event that the auditing of management system schemes such as the ISO 14001, a common requirement of many VSS, brings to light previously unnoticed breaches of environmental regulations. In these cases liability may arise and auditors may be even mandated to disclose violations under certain legal regimes.<sup>20</sup> Similar concerns arise when the auditing is coupled with a disclosure requirement.<sup>21</sup> Conversely, other initiatives which are hortatory or difficult to enforce generate fewer problems in terms of market access.<sup>22</sup> Third-party certification is therefore chosen as an additional element defining a VSS, because it allows us to differentiate hortatory schemes and enforceable ones, and identifies schemes which really are trade-restrictive.<sup>23</sup>

The effectiveness of regulatory schemes in achieving its objectives is increasingly ascribed to their link to third-party certification.<sup>24</sup> Since third-party certification brings about impartiality, independence and a certain amount of fair process procedures, it also contributes to the elevation of the legitimacy of the regulatory regimes to which it applies.<sup>25</sup> Certification therefore strengthens schemes that arguably make a *prima facie* valid claim at regulating a certain social and environmental domain in an

<sup>20</sup> Orts, E.W., Murray, P.C. (1997) Environmental disclosure and evidentiary privilege. *University of Illinois Law Review* 3(1), 1-69; Delmas, M.A. (2002) The diffusion of environmental management system standards in Europe and in the United States: An institutional perspective. *Policy Science* 35(1), 96-97.

<sup>21</sup> See, for example, the MSC. Both the draft report from the auditors and the final report have to be made public according to Articles 27.15 and 27.17 of MSC Certification Requirements. See at <http://www.msc.org/documents/scheme-documents/msc-scheme-requirements/msc-certification-requirements/view>.

<sup>22</sup> Arthurs, H. (2004) 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation'. In Conaghan, J., Fischl, R.M., Klare, K. (Eds.) *Labour law in an era of globalisation. Transformative practices and possibilities*. Oxford: Oxford University Press, 479.

<sup>23</sup> It should be noted that, from an empirical assessment, many multi-stakeholder VSS employ third-party certification to verify compliance. Conversely, many company VSS, and also a few sectoral VSS, foresee different (and weaker) forms of enforcement, such as self-declarations and second-party certification. This would exclude them from the scope of this research project.

<sup>24</sup> Kalfagianni, A., Pattberg, P. (2013) Participation and inclusiveness in private rule-setting organisation: Does it matter for effectiveness? *Innovation: The European Journal of Social Science Research* 26(1), 8-9. See generally on certification: Conroy, M.E. (2007) *Branded! How the 'certification revolution' is transforming global corporations*. Gabriola Island, BC, Canada: New Society. Effectiveness generated by certification may however differ between sectors, and between schemes. There seems to be agreement that forestry certification brings about positive change (See generally Cashore, B., Gale, F., Meidinger, E., Newsom, D. (Eds.) (2006) *Confronting sustainability: Forest certification in developing and transitioning countries*. New Haven: Yale Forestry School). On the other hand, evidence is mixed for organic agriculture (Marshall, R.S. and Standiford, S.S. (2005) Organisational resource bundles and institutional change in the U.S. organic food and agricultural certification sector. *Organisation and Environment* 18(3), 265-286), apparel (Elliott, K., Freeman, R. (2003) Can labor standards improve under globalisation? Washington: Institute for International Economics), and mining (Mining Certification Evaluation Project Final Report. Online, available at: [www.minerals.csiro.au/sd/Certification/MCEP\\_Final\\_Report\\_Jan2006.pdf](http://www.minerals.csiro.au/sd/Certification/MCEP_Final_Report_Jan2006.pdf)). Generally, on the effects of VSS, see for exhaustive literature review: International Trade Center (2012) *When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV*. Geneva: ITC.

<sup>25</sup> See with respect to the domain of sustainability standards: Guldbradnsen, L.H. (2010) *Transnational environmental governance: The emergence and effects of the certification of forests and fisheries*. Cheltenham: Edward Elgar. From a more legal perspective: 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.



effective manner - or, at least, do not just pursue the self-serving economic interest of the certified entity. Schemes which do not employ third-party certification can be defined as self-declarations,<sup>26</sup> and are excluded from the scope of this research.

## 2.2 Areas of 'sustainability'

The group of VSS covered by this book encompasses different types of standards. Two major groups can be found addressing 'sustainability' - which is understood broadly as including all environmental and social issues described in this Section. The first group of VSS aims at directly regulating a domain in the area of sustainability, by directly setting requirements with which products in that domain must be in compliance. To some extent, such VSS can be seen as 'quality' standards insofar they identify products which possess special social and environmental features which distinguish them from 'regular' products. Included within this group are all initiatives contributing to a different extent to better resource management, the preservation of ecosystems and biodiversity, and to ensure animal welfare. Good agricultural practices standards (GAP)<sup>27</sup> also can to a certain extent be accommodated in the group above. Albeit responding to logics of product health and safety,<sup>28</sup> they reflect social and environmental considerations as well, or at the very least inform the context in which safety standards are drafted,<sup>29</sup> as a direct consequence of the acknowledgement of the role agricultural production can play in the achievement of sustainable development.<sup>30</sup> Organic agriculture schemes can also be considered as included in this group as they regulate pesticide and genetically-modified organisms (GMOs) use.

Social standards also belong in the category of quality standards. Social issues covered by VSS differ considerably and include, for example, standards covering the subject matter of the seven core ILO Core Conventions;<sup>31</sup> non-Core Conventions such

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<sup>26</sup> This is the European Commission's approach for certification schemes applying to agricultural products and foodstuff. See Commission Communication - EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuff. 2010/C 341/04.

<sup>27</sup> See, generally, Henson, S., Reardon, T. (2005) *Supra* at 4, 242; Liu, P. (2009) Private standards in international trade: Issues and opportunities. Paper presented at the WTO's Workshop on environmental-related private standards, certification and labelling requirements, Geneva, 9 July 2009; Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting process. Paper prepared for the Joint FAO/WHO Food Standards Programme.

<sup>28</sup> FAO (2007) Private standards in the United States and European Union markets for fruit and vegetables. Implication for developing countries. Rome: FAO Commodity Studies Series, 46.

<sup>29</sup> See for example the strong emphasis put by FAO on economic and social sustainability of farming practices. Food and Agriculture Organisation of the United Nations. (2003) Development of a framework for good agricultural practices. COAG/2003/6.

<sup>30</sup> See in particular Agenda 21 Chapter 14 on Promoting Sustainable Agriculture and Rural Development Johannesburg Declaration on Sustainable Development (4 September 2002) A/CONF.199/20. Social requirements however constitute separate standards that remain optional for producers seeking certification. See the Risk Assessment Module on Social Practices of GLOBALG.A.P., at [http://www.globalgap.org/uk\\_en/what-we-do/globalg.a.p.-00001/GRASP/](http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-00001/GRASP/).

<sup>31</sup> ILO Convention C29 on forced labor (1930); ILO Convention C87 on freedom of association and protection of the right to organise (1948); ILO Convention C98 on the right to organise and collective bargaining (1949); ILO

as the Convention on Indigenous and tribal Peoples;<sup>32</sup> the issue-area covered by the International Covenant on Economic, Social and Cultural Rights;<sup>33</sup> and also provisions and instruments addressing issues outside multilaterally agreed upon instruments, such as adequate remuneration and stable contractual relations between suppliers and producers. Also included in this group are FairTrade, and broadly defined 'ethical' claims ensuring appropriate remuneration, stable contractual relations, and direct business relations with producers.

Some of the concerns addressed by social and environmental schemes can be considered as moral ones, to the extent that they pertain to the standard of right and wrong conduct maintained by a community.<sup>34</sup> Animal welfare and organic agriculture, which often also have an impact on the environment, are examples of that. The same can be said for all social standards, which hinge on consumers' representations of what the appropriate level of social protection, remuneration and workplace conditions should be.<sup>35</sup> For clarity, standards addressing other moral concerns, which do not have such a close impact on environmental or social practices, are not considered as VSS. For example, there are certification schemes identifying halal or kosher products, which are similarly set transnationally, mostly by private actors.<sup>36</sup>

VSS do not just regulate the areas above in a direct manner, but can also regulate indirectly by offering tools that aid consumers in making their purchase decisions. VSS can simply provide information to consumers concerning, for example, the amount of CO<sub>2</sub> emissions from products. In such cases, the standards do not provide for substantive requirements, or specific thresholds to be met, but consist of complex methodologies for data collection and assessment, as will be discussed in Section 5.1. Eco-labels identifying and/or classifying products on the basis of their environmental performance, emission, and energy consumptions can also be seen as standards indirectly addressing environmental issues.<sup>37</sup> Well recognised public schemes have

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Convention C100 on equal remuneration (1951); ILO Convention C105 on the abolition of forced labor (1957); ILO Convention C111 on employment and occupational discrimination (1958); ILO Convention C138 on minimum age (1973); ILO Convention C182 on the worst forms of child labor (1999).

<sup>32</sup> ILO Convention C169 on Indigenous and Tribal People (1989).

<sup>33</sup> International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>34</sup> This is the definition of public morals given within the frame of WTO dispute settlement, where a justificatory ground exists under Art. XX(a) to save measure otherwise inconsistent with the GATT on the basis of public morals. See Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 10 November 2004, para. 6.465.

<sup>35</sup> Also animal welfare standards can fall under this rationale. However, the term 'social' is here limited to practices affecting workers and producers, not animals.

<sup>36</sup> Havinga, T. (2011) 'On the borderline between state law and religious law. Regulatory arrangements connected to kosher and halal foods in the Netherlands and the United States'. In van der Meulen, B. (Ed.) *Private food law: Governing food chains through contract law, self-regulation, private standards, audit and certification schemes*. Wageningen: Wageningen Academic Publishers, 265-288.

<sup>37</sup> An eco-label is a label 'which identifies overall environmental preference of a product (i.e., good or service) within a product category based on life cycle considerations', according to the definition provided by the Global Eco-Labeling Network and quoted in Bonsi, R., Hammet, A.L., Smith, B. (2008) Eco-labels and international trade:

been established in the past to identify the better-performing products in a given product group, such as the EU Eco-Label,<sup>38</sup> the German Blue Angel scheme,<sup>39</sup> and the Scandinavian Nordic Swan.<sup>40</sup> Nevertheless, private schemes are also on the rise.<sup>41</sup>

VSS thus constitute a broad group of initiatives which aims at protecting the public interest, and not just interests directly involved in the supply chain.<sup>42</sup> Sophisticated multi-stakeholder global governance platforms are included, such as the Forestry Stewardship Council (FSC),<sup>43</sup> the Marine Stewardship Council (MSC),<sup>44</sup> FairTrade,<sup>45</sup> or Social Accountability International<sup>46</sup> aiming, respectively, at the sustainable management of forests, at the sustainable exploitation of marine resources, at tackling poverty and empowering producers in the Global South, and at promoting workers' rights. Also sectoral initiatives involving predominantly economic actors are covered. Prime examples are the Program for the Endorsement of Forestry Certification (PEFC),<sup>47</sup> a FSC competitor in the area of forest resource management,

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Problems and solutions. *Journal of World Trade* 42(3), 409. Eco-labels such as the German Blue Swan, the Scandinavian Nordic Swan or the EU Ecolabel all assess the environmental impact of a good throughout its product-cycle by means of a life-cycle assessment (LCA). Product categories are created which group together products with the same end-use; only those with a particularly efficient environmental performance are entitled to use the label.

<sup>38</sup> Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, L 27/1.

<sup>39</sup> The German Blue Angel is also the oldest voluntary labelling scheme ever established addressing environmental concerns, as it dates back to 1977. See Gertz, R. (2004) Access to environmental information and the German Blue Angel - Lessons to be learned? *European Environmental Law Review* 13(10), 268-275.

<sup>40</sup> See <http://www.nordic-ecolabel.org>

<sup>41</sup> In the EU alone, there are 80 different methodologies for calculating and reporting greenhouse gas emissions, and around 60 methodologies for carbon footprints. See Communication from the Commission COM/2013/0196 final. Building the Single Market for green products. Facilitating better information on the environmental performance of products and organisations. However, not all of these methodologies can be seen as VSS since they may not require certification. Indeed, some of them result in full-fledged private schemes which allow companies to make effective and quantifiable claims over the environmental impact of their products and operations.

<sup>42</sup> For an exhaustive mapping exercise from the relevant United Nation agency on VSS, see United Nations Forum on Sustainability Standards (UNFSS) (2013) Voluntary Sustainability Standards - Today's Landscape of Issues and Initiatives to Achieve Public Policy Objectives - Part 2: Initiatives. Available at [https://unfss.files.wordpress.com/2012/05/unfss-report-initiatives-2\\_draft\\_lores.pdf](https://unfss.files.wordpress.com/2012/05/unfss-report-initiatives-2_draft_lores.pdf)). See also Marx, A., Sharma, A., Bécault, E. (2015) *Supra* at 2. Our definition may, however, be broader as it includes standards drafted by many different types of bodies, and narrower at the same time, as it excludes standards for services.

<sup>43</sup> <https://ic.fsc.org/en>. On FSC structure and functioning see Taylor, P.L. (2005) In the market but not of it: Fair Trade coffee and Forest Stewardship Council certification as market-based social change. *World Development* 33(1), 129-147.

<sup>44</sup> <https://www.msc.org>. On MSC see generally, Cummings, A. (2004) The Marine Stewardship Council: A multi-stakeholder approach to sustainable fishing. *Corporate Social Responsibility and Environmental Management* 11(2), 85-94; Ponte, S. (2012) The Marine Stewardship Council (MSC) and the Making of a Market for 'Sustainable Fish'. *Journal of Agrarian Change* 12(2-3), 300-315.

<sup>45</sup> <http://www.fairtrade.net>. On the Fair Trade movement and certification see Jaffee, D. (2014) *Brewing justice. Fair Trade coffee, sustainability, and survival*. Oakland: University of California Press.

<sup>46</sup> <http://www.sa-intl.org>. On SA8000, Social Accountability International's main standard, see: Gilbert, U., Rasche, A. (2007) Discourse ethics and social accountability. The ethics of SA8000. *Business Ethics Quarterly* 17(2), 187-216.

<sup>47</sup> <http://www.pefc.org>. On PEFC, in particular in relation to FSC see Auld, G., Gulbrandsen, L.H., McDermott, C.L. (2008) Certification schemes and the impact on forests and forestry. *Annual Review of Environment and Resources* 33, 198; Overdevest, C. (2010) Comparing forest certification schemes: the case of ratcheting standards in the forest sector. *Socio-Economic Review* 8(1), 47-76.

GLOBALG.A.P.<sup>48</sup> for farm assurance and good agricultural practices, and a myriad of sectoral supply chain codes addressing mostly labour issues, such as the International Council of Toy Industries' Code and CARE Process,<sup>49</sup> and the Electronic Industry Citizenship Coalition's Code.<sup>50</sup>

Other sectoral initiatives can address environmental issues, such as schemes in the biofuel domain like the Biomass Biofuels Sustainability Voluntary Initiative (2BSVs),<sup>51</sup> which certifies 'sustainable' biofuels in the meaning of EU Directive 2009/28/EC on Renewable Energy.<sup>52</sup> The definition also includes sourcing requirements set forth by single retailers to provide consumers with 'sustainable' or 'responsible' products such as those implemented by Carrefour<sup>53</sup> and Tesco,<sup>54</sup> or requirements by single companies to preserve acceptable working conditions in the supply chain, such as those implemented by Starbucks<sup>55</sup> or Nike,<sup>56</sup> provided that enforcement by means of third-party certification is employed.

It is evident that VSS constitute a broad group of diverse instruments, underpinned by different logics, interests and organisations.<sup>57</sup> The next Section attempts to bring order and identifies three categories of VSS, and discusses the main features associated with each of these ideal-typical groups. In spite of a broad definition of VSS, similar effects, in particular on trade, are generated by the three types of VSS discussed below. However, as the following EU and WTO Chapters will illustrate, for the purpose of the legal rules here considered, the treatment of these three types of standards may - and should - differ.

<sup>48</sup> [http://www.globalgap.org/uk\\_en/](http://www.globalgap.org/uk_en/). Hachez, N., Wouters, J. (2011) A glimpse at the democratic legitimacy of private standards. Assessing the public accountability of GLOBALG.A.P. *Journal of International Economic Law* 14(3), 677-710.

<sup>49</sup> <http://www.toy-icti.org>. For a comparative analysis of certain businesses' codes, including ICTI see: Kock, A., van Tulder, R. (2002) Child labor and multinational conduct: A comparison of international business and stakeholder codes. *Journal of Business Ethics* 36(3), 291-301.

<sup>50</sup> <http://www.eiccoalition.org>. For an account of the industry's code in the broader interactive frame with public regulation see: Locke, R.M., Rissing, B.A., Pal, T. (2013) Complements or substitutes? Private codes, State regulation and the enforcement of labour standards in global supply chains. *British Journal of Industrial Relations* 51(3), 519-552.

<sup>51</sup> <http://en.2bsvs.org>.

<sup>52</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L-140.

<sup>53</sup> [http://www.carrefour.com/sites/default/files/CHARTESOCIALE\\_ENv2.pdf](http://www.carrefour.com/sites/default/files/CHARTESOCIALE_ENv2.pdf).

<sup>54</sup> <http://www.tesco.com/nurture/>.

<sup>55</sup> <http://www.starbucks.com/responsibility/sourcing/coffee>.

<sup>56</sup> <http://about.nike.com/pages/resources-faq>.

<sup>57</sup> See also Marx, A. (2013) *Supra* at 3, 268-287; Marx, A., Sharma, A., Bécault, E. (2015) *Supra* at 2, 14.

### 3. Institutional arrangement of VSS bodies and their output

VSS constitute a varied group of different instruments with diverse constituencies, institutional settings, procedural fairness in the standard-setting, and areas of coverage. This Section introduces a classification between multi-stakeholder schemes, sectoral schemes and company schemes. The classification has been developed based on the institutional features connected to the participants to the rule-setting and the participants to the regulatory regime. It allows the location of the regulatory claim made by the scheme to be placed on a continuum spanning from a regulatory stance resembling that of public authorities, to the domain of private autonomy. At the same time, it allows us to determine normatively what the role of the State should be *vis-à-vis* these instruments, and to fine tune both the positive and normative application of the legal provisions with the different reality of the schemes.

#### 3.1 VSS and global public goods

Differences in the institutional structure, procedural fairness in standard-setting, and areas of coverage affect the effectiveness and legitimacy of the resulting regulatory regime, not just its trade-restrictiveness.<sup>58</sup> The definition here employed is of cognitive acceptance and justification of shared rules by the community to which the rules apply, which is different from the legitimacy applied to the State and its activities.<sup>59</sup> Several factors contribute to determine such acceptance, including procedural elements ensuring fair and effective participation of all actors involved, procedural fairness in the standard-setting and governance of the VSS body,<sup>60</sup> and also output considerations about the effectiveness and efficiency of the regime in pursuing its objectives.<sup>61</sup>

IR and legal literature alike have noted the similarities between a specific subgroup of transnational private regimes and state-based regulatory and legal systems. In the domain of sustainability, an innovative institutional approach combining elements of

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<sup>58</sup> Cafaggi, F. (2011) New foundations of transnational private regulation. *Journal of Law and Society* 38(1), 38.

<sup>59</sup> 'Legitimacy requires institutionalised authority (whether concentrated or diffuse) with power resources to exercise rule as well as shared norms among the community. Norms of legitimacy provide justifications and a shared understanding of what an acceptable or appropriate institution should look like and bounds what it can and should do.' Bernstein, S., Cashore, B. (2007) Can non-State global governance be legitimate? A theoretical framework. *Regulation and Governance* 1(4), 351. See also Bernstein, S. (2005) Legitimacy in global environmental governance. *Journal of International Law and International Relations* 1(1-2), 142.

<sup>60</sup> Casey, D., Scott, C. (2011) The crystallisation of regulatory norm. *Journal of Law and Society* 38(1), 87.

<sup>61</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), 505. Risse, T. (2004) 'Transnational governance and legitimacy'. In Benz, A., Papadopoulos, Y. (Eds.) *Governance and democracy. Comparing national, European and international experiences*. London and New York: Routledge, 180.

expert-driven technocracy with elements of deliberative democracy is that of 'non-state market-driven' (NSMD) instruments.<sup>62</sup> By means of market forces, and through the involvement of different stakeholders and broader civil society, these regimes aim to be authoritative through the creation of rules with a sufficient pull toward compliance. Most importantly, such regimes present crucial features of 'traditional' public legal forms such as: the definition of rights and duties through rules; implementation and enforcement by specialised officials; a participatory, transparent and proceduralized rule-making process; and a normative justification of the rules.<sup>63</sup>

On the one hand, all VSS under inquiry here, by definition, prescribe rules and duties by means of their standards, and are implemented and enforced by specialised officials through third-party certification. On the other hand, variations in participation in the rule-setting, procedures, and normative justifications identify different groups, as Sections 3.1.1, 3.1.2 and 3.1.3 clarify. International legal scholarship agrees with NSMD scholars that certain private transnational regulatory regimes can be based on a normatively much stronger procedural backdrop, grounded firmly on 'thick stakeholder consensus', rather than public international law, whose logic responds to a 'thin state consent'.<sup>64</sup> Certain VSS regimes, from a position of strength due to a combination of high input and output legitimacy, are able to promote and market their own standards as appropriate and legitimate for the an entire economic sector, and thus to reorient the norms of acceptable market behaviour. Governance and enforcement rules have been described as resembling more the dynamics of state regulation than those of voluntary bodies' standards, once actors opt into the regime.<sup>65</sup>

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<sup>62</sup> Cashore, B. (2002) *Supra* at 61. Similar and recurring structures and governance processes among multi-stakeholder organisations in the domain of sustainability have been broadly observed also by, *inter alia*, Meidinger, E. (2007) 'Beyond Westphalia: Competitive legalisation in emerging transnational regulatory systems'. In Brüttsch, C., Lehmkuhl, D. (Eds.) *Supra* at 19, 121-43; Bernstein, S., Hannah, E. (2008) Non-state global standard setting and the WTO: Legitimacy and the need for regulatory space. *Journal of International Economic Law*, 11(3), 575-608; Dingwerth, K., Pattberg, P. (2009) World politics and organisational fields: The case of transnational sustainability governance. *European Journal of International Relations* 15(4), 713-715.

<sup>63</sup> Meidinger, E. (2007) 'Beyond Westphalia: Competitive legalisation in emerging transnational regulatory systems'. In Brüttsch, C., Lehmkuhl, D. (Eds.) *Supra* at 19, 139; see also Matten, D. Crane, A. (2005) Corporate citizenship: towards an extended theoretical conceptualisation. *Academy of Management Review* 30, 166-79.

<sup>64</sup> Pauwelyn, J., Wessel, R.A., Wouters, J. (2012) 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable'. In Pauwelyn, J., Wessel, R.A., Wouters, J. (Eds.) *Informal international lawmaking*. Oxford: Oxford University Press, 505-506. For an application of the concept to the domain of international trade law and the domain of international standardisation, see Pauwelyn, J. (2014) Rule-based trade 2.0? The rise of informal rules and international standards and how they may out compete WTO Treaties. *Journal of International Economic Law* 17(4), 739-751.

<sup>65</sup> Bernstein, S., Hannah, E. (2008) *Supra* at 62, 575-579. This is particularly evident if the reference point employed is ISO, whose procedural requirements in the standard-setting ensure much less openness, transparency and inclusiveness if compared to the requirements into play for certain VSS bodies. On ISO's procedural requirements see most recently Delimatsis, P. (2014) Into the abyss of standard-setting: An analysis of procedural and substantive guarantees within ISO. TILEC Discussion Paper 2014-042.

A crucial feature of some VSS is that they are not just open for acceptance to all market actors willing to join (and, of course, to undergo certification), but also that the very standard-setting process can be influenced by many different types of actors and constituencies - an element which highlights their 'collective governing' function.<sup>66</sup> Other VSS are not, however, open for acceptance to all actors. They are either limited to certain actors in a specific sector or selected sub-entities in the supply chain, or the standards are drafted by a narrower constituency of interests. A collective governing and regulatory role is intimately connected with an approach which frames certain transnational rules taking the form of standards as global public goods, or as rules which contribute to the production of global public goods. Global public goods are goods whose non-rival consumption generates non-excludable benefits, and which are supplied at a universal level. Their supply requires multi-actor, multi-sector, and multi-level cooperation to be provided, which is different from national public goods.<sup>67</sup> Public goods are normally undersupplied, as individual actors are tempted to free-ride.<sup>68</sup>

Transnational regulatory regimes are both global public goods in themselves, and contribute to the creation of global public goods such as transnational environmental and social protection. Importantly, such regimes can also be supplied by private economic actors and civil society.<sup>69</sup> Standardisation, for example, has long been considered as a (global) public good in economics literature.<sup>70</sup> More recently, international standards have been considered also by legal scholars as a global public good, as they are available to all, and no actor can monopolise their use.<sup>71</sup> The nature of a standard as a global public good is not affected by a requirement of certification

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<sup>66</sup> Wolf, K. (2006) 'Private actors and the legitimacy of governance beyond the State: Conceptual outlines and empirical explorations'. In Benz, A., Papadopoulos, Y. (Eds.) *Governance and democracy*. London and New York: Routledge, 220.

<sup>67</sup> Kaul, I. (2012) Global public goods: Explaining their under provision. *Journal of International Economic Law* 15(3), 731-732 and 736.

<sup>68</sup> Kaul, I., Conceicao, P., Le Goulven, K., Mendoza, R. (2003) 'How to improve the provision of global public goods?' In Kaul, I., Conceicao, P., Le Goulven, K., Mendoza, R. (Eds.) *Providing global public goods: Managing globalisation*, New York and Oxford: Oxford University Press, 21.

<sup>69</sup> Demsetz, H. (1970) The private production of public goods. *The Journal of Law and Economics* 13(2), 293-306. More recently and closer to our subject matter: Cafaggi, F. (2012) Transnational private regulation and the production of global public goods and private 'bads'. *European Journal of International Law* 23(3), 696. For the same conclusion from the perspective of management and economics see Scherer, A.G., Palazzo, G. (2011) The new political role of business in a globalised world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy. *Journal of Management Study* 48(1), 899-931.

<sup>70</sup> Standardisation was described as a public good for the first time by Kindleberger, C.P. (1983) Standards as public, collective and private goods. *Kyklos* 36(3), 377-396. However, the author's claim was that everybody, and not just all economic actors could benefit from standardisation. His contribution also focused on the standardisation of system of measurement, and not standards developed by international standardising organisation as in subsequent, more recent, literature. For this approach, see Wieland, J. (2014) *Governance ethics: Global value creation, economic organisation and normativity*. Heidelberg-New York-Dordrecht-London: Springer, 61-72.

<sup>71</sup> From a more markedly international legal perspective: Du, M., Deng, F. (2016) International standards as global public goods in the world trading system. *Legal Issues of Economic Integration* 43(2), 120.

and, at times, accessibility upon the payment of a fee.<sup>72</sup> For a standard to be a global public good, non-rivalry and non-excludability must apply to its outcome and effects (i.e. environmental benefits, which are always non-rival and non-excludable), and also must also apply to its 'production process' by means of standardisation and the procedures to which it is subject.<sup>73</sup>

On this last point, standards and VSS schemes are highly varied. Thus, not all of them can be said to constitute global public goods. Certain VSS, however, are available for every economic operator in the same manner as global public goods and no actor can monopolise or restrict their consumption or acceptance - not even the actors which did not contribute to their creation. Further, no actor can be excluded in their production, nor can participation by one specific actor reduce the possibility of another to participate. Finally, increased use generates larger benefits, which actors cannot be prevented from enjoying. This latter feature can be framed from the perspective of environmental or social objectives pursued by the scheme - whose improvements benefit everyone - but also from the perspective of the economic benefits accrued to the actors concerned, i.e. the arguable increase in competitiveness and efficiency for the firms accepting the VSS.<sup>74</sup>

### 3.1.1 Multi-stakeholder VSS

Not all VSS possess all the characteristics described above. The features and effects of NSMD regimes, an open and 'collective governing' function, and the production of standards in the form of public goods, are shared by a specific (and to some extent ideal) group of VSS. By reference to one of its institutional elements, this group can be defined as a 'multi-stakeholder' VSS. The name highlights a specific feature in the standards-setting and governance of the organisation responsible for the standards, which is the presence of interests and representatives, rather than just the industry. At different degrees, social and environmental NGOs, consumer organisations, trade unions, local producers, and smallholders are also included, and they draft standards by consensus.<sup>75</sup>

Multi-stakeholder VSS are set by a body within a permanent organisation; the latter also serves as a forum for interest representation and a platform for revision and amendment of the standards. Multi-stakeholder schemes possess a strong

<sup>72</sup> Cafaggi, F. (2012) *Supra* at 69, 702. For a different position holding that certification-based regime are instead club goods see, albeit from a different perspective, Potoski, M., Prakash, A. (2005) Covenants with weak swords: ISO 14001 and facilities environmental performance. *Journal of Policy Analysis Management* 24(4), 745–769.

<sup>73</sup> Cafaggi, F. (2012) *Supra* at 69, 701.

<sup>74</sup> Some caveats are here required and refer to the fact that, different from technical standardisation, which is normally the subject of the disquisitions linking standards to public goods, VSS do not generate some of the positive externalities technical standards do. This issue will be discussed more in detail in Section 2.4.2.4 of Chapter 4.

<sup>75</sup> Marx, A. (2013) *Supra* at 3, 274.



transnational character, bringing together disparate constituencies and addressing global phenomena. They are open for acceptance by all interested actors. Furthermore, all interest groups affected by the standards are included in standard-setting and, at times, governance of the organisation. VSS membership provides an opportunity to contribute to the rule-setting, and is open to all interested individual, economic, non-governmental and at times even public actors. At least one body represents all different interests in the management of the organisation, from steering functions to advisory ones.<sup>76</sup> Therefore, there is only a certain extent of overlap between regulators and the regulated entities, which differentiate multi-stakeholder schemes from initiatives possessing stronger self-regulatory features, such as sectoral and company schemes.

Such a governance structure is not always ideal and it doesn't automatically ensure the 'perfect' functioning of the scheme, for example by preventing the generation of trade-barrier effects. Allowing different interests to be represented in the organisation does not mean that *all* relevant affected groups are actually involved. As a matter of fact, severe underrepresentation of developing countries' interests persists, which can be partially responsible for the trade-barrier effects generated by private schemes.<sup>77</sup> The lack of broad representation of global South's interests even in the most inclusive regimes provides a strong argument for claims that environmental protection and sustainability in general are in the interests of developed countries only.<sup>78</sup> A notable exception is the FSC, whose governance structure consists of three chambers, respectively representing social, environmental and economic interests. Each chamber is divided into an equally represented 'North' and 'South' sub-chamber system, which allows for effective equal representation of developed and developing countries' constituencies.<sup>79</sup>

The procedures employed in the standard-setting by multi-stakeholder VSS present a high level of participatory fairness, procedural transparency, openness and inclusiveness. Multi-stakeholder VSS are usually members of the ISEAL Alliance, a meta-regulatory organisation<sup>80</sup> of private standard-setters in the domain of sustainability, whose aim is to contribute to the creation of social and environmental certifications which are effective, legitimate and credible.<sup>81</sup> ISEAL drafts procedural standards in the form of Codes of Good Practice, which are used as a reference for

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<sup>76</sup> Dingwerth, K., Pattberg, P. (2009) *Supra* at 62, 713.

<sup>77</sup> Scott, C. (2012) 'Non-judicial enforcement of transnational private regulation'. In Cafaggi, F. (Ed.) *Supra* at 25,145.

<sup>78</sup> Kapoor, A. (2011) Product and process methods (PPMs): 'A losing battle for developing countries'. *International Trade Law and Regulation* 17(4), 131-142.

<sup>79</sup> See, generally on FSC structure and governance Tollefson, C., Gale, F., Haley, D. (2008) *Setting the standard. Certification, governance and the Forestry Stewardship Council*. Vancouver and Toronto: UBC Press.

<sup>80</sup> Derks, B. (2014) Meta-governance in the realm of voluntary sustainability standards: Early experiences and their implications. UNFSS Discussion Papers No. 1, 9-12.

<sup>81</sup> ISEAL Alliance (2011) Scaling up strategy. A strategy for scaling up the impact of voluntary standards, online at [http://community.isealalliance.org/sites/default/files/Scaling\\_Up\\_Strategy\\_Final\\_June2011\\_0.pdf](http://community.isealalliance.org/sites/default/files/Scaling_Up_Strategy_Final_June2011_0.pdf).

drafting, updating and enforcing substantive sustainability standards normally in the form of labelling schemes. Compliance with the ISEAL Code ensures, *inter alia*, that VSS standard-setting bodies are operating in conformity with all procedural requirements of the relevant international instruments addressing private standard-setting, such as the Code of Good Practice contained in the WTO Technical Barriers to Trade (TBT) Agreement,<sup>82</sup> and the ISO/IEC Guide 59 addressing good practices for standardisation.<sup>83</sup> Arguably, this ensures the clarity and effectiveness of the resulting set of standards.<sup>84</sup>

The ISEAL Code, however, goes much further than the requirements contained in those two instruments. For example, it provides for more detailed rules about draft standards, offers several possibilities for the submission of comments by stakeholders at several stages of the standard-setting and posits additional requirements ensuring increased participation, such as, for example, broad and pro-active stakeholder representation and involvement.<sup>85</sup> ISEAL also provides a standardised methodology for impact assessment to demonstrate that standards have a positive impact.<sup>86</sup> However, one should not believe that ISEAL meta-standards were drafted spontaneously by enlightened civic constituencies. They were drafted to respond to the need to ensure compliance with good administration principles provided for in international instruments, to ensure procedural legitimacy to the whole sustainability standards movement<sup>87</sup> and its institutionalisation,<sup>88</sup> and also to respond to the demands by public authorities and courts.<sup>89</sup>

The open and non-excludable character, not just of the access to the final 'good' - the standard - but also of its 'production' process - the standard-setting - allows us to frame multi-stakeholder VSS as public goods. From the perspective of legitimacy, more than ten years ago a study on NSMD schemes concluded that schemes which ensure broad interest representation and which are perceived as independent from

<sup>82</sup> The main provisions of the TBT Code of Good Practice provide that standards shall not discriminate; shall not be more trade restrictive than necessary; shall be based on international standards; and shall be drafted by specifying performance characteristics, if feasible. Standard-setters are required to participate to international standard-setting activities, and avoid overlap and duplication with other standards. A host of procedural requirements addresses transparency in the standard-setting, the provision of information about draft standards, the availability of periods for commenting on draft standards, the presence of a redress procedure. For an account of the substantive and procedural requirements of the TBT Code of Good Practice, see Section 2.2 of Chapter 6.

<sup>83</sup> ISO/IEC (1994) ISO/IEC Guide 59: 1994. Code of Good Practice for Standardisation.

<sup>84</sup> ISEAL Alliance (2014) Setting social and environmental standards. ISEAL Code of Good Practice v. 6.0, online at [http://issuu.com/isealalliance/docs/iseal\\_standard\\_setting\\_code\\_v6\\_dec\\_](http://issuu.com/isealalliance/docs/iseal_standard_setting_code_v6_dec_).

<sup>85</sup> *Ibid.*

<sup>86</sup> ISEAL Alliance (2014) Assessing the impact of social and environmental standards. ISEAL Code of Good Practice (Impacts Code) v. 2.0, available at <http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/impacts-code>.

<sup>87</sup> Reinecke, J., Manning, S., von Hagen, O. (2012) *Supra* at 1, 804.

<sup>88</sup> Loconto, A., Fouilleux, E. (2014) Politics of private regulation: ISEAL and the shaping of transnational sustainability governance. *Regulation and Governance* 8(2), 178.

<sup>89</sup> Bartley, T. (2011) Transnational governance as the layering of rules: Intersections of public and private standards. *Theoretical Inquiries in Law* 12(2), 517.

the industry - such as, for example, the FSC - possess increasingly visible elements of moral legitimacy. Moral legitimacy presupposes that actors do not just follow certain rules on the basis of narrow self-interests, but are also increasingly guided by a value judgment that following such rules is the 'right thing' to do.<sup>90</sup> The adoption of multi-stakeholder schemes, arguably, is not just based on the possibility of increased economic returns and market opportunities, but also on the perception from companies that the resulting regulatory regime has some intrinsic value justifying its adoption. A tension with more economic logics, however, still permeates multi-stakeholder schemes. Ultimately, the regime has to be embraced by economic actors, which in turn requires overall economic feasibility to be successfully implemented.<sup>91</sup>

### 3.1.2 Company VSS

VSS drafted by a single company radically differ from multi-stakeholder VSS on several grounds. The purpose of VSS drafted by a single company is comparable to that of multi-stakeholder VSS. Both types of instruments define and identify sustainable product and process features, with the aim of correcting externalities or to remedy information asymmetries - in this case between supplier and producer(s). However, a review of the dynamics underpinning company VSS, which are then included in a supply contract, reveals a remarkably asymmetrical relation between the firm imposing the standard and the supplier which has to adhere to or enforce it.

Firstly, entrance in the regime is not open to all interested parties, just the retailer or the scheme-holder intending to enter in a contractual relation with another business entity, which is normally a supplier or producer. The regulatory regime can take the form of a one-off set of standards or, more often, a default set of standards applicable to all upstream business entities. Secondly, company VSS are, generally, neither drafted nor managed within a permanent organisation.<sup>92</sup> Thirdly, suppliers and producers are rarely in the position of influencing the substance of the standards, which can also be a simple reference to a third-party standard.<sup>93</sup> Nevertheless, compliance with the VSS can be an essential condition if entrance is sought in a given

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<sup>90</sup> Cashore, B. (2002) *Supra* at 61, 522. Similar findings, albeit with some caveats concerning developing countries participation, were made also by 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.) *Private standards and global governance. Economic, legal and political perspectives*. Cheltenham-Northampton: Edward Elgar, 60-97.

<sup>91</sup> Potoski, M., Prakash, A. (2009) 'A club theory approach to voluntary programs'. In Potoski, M., Prakash, A. (Eds.) *Voluntary programs: A club theory perspective*. Cambridge: MIT Press, 17-40.

<sup>92</sup> Vandenbergh, M.P. (2007) *Supra* at 5, 924-925.

<sup>93</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.

supply chain, especially in the presence of downstream entities with strong market shares and market power.<sup>94</sup>

Such an asymmetrical relation bears consequences on economic outcomes as well. There are notable differences concerning the impact of the standard between upstream and downstream economic actors in a supply chain. It has been demonstrated that upstream actors - suppliers and producers - bear most of the costs of voluntary schemes in the agri-food sector, the major sector of application of company VSS. Conversely, downstream economic actors such as retailers tend to reap most of the economic benefits.<sup>95</sup> This is not to deny any positive impact of company VSS on the welfare of suppliers or, in the case of developing countries' suppliers, on economic development at large. Empirical evidence is however mixed.<sup>96</sup> In the end, company VSS are standards defining sourcing requirements, and are intimately connected to the right to conduct economic activities recognised in many jurisdictions.

It is safe to hold that company VSS, generally, do not possess standard-setting procedures which are as inclusive and aiming at ensuring due process as those of multi-stakeholder VSS. This is due to the mostly 'unilateral' character of company VSS.<sup>97</sup> It cannot be concluded, however, that this type of standard-setting, adoption, and enforcement is unlawful. Private contractual relations often take place against a backdrop of power inequality, the extent of which very rarely deserves the attention of the legislator or the judiciary. Company VSS are a widespread supply-chain management tool and make perfect economic sense.<sup>98</sup> For the purpose of the distinction made here, company VSS can produce global public goods, if to an extent only. However, as they do not constitute an open regulatory system, they themselves are not global public goods. Company VSS are private goods, as access to the

<sup>94</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), 100-101; Jiang, B. (2009) *Supra* at 17, 78. Henson, S., Humphrey, J. (2012) 'Private standards in global agri-food chains'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra* at 90, 98-113.

<sup>95</sup> See for example Clapp, J., Fuchs, D. (2009) 'Agrifood corporations, global governance and sustainability: A framework for analysis'. In Clapp, J., Fuchs, D. (Eds.) *Corporate power in global agrifood governance*. Cambridge MA: The MIT Press, 6-7.

<sup>96</sup> For a comprehensive literature review on the effects of private standards (including many company standards) on developing countries see: International Trade Centre (2011) The impacts of private standards on producers in developing countries. Literature review series on the impact of private standards. Part I and Part II available at <http://www.intracen.org/itc/publications/publications-catalogue>; Maertens, M., Swinnen, J. (2012) 'Private standards, global food supply chain and the implications for developing countries'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra* at 90, 153-171.

<sup>97</sup> It has been observed that increasingly also private firms are adopting governance mechanisms that imitate the multi-stakeholder mode of governance and consist of forums where different interests can be voiced. It has also been observed that an equal voice in decision-making and standard-setting is still often times denied. See Franssen, L. (2012) Multi-stakeholder governance and voluntary programme interactions: Legitimation politics in the institutional design of Corporate Social Responsibility. *Socio-Economic Review* 10(1), 164-165, 188.

<sup>98</sup> Gereffi, G., Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78-104.

standard is not open, and certain actors are excluded from benefiting from it.<sup>99</sup> Furthermore, it is arguable that their perceived legitimacy can be expected to flow substantially from logics connected to the economic self-interest of the parties directly involved. Nevertheless, this form of private contracting is considered as an important transnational governance tool because of its extensive consequences and implications on the supply chain.<sup>100</sup>

### 3.1.3 Sectoral VSS

Sectoral VSS are schemes and codes of conduct drafted by (normally sectoral) associations of enterprises for their application in a given sector. Generally, such standards are open for acceptance to all actors in a supply chain. Sectoral VSS display features which are a combination of those reviewed above for multi-stakeholder and companies schemes. Sectoral VSS are located somewhere 'in between' multi-stakeholder and company VSS. Downstream business actors are the actors which have the final word over the content of the standard, although exceptions are possible.<sup>101</sup> The standard-setting is not highly proceduralized, as sectoral codes are often a response to a specific economic need, or a one-off response to or prevention against negative events.<sup>102</sup> It is also rare that interests other than economic ones are included in the standard-setting and in the governance of the organisation, if any. The application of the standards is, however, broader than the bilateral economic relation between suppliers and retailers at issue for company VSS. Sectoral standards may apply to all actors in a given sector, often as a precondition to business relations.<sup>103</sup>

Sectoral schemes include industry codes and standards that are traditionally understood as a typical form of business self-regulation, whose enforceability varies according to the instrument and the legal system considered.<sup>104</sup> This type of instrument has made its appearance before courts and possesses certain specific features concerning its enforcement.<sup>105</sup> Codes and standards drafted by sectoral associations or with the involvement of a stakeholder base may, under certain

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<sup>99</sup> Kindleberger, C.P. (1983) *Supra* at 70, 381.

<sup>100</sup> Vandenberg, M.P. (2007) *Supra* at 5, 917.

<sup>101</sup> Hachez, N., Wouters, J. (2011) *Supra* at 48, 677-710.

<sup>102</sup> 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; Jenkins H., Yakovleva N. (2006) Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure. *Journal of Cleaner Production* 14, 271-284.

<sup>103</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.

<sup>104</sup> As here we are concerned with sectoral schemes enforced by means of third-party certifiers, the actual level of enforceability is rather high - if by enforceability it means the possibility to ensure that a standard is properly complied with. See Wymeersch, E. (2006) The enforcement of corporate governance codes. *Journal of Corporate Law Studies* 6(1), 117.

<sup>105</sup> Delimatsis, P. (2010) 'Thou shall not... (dis)trust': Codes of conduct and harmonisation of professional standards in the EU. *Common Market Law Review* 47(4), 1049-1087.

circumstances, be interpreted and enforced as legally binding contracts.<sup>106</sup> Codes may affect litigation even if not transposed into binding contracts. Codes of conduct are routinely resorted to by judges as yardstick in the interpretation of general normative standards, such as 'reasonableness' or 'due diligence' in corporate practices.<sup>107</sup> When a code is sufficiently precise and addressed to the broad public, as in the case of highly-promoted labour codes, judges may enforce it under the law for consumer protection against deceptive practices.<sup>108</sup> Sectoral codes drafted by specific bodies, especially those regulating the practice of a profession, may also be subject to the application of certain public law rules,<sup>109</sup> competition law,<sup>110</sup> and even constitutional norms. For example, professional bodies must comply with ECHR, and in particular with the fair process obligation contained therein.<sup>111</sup> However, no delegation can be observed for sectoral VSS, which is different from certain types of self-regulation.<sup>112</sup>

By constituting a form of industry self-regulation, sectoral VSS aim at collectively governing the activity of the entities to which they apply. The justification of self-regulatory activities stems from freedom of contract and self-organisation considerations aiming at ensuring the proper practice of a profession or a sector.<sup>113</sup> However, the rules of sectoral VSS do not just apply to the actors that drafted them, but also to third parties, which is different from a narrow understanding of the term self-regulation. These are different actors in the supply chain which are not involved in the standard-setting, possibly even their subcontractors. Given the mismatch between

<sup>106</sup> Arthurs, H. (2004) 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation'. In Conaghan, J., Fischl, R.M., Klare, K. (Eds.) *Labour law in an era of globalisation: Transformative practices and possibilities*. Oxford: Oxford University Press, 484.

<sup>107</sup> Wymeersch, E. (2006) *Supra* at 104, 119. In the EU, however, a sectoral code does not grant a presumption of conformity with the standard of fairness of the Unfair Commercial Practices Directive, but only strong evidence of compliance. See Pavillon, C.M.D.S. (2012), The interplay between the Unfair Commercial Practices Directive and codes of conduct. *Erasmus Law Review* 5(4), 260. The employment of corporate codes to assess, for example, due diligence can be defined as an indirect form of judicial review, and is tantamount to an indirect scrutiny of legitimacy of the code at hand. This 'recognition' of sort by a Court of private standards expands their legitimacy and authority to regulate a given domain. See Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra* at 25, 93.

<sup>108</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; see also 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(1), 129.

<sup>109</sup> Under EU freedom of movement see, for example, C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653. Furthermore, the Commission is instructed to ensure that the use of self-regulation is consistent with EU law, and meets the criteria of transparency and representativeness. See European Parliament/Council/Commission, Interinstitutional agreement on better law-making [2003] C 321/1, para. 17.

<sup>110</sup> Under EU competition law, see most recently, C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000; C-136/12 *Consiglio Nazionale dei Geologi v. Autorità Garante della Concorrenza e del Mercato* [2013], ECR I-000.

<sup>111</sup> See, generally, Vitkauskas, D., Dikov, G. (2012) Protecting the right to a fair trial under the European Convention on Human Rights. Council of Europe human rights handbooks.

<sup>112</sup> Büthe, T., Mattli, W. (2005) Global private governance: Lessons from a national model of setting standards in accounting. *Law and Contemporary Problems* 68(3), 229-231.

<sup>113</sup> Under EU law see C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 123.

regulators and regulated entities, 'private regulation' has been advanced as a better fitting definition.<sup>114</sup> However, the prevailing logic in the elaboration and adoption of sectoral codes remains rooted in economic and business considerations of liability limitation and risk avoidance.<sup>115</sup> The limited and asymmetrical participation in the setting of sectoral standards, as well as their restricted application - which is circumscribed to specific actors in the supply chain - is not consistent with the approach described above which frames certain standards as global public goods. At best, sectoral VSS can be considered as non-purely private goods, or 'club goods'. Their consumption is non-rival, but excludable, if only to a certain extent.<sup>116</sup> Self-regulation as a club good produces and protects private benefits, i.e. those of the regime members; it creates barriers to exclude others from acceding to or producing the same good.<sup>117</sup>

### 3.2 Institutional desirability?

Section 3.1 has built three categories of VSS on the basis of their institutional arrangement and other features. Multi-stakeholder, sectoral, and company VSS differ insofar as standards are created by and apply to, respectively: i) by any interested actor and to any interested actor; ii) by actors in the supply chain and to actors in the supply chain; and iii) by a company and to a limited group of suppliers. It is thus suggested that multi-stakeholder, sectoral, and company VSS represent, respectively: i) global public goods; ii) club goods; and iii) private goods. It will be shown that, in line with an approach that equates international standards with global public goods, multi-stakeholder VSS have a very high chance of being considered as 'relevant international standards' in the meaning of Art. 2.4 of the TBT Agreement.<sup>118</sup>

Regardless of whether they constitute themselves as a global public good, these three types of standards contribute to the production of global public goods, albeit to different extents. The objectives pursued by the schemes, i.e. the establishment of regulatory regimes correcting social and environmental externalities, are global public goods. Some regimes, however, give more weight to the accomplishment of private benefits over the achievement of global public goods. As seen, this is determined by

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<sup>114</sup> Cafaggi, F. (2006) 'Rethinking private regulation. In Cafaggi, F. (Ed.) *Reframing self-regulation in European private law*. Alphen aan den Rijn: Kluwer Law International, 17-19.

<sup>115</sup> 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) *Supra* at 102, 400.

<sup>116</sup> Bernstein, L. (1992) Opting out the legal system: Extralegal contractual relations in the diamond industry. *The Journal of Legal Studies* 21(1), 1145-157. On a similar position, although not expressly employing the concept of club good, see 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), 145-182.

<sup>117</sup> Cafaggi, F. (2012) *Supra* at 69, 700.

<sup>118</sup> See Section 4.2 of Chapter 5.

the governance and institutional arrangements,<sup>119</sup> and it arguably is the case for company and, albeit to a lesser extent, sectoral VSS. Nevertheless, as all these regimes pursue at different degrees also non-economic objectives, which benefit everybody in a non-rival and non-excludable manner, they contribute at least to a certain extent to the creation of global public goods.

The contribution of private actors to the creation of public goods such as environmental protection is controversial. Similarly, the very provision of certain global public goods should not be considered as inherently desirable, as there are different needs from different types of global public goods among different global constituencies.<sup>120</sup> For this reason, especially when global public goods result in distributional implications, public control and supervision over their provision should be exercised.<sup>121</sup> This approach normatively favours multi-stakeholder VSS for the purpose of the production of global public goods, because of their inclusive, open, and deliberative procedural requirements - which are also found to generate more stringent standards.<sup>122</sup> The effects of the regime must be comprehensively taken into account as well before concluding that multi-stakeholder VSS can be considered as global public goods.<sup>123</sup> This requires that multi-stakeholder VSS' outcomes should be satisfactory not just by achieving the scheme's objective, but also by avoiding generation of negative externalities in their application, which may include trade barrier effects and consumer confusion hindering their optimal functioning.<sup>124</sup>

To link standards with global public goods has additional consequences for the role the State and public institutions should play *vis-à-vis* transnational private rules, apart from a supervisory role where distributional effects are at stake. Standards as global public goods are the outcome of the aggregate effort of different types of actors. In order to stimulate their creation and, importantly, an output which is desirable, the State should put facilitations into place to support and encourage the aggregate effort of the actors involved.<sup>125</sup> These facilitations may take the form of interactions between private and public authority, as described in the next Section with respect to VSS. Public-private interactions contribute to supporting the private regulatory scheme by fostering its acceptance, ensuring its trustworthiness, and limiting adverse market effects. At the same time, in some instances, public authorities provide constraints or

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<sup>119</sup> Cafaggi, F. (2012) *Supra* at 69, 699.

<sup>120</sup> Kaul, I. (2012) *Supra* at 67, 733.

<sup>121</sup> Cafaggi, F. (2012) *Supra* at 69, 696.

<sup>122</sup> Kalfagianni, A., Pattberg, P. (2013) *Supra* at 24, 15.

<sup>123</sup> Cafaggi, F. (2012) *Supra* at 69, 698.

<sup>124</sup> Literature on international standards similarly acknowledges the importance to equally meeting high thresholds of procedural accountability and also of substantive quality. See Wijkström, E., McDaniels, D. (2013) Improving regulatory governance: International standards and the WTO TBT Agreement. *Journal of World Trade* 47(5), 1013-1046.

<sup>125</sup> Krisch, N. (2014) The decay of consent: International law in an age of global public goods. *American Journal of International Law* 108(1), 4; Du, M., Deng, F. (2016) *Supra* at 71,119.



conditions with which the scheme must comply as a form of control on procedures and, at times, outcomes.

Public authorities can also exercise their supervising and coordinating roles by means of interactions such as court review under, for example, freedom of movement provisions and competition law in the EU. This interaction brings legal accountability by means of substantive and procedural review of VSS' features.<sup>126</sup> The reach of meta-regulatory tools such as the TBT Code of Good Practices is also of fundamental importance and potentially far-reaching. These means of review and influence will be discussed, respectively, in Chapter 3, 4 and 6. Arguably, court review may ensure a rather thorough control over private regulatory activities, which may though generate 'chilling' effects for private regulation. In light of the frame above, a more extensive degree of control appears reasonable for VSS, as they structurally generate distributional concerns since they mediate between trade and non-trade values, affect producers' competitiveness, and consumers' tastes and consumption patterns. Distributional concerns are less visible for technical standards, thereby suggesting that the State's approach towards them should be more limited,<sup>127</sup> and possibly only encompassing facilitation, and not necessarily requiring review and closer forms of supervision.

Public coordination and supervision over private regimes may raise concerns for private autonomy of the actors establishing the regime. To frame VSS as global, club, or private goods defuses such an argument, and identifies normatively which regimes should be treated more deferentially by public authorities. Public control over private and club goods such as company and sectoral VSS should be less intrusive, arguably less so for private goods. Conversely, the control of global public goods such as multi-stakeholder VSS is less controversial, as discussed above. This is also demonstrated empirically, as most of the interaction described in the next Section and in Chapter 3 already addresses multi-stakeholder schemes. Finally, as will be seen, concerns about private autonomy are also limited under an argument that passing the test of public scrutiny is in the interest of scheme holders in order to enhance their legitimacy and acceptance.

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<sup>126</sup> Stewart, R.B. (2014) Remediating disregard in global regulatory governance: Accountability, participation, and responsiveness. *American Journal of International law* 108(2), 249.

<sup>127</sup> Stewart, R.B. (2014) *Supra* at 126 , 226.

## 4. Public role and specific forms of interaction with VSS

As discussed above, legal scholarship framing certain forms of transnational private regulation as global public goods, in line with political science scholarship,<sup>128</sup> identifies a directing and controlling role of the State. Recommendations have been made that public actors should intervene in private regulation. In spite of the private character of VSS schemes, it can be empirically discerned that they do not operate in a vacuum devoid of public influence.<sup>129</sup> The relation between States and VSS is, however, a complex one, if not because it takes forms and venues which are at times indirect and, thus, not easily identifiable. In general, different forms of interactions are observable.<sup>130</sup> The concept of interaction is much more flexible to describe the interplay between private and public authority than the concepts of delegation and agency - which are increasingly inadequate in describing the complexity of reality, especially at the transnational stage.<sup>131</sup> 'Interactions', in the meaning of the Transnational Business-Governance Interaction (TBGI) approach, identify several possible ways in which governance actors and institutions engage with and react to one another in the regulation of business conduct.<sup>132</sup> Interactions affect the design of the regulatory institutions, the nature and the content of their rules, and the overall behaviour of the regulated entities.<sup>133</sup>

The TBGI framework aims at observing the effects of interactions on several components of the regulatory governance process.<sup>134</sup> Particularly relevant for our purpose are the formulation and implementation steps, as they determine the substance of the standards and have a direct bearing on the negative effects of VSS.

<sup>128</sup> In particular the claim that states possess the incentives and have the interest to employ and promote 'transnational new governance'. Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42(2), 510.

<sup>129</sup> See the excellent work from Bartley, and in particular Bartley, T. (2011) *Supra* at 89; Bartley, T. (2014) Transnational governance and the re-centred state: Sustainability or legality. *Regulation and Governance* 8(1), 93-109.

<sup>130</sup> In this book, the focus will be on EU regulators and VSS. Also the interplay between the meta-rules of the TBT Code of Good Conduct and VSS can be considered as a form of interaction.

<sup>131</sup> Lindseth, P.L. (2006) 'Agents without principals? Delegation in an age of diffuse and fragmented governance' In Cafaggi, F. (Ed.) *Supra* at 114, 108-109. See also Sabell, C.F., Zeitlin, J. (2012) 'Experimentalist governance'. In Levi-Faur, D. (Ed.) *The Oxford Handbook of Governance*. Oxford: Oxford University Press, 174-175; Green, J.F. (2013) *Rethinking private authority: Agents and entrepreneurs in global environmental governance*. Princeton: Princeton University Press, in particular at 14-19.

<sup>132</sup> 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), 2.

<sup>133</sup> 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), 355.

<sup>134</sup> Such steps are: i) framing the regulatory agenda and setting objectives; (ii) formulating rules or norms; (iii) implementing rules within targets; (iv) gathering information and monitoring behaviour; (v) responding to non-compliance via sanctions and other forms of enforcement; and (vi) evaluating policy and providing feedback, including review of rules. Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra* at 132, 6.

Most of the interactions considered here occur at a meso-level and at the macro-level,<sup>135</sup> in the sense they take place between VSS (either singularly or collectively) on the one hand, and regulators and regimes at the EU and WTO level on the other. Section 3 of Chapter 3, however, also discusses interactions occurring at the micro-level, i.e. between individual regulatory actors such as EU regulators and a specific VSS. The objective is to assess the likely effects of all these interactions on the substance of the schemes.

The study of such interactions allows us to understand, explain and predict their impact on VSS, by means of the expected variation of the proxies of outputs and outcomes.<sup>136</sup> The interactions considered here are between VSS and the internal market discipline under Art. 34 TFEU and under the EU competition law regime, and between interactions with the WTO law regime and its meta-regulatory provisions. Although political scientists understand the concept of public-private interactions in an expansive manner, and at several different stages of the standard-setting,<sup>137</sup> the focus here will also be on interactions based on specific legal instruments. Such interactions at the micro and meso-level take place where EU regulators attempt to influence at several degrees the substance and procedures of VSS. Based on empirical review, such interaction between governments in the exercise of their market regulation prerogatives and VSS - often multi-stakeholder - can take three forms.<sup>138</sup> Governments can be *users* of VSS, *facilitators*, or *supporters*. All three forms of interactions describe situations in which public and private authorities engage in forms of coordination and/or cooptation.<sup>139</sup>

Specifically, these interactions, at different degrees, may result in coordination between the regulatory actors, i.e. an allocation of regulatory tasks which highlights the implementing effects of VSS. Other effects of such interactions are of particular concern here, as they may also influence procedural and substantive requirements. Some interactions, under certain circumstances, have the effect of co-opting the VSS in question by imposing legal obligations on the schemes. It may also occur that more structured forms of interaction result in supervision and review over VSS. For example,

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<sup>135</sup> Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra* at 132, 8.

<sup>136</sup> Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) *Supra* at 133, 356.

<sup>137</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.) *The Politics of Global Regulation*. Princeton: Princeton University Press, 44–88.

<sup>138</sup> The classification is based on an early empirical work identifying examples of public use, at different extents, of VSS schemes by Carey, C., Guttenstein, E. (2008) Government use of voluntary standards: Innovation in sustainable governance. ISEAL Alliance R079, 18-21. See also, for a similar empirical categorisation, Cragg, W. (2005) *Three questions about corporate codes: Problematisation, authorisation, and public/private divide*. Cheltenham: Edward Elgar, cit. in von Hagen, O., Alvarez, G. (2011) The interplay of public and private standards. Literature Review Series on the impact of private standards - Part III. Geneva: International Trade Centre, 16.

<sup>139</sup> Other possible forms of interaction may instead generate competition between regimes, or chaos. Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra* at 132, 11-12. For a similar approach to the effects of interactions between public and private authority see also Cafaggi, F. (2011) *Supra* at 58, 44-45.

these forms of interactions under EU law may result in an amount of indirect legal scrutiny of VSS, either because of the presence of legal acts, because of certain requirements imposed by the legislators, or because recognition leads altogether to the application of the freedom of movement provisions. Chapter 3 will discuss these situations into detail. Chapter 5 then discusses the extent to which these forms of interaction may give rise to attribution under WTO law.

It is assumed here that VSS, some more than others, have an interest in forming at least some types of structured relations with States and rule-makers. Apart from the obvious benefit that direct incentives and facilitation for uptake can generate, forms of recognition and possibly even employment in legislation greatly increases the legitimacy of VSS. This is particularly important for schemes competing on a market for sustainability standardisation. It is especially relevant for multi-stakeholder initiatives in need of communicating to the broader public the differences with similar schemes, but where a stronger role played by the industry may have the effect of ‘watering down’ the substance of the standards. Stronger forms of interaction can thus have positive impacts on uptake as they profoundly affect the perceived legitimacy of the scheme.<sup>140</sup> These interactions have also been considered as capable of enhancing the legitimacy of public rules, for example where they further and contribute to public goals.<sup>141</sup>

#### 4.1 Public authorities as users of VSS

Where a close and formal arrangement between governments and a VSS is present, possibly by means of legal acts, public bodies can be seen as *users*, i.e. they have a direct relation with a VSS. This happens when public authorities specifically require the employment of a sustainability scheme, for example to sort out which producers or products can be entitled to a benefit, or as a means to demonstrate compliance with legislative requirements. A regulation can either explicitly indicate a scheme to be employed or provide for a general requirement to use one. A connection with a legislative instrument is necessary to give rise to this type of relation. This interaction influences VSS by several means. The employment in legislation is prerogative of instruments whose objectives and procedures are in line with those spelled out by public authority. A VSS which wants to be ‘used’ has to abide by substantive and procedural requirements determined by the regulator.

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<sup>140</sup> Meidinger, E. (2006) The administrative law of global private-public regulation: The case of forestry. *European Journal of International Law* 17(1), 59; Black, J. (2008) Constructing and contesting legitimacy and accountability in polycentric regulatory regimes. *Regulation and Governance* 2(1), 157; Bernstein, S., Hannah, E. (2008) *Supra* at 62, 584; Overvest, C., Zeitlin, J. (2014) Assembling an experimentalist regime: Transnational governance interaction in the forest sector. *Regulation and Governance* 8(1), 44.

<sup>141</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, 223.

When public bodies are users of VSS, a more or less clear division of labour can be observed, in particular whenever compliance with VSS gives rise to a presumption of compliance. In this sense, endorsement or recognition leads to regulatory complementarity between private and public institutions.<sup>142</sup> Complementarity highlights the implementing role of VSS, and it is a particularly noticeable phenomenon in the EU approach to biofuel sustainability within the frame of the Renewable Energy Directive discussed in Section 3.1 of Chapter 3. Recognition, or forms of support to VSS schemes, may come with strings attached. In addition, recognition may also bring the application of certain provisions or legal principles either directly on the VSS body, or indirectly, as a form of control exercised by judiciary bodies to validate the act of recognition. This legal spill over of sorts can, to this extent, be seen as a cooptation device to influence either the substance of the standards or certain procedures of the VSS body concerned. This argument is also discussed in Section 3.1 of Chapter 3.

A government can also be a user of a VSS in the strict sense of the term when certification of governmental products or properties is undertaken, as in the case of FSC certification of publicly owned forestal land. However, in this case, the VSS scheme does not seem to be subject to any legal rules, which is different from the other cases of governmental use. This scenario will therefore not be taken into account.

## 4.2 Public authorities as facilitators of VSS

Public bodies can be seen as *facilitators* when they provide a legal environment which is directly or indirectly favourable to the development or uptake of VSS. This is the most frequent interaction, and a variety of approaches are possible. This type of interaction, therefore, includes a host of means by which public authorities coordinate and support transitional private regulatory activities. Some means, such as harmonisation initiatives aimed at ensuring a minimum extent of trustworthiness and meta-regulation efforts, either directly or indirectly, result in certain requirements being imposed on the scheme. 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>143</sup> In other cases, facilitation simply fosters VSS' acceptance. An example of facilitation which directly impacts on VSS is the Organic Food Regulation, which sets baseline requirements with which private organic agriculture certification initiatives must comply. An example of facilitation which, instead, indirectly impacts VSS is the public procurement Directive. It permits contracting authorities to employ private schemes as

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<sup>142</sup> Cafaggi, F. (2011) *Supra* at 58, 41.

<sup>143</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.

a tendering specification. Requirements are imposed about the procedures of the VSS which can be employed, and which contracting authorities have to verify. By this means, public authorities can exercise indirect control over procedural features of VSS. An example of such interaction which does not result in direct or indirect effects on a scheme, apart from arguably increasing its uptake, is the EU Forest Law Enforcement, Governance and Trade (FLEGT) scheme. The initiative aims at combating the practice of illegal logging outside the EU by establishing procedures retailers must have in place to assess that the timber which is sold in the EU has been gathered in accordance with the requirements of the countries of origin. Among the documents that retailers may request to prove compliance with local legal requirements, third party forestry certification schemes are allowed to be employed.<sup>144</sup> Other forms of facilitation will be described and discussed in Section 3.2 of Chapter 3.

### 4.3 Public authorities as supporters of VSS

Finally, public bodies can be seen as *supporters* of a specific VSS, because of the extent of affiliation, practical assistance, or endorsement. The most straightforward form of support is the allocation of resources in favour of VSS. The EU, for example, allocates funds in partnership with NGOs to FairTrade initiatives.<sup>145</sup> Support can also take the form of expressed endorsement which, differently from use of VSS, does not occur by means of legal instruments. Some European competition authorities, in the exercise of their competition advocacy tasks, have been suggested to recommend to market actors the acceptance of market-based instruments in the domain of sustainability.<sup>146</sup> Public authorities can offer incentives to firms to undertake certification, such as technical assistance. Endorsement can also take place when governments themselves are member of a voluntary sustainability initiative.

States may also participate directly in the standard-setting, provided that the VSS allows it. Multi-stakeholder VSS do not normally restrict participation in the standard-setting to private actors only, but effectively permit any interested stakeholder to participate, which is different from sectoral and company schemes.<sup>147</sup> It is however difficult to evaluate whether and to what extent public actors, arguably specialised governmental agencies, effectively take the opportunity to participate in the standard-

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<sup>144</sup> Regulation (EU) 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market. L 296/23. See in particular Art. 6.

<sup>145</sup> Commission Communication COM(2009) 215 final. Contributing to Sustainable Development: The role of Fair Trade and non- governmental trade-related sustainability assurance schemes.

<sup>146</sup> Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges, 35. Available at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf>.

<sup>147</sup> This is the case, for example, of FairTrade and FSC. Fairtrade International, *Standard Operating Procedure Development of Fairtrade Standards*, Art. 2.3, [http://www.fairtrade.net/fileadmin/user\\_upload/content/2009/standards/documents/2012-02-07\\_SOP\\_Development\\_Fairtrade\\_Standards.pdf](http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2012-02-07_SOP_Development_Fairtrade_Standards.pdf); Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palsgrave Macmillan, 53, 61.

setting. Support also occurs whenever states provide an environment which is supportive of CSR practices and specific self-regulatory activities. EU examples of support of VSS include, for example, the establishment of the Retailer Forum, which has the objective of facilitating the private sector's exchange of best practices among retailers to foster demand and consumption of sustainable products.<sup>148</sup>

## 5. Formal features of VSS

Sections 3 and 4 provided an institutional categorisation of VSS bodies and standards, and described the possible avenues for their control and supervision from public authorities by means of interactions between regulators and private standard-setters. Our attention now turns to the output of standard-setting to clarify concepts to which we will return in the course of the legal analysis. Section 5.1 begins by describing certain formal features of standards. The aim is to discuss elements which are relevant in particular under WTO law. This Section adopts a descriptive perspective to reveal how specific elements in the form of the set of standards related to trade-barrier effects may determine the applicability of certain legal provisions, and present a higher chance of being in potential conflict with EU and WTO law rules as discussed in the following Chapters. The elements addressed here include the form of the standards in Section 5.1, the presence of a label in Section 5.3, the stringency of a scheme in Section 5.4, and adaptation, recognition and overlap between standards in Section 5.5. Section 5.2 illustrates the differences between VSS and the type of instruments normally evoked by the concept of standard, i.e. technical standards. As the legal treatment of technical standards in legal areas such as competition law is relatively well-defined, their differences with VSS must be understood. Here the focus is on the rationales behind their creation and acceptance. Differences and similarities concerning the economic effects of VSS and technical standards will be addressed in detail in Chapter 4.

### 5.1 Form of the standards

The prescriptive element of a VSS, like all standards, can take several forms, according to the classification of possible modalities of a standard spelled out by the ISO.<sup>149</sup> As a first relevant distinction, a VSS can address features of either a product or the process(es) performed to bring a product into existence. A standard addressing features of a product is a standard which specifies one or more requirements with

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<sup>148</sup> Commission Communication COM(2008) 397 final on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan.

<sup>149</sup> ISO/IEC (2004) ISO/IEC Guide 2: 2004. Standardisation and related activities / General vocabulary. The relevance of ISO Guide is not incidental, as the TBT Agreement provides that the terms contained in the TBT Agreement shall be given the same meaning as in ISO/IEC Guide 2, which represents the ISO official document concerning terminology employed in standardisation.

which a product must be in compliance. It can address its physical features, but also other aspects concerning terminology, sampling, testing, and labelling.<sup>150</sup> Product standards are therefore technical specifications of design and performance characteristics of manufactured goods.<sup>151</sup>

A standard can also address the processes employed in bringing a product into existence. Although the ISO/IEC Guide 2:2004 does not provide for a definition of process, a product is defined as the result of a process in other ISO documents.<sup>152</sup> It is therefore safe to hold that a process encompasses specific actions and steps required in the production of a product. A recurring classification of processes can be found in international trade law and differentiates between processes that leave an observable trace in the final product and processes which do not. The first situation identifies incorporated, or product-related, processes and production methods (PPMs), whereas the second identifies unincorporated, or non-product related PPMs. The academic example of the former include a standard defining the use of pesticides or other chemicals in agriculture, which may result in hazardous residues; classic examples of the latter are standards addressing the amount of polluting emissions in the production of a good, or the working conditions of labourer, which make indiscernible a 'green' good from a 'brown' good, or a child-labour free carpet from a sweatshop carpet. This distinction between incorporated and unincorporated PPMs arose in the legal literature as a way of dealing with States' uneasiness with the regulation of processes of production taking place abroad. Given its 'academic' origins, it may even be irrelevant within the context of the TBT Agreement.<sup>153</sup> The distinction has, however, deeply influenced many debates, including that about the possible reach of WTO law over the regulation of environmental measures. However, here it will be used primarily to highlight conceptual differences in the substance of VSS.

Many VSS address intangible features of the production process such as labour standards, and environmental and social externalities of processes. Following the distinction between incorporated and unincorporated PPMs, they thus fall in the latter category. However, the line dividing incorporated from unincorporated PPMs, and process from product standards, is not always obvious, or even possible to draw. For example, the widespread employment of process standards, especially in private regulation, has generated standards in some domains - such as, for example, organic food production - addressing simultaneously product and process. By establishing process requirements regulating the use of pesticides, they directly impact those

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<sup>150</sup> ISO/IEC (2004) ISO/IEC Guide 2: 2004. Standardisation and related activities / General vocabulary. Art. 5.1 to 5.8.

<sup>151</sup> Büthe, T., Mattli, M. (2012) *Supra* at 12, 5.

<sup>152</sup> ISO/IEC (2004) ISO/IEC International Standard 17000. Conformity assessment - Vocabulary and general principles. Art. 3.3. For the definition of process provided by the Appellate Body within the framework of the TBT Agreement, see Section 2.1.2 of Chapter 6.

<sup>153</sup> Both issues will be discussed exhaustively from the perspective of WTO law in Chapter 5 and 6.



product features which are directly sought after by consumers. For goods such as recycled products, standards addressing processes also constitute product standards.

The standards of a VSS scheme - defining either a product, or the two types of process discussed above - can be descriptive standards, performance standards, or management system standards. A product or a process can be defined in descriptive manner, for example by describing certain tangible physical features, or by describing process that shall or shall not be used, like child labour, or environmentally sound fishing methods which do not harm other species. In the alternative, VSS can also define features of products and processes in a performance-based manner. Performance standards do not describe certain characteristics, but instead specify their attributes in terms of output. Performance-based requirements define the energy efficiency of products like house appliances, or set a maximum level of polluting emissions in the production process. Performance-based standards are normatively preferable because, by focusing on the outcomes and allowing different means to accomplish them, they are less trade-restrictive than descriptive standards.<sup>154</sup>

A third form of standard is also possible, which presents different features from descriptive and performance requirements. A substantial part, if not the majority, of the requirements provided for in VSS takes the form of management system standards.<sup>155</sup> A management system standard defines processes and procedures<sup>156</sup> to be established and implemented in the administration and management of the producing company, which do not necessarily result in a specific outcome. These standards can be seen as guidelines on how to design and manage complex organisations.<sup>157</sup> A management system standard is a set of deeply varying elements including organisational structures, procedures concerning the planning of specific activities, and the allocation of responsibilities, which a company's management employs to establish specific objectives - such as a specific environmental policy - and to then achieve them.<sup>158</sup> These requirements are typical of a reflexive approach to regulation and law, which aims at designing self-regulating regimes by means of

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<sup>154</sup> See Annex 3.1 of the TBT Agreement.

<sup>155</sup> For example, FSC standards require the presence of a management system which promotes 'the development and adoption of environmentally friendly non-chemical methods of pest management and strive to avoid the use of chemical pesticides'. (Principle 6.6). Further, and more generally, 'a management plan - appropriate to the scale and intensity of the operations - shall be written, implemented, and kept up to date' (Principle 7). See 'FSC Principles and Criteria for Forest Stewardship'. Available at <https://ic.fsc.org/principles-and-criteria.34.htm>. Management systems are also required for schemes focusing on social aspects only, such as SA8000. See 'Social Accountability 8000 - International standard' Art. 9. Available at <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937>. All PEFC standards directly refer to management requirements and management plans. See Sustainable Forest Management. Available at <http://www.pefc.org/standards/technical-documentation/pefc-international-standards-2010/676-sustainable-forest-management-pefc-st-10032010>.

<sup>156</sup> To this extent a system standard addresses only processes and not products.

<sup>157</sup> Furusten, S. (2000) 'The knowledge base of standards'. In Brunsson, N. and Jacobsson, B. (Eds.) *A World of standards*. Oxford: Oxford University Press, 71.

<sup>158</sup> ISO (2004) ISO International Standard 14001. Environmental management systems - Requirements with guidance for use. Art. 3.8; Delmas, M.A. (2002) *Supra* at 20, 93.

organisational and procedural norms. Control occurs on an indirect level, since the only task of a reflexive system is to determine the organisational and procedural background constraining future action.<sup>159</sup> A reflexive law instrument, differently from 'command and control' regulatory instruments, creates a system of incentives and procedures stimulating actors to reflect about which behaviour they should take and foster continuous improvement. They constitute a common feature of 'experimentalist' governance regimes.<sup>160</sup>

The peculiarity of this type of 'reflexive' standards is that the processes in question are neither incorporated nor unincorporated in the final product; it can, in fact, be said that they bear no direct relation *at all* with the product or any of its characteristics.<sup>161</sup> Depending on the environmental goals and policy plans companies are required to independently develop, and against which they will be audited, entities operating in the same sector or managing the same type of environmental risk might end up having different levels of stringency in their approach to environmental protection.<sup>162</sup> This is also explicitly acknowledged by ISO itself in the text of the ISO 14001 standard, the most widely employed management system standard for environmental performance,<sup>163</sup> and which is often referred to in other standards, VSS included.

VSS normally include a combination of the three types of standards here described, with a certain preference for management system standards which reflect a policy preference for governing principles in achieving sustainable resource management.<sup>164</sup> Management system standards are pervasive and often require extensive changes in the internal organisation of a firm and its established management practices.<sup>165</sup> In general, descriptive and performance-based requirements can be found as well, addressing incorporated and, especially, unincorporated PPMs. The employment of certain types of standards depends, to some extent, on the objective pursued by the scheme. For example, schemes which use labels to inform consumers about energy-efficiency features of products predominantly employ descriptive and performance

<sup>159</sup> Teubner, G. (1983) Substantive and reflexive elements in modern law. *Law and Society Review* 17(2), 239-252.

<sup>160</sup> Overdevest, C., Zeitlin, J. (2014) *Supra* at 140, 7.

<sup>161</sup> Braun, B. (2005) 'Building global institutions: The diffusion of management standards in the world economy - An institutional perspective'. In Alvstam, C.G., Schamp, E.W. (Eds.) *Linking industries across the World*. London: Ashgate, 3-27.

<sup>162</sup> On ISO 14001 see Clapp, J. (1998) The privatisation of global environmental governance: ISO 14000 and the developing world. *Global Governance* 4(3), 309.

<sup>163</sup> ISO/IEC (2004) International Standard ISO 14001. Environmental management systems. Requirements with guidance for use, vi.

<sup>164</sup> Over the effectiveness of which, actually, the evidence is conflicting. See, for example Rondinelli, D., Vastag, G. (2000) Panacea, common sense or just a label? The Value of ISO 14001 environmental management system. *European Management Journal* 18(5), 499-510.

<sup>165</sup> This is illustrated by the fact that 95% of the corrective action requirements issued by auditors (i.e. the remedies firms have to undertake in order to be fully compliant with the standards) in the forestry certification sector concern improvements to be made in the implementation of management plans. See Auld, G., Gulbrandsen, L.H., McDermott, C.L. (2008) Certification schemes and the impact on forests and forestry. *Annual Review of Environment and Resources* 33, 198.

standards. The subject matter of social VSS necessarily requires standards addressing unincorporated PPMs, often by means of descriptive standards.

A special situation which cannot be fitted into any of the three types of standards described above is that of VSS whose standards provide for a methodology to be employed in the calculation of features such as polluting emission. This feature is typical of VSS indirectly regulating a certain (normally environmental) issue. Life-cycle assessment standards, or standards addressing the calculation of certain types of emission such as food miles, are a prime example. Such standards prescribe which elements are to be taken into account in the calculation of certain emissions throughout product life, or a subset of it. Several methodologies coexist, which may or may not include certain steps in the product cycle, or give different weights to the emissions produced in different steps of the production or consumption phase, to the detriment of clarity and increase the costs for companies that want to market their 'green' products in different countries.<sup>166</sup> The choice of a methodology for assessment of a process would indeed fit in the ISO definition of standard, albeit it does not determine any product or process.

Product / Process									Methodology
Descriptive (Design)			Performance			Management system			
pr. char.	pr-PPM	npr-PPM	pr. char.	pr-PPM	npr-PPM	pr. char.	pr-PPM	npr-PPM	
size, dimension, color, material	prohibition to use chemicals	minimum salary provision	appliance efficiency (kW per use)	maximum level of chemical residues	limit to polluting emissions during production/ no child labour	n/a	health and safety, quality, risk assessment systems	social and environmental systems	

Table 1. Possible types of standards addressing product or process, or methodology

<sup>166</sup> The EU Commission has identified 80 methodologies and initiatives for calculating and reporting greenhouse gas emissions, elaborated both by private and public bodies, and around 60 methodologies for carbon footprint calculation. The effects on the EU internal market are that companies wanting to market their product in different Member States have to undergo certification and reporting under different systems and methodologies, with consequent cost increases. The Commission has therefore developed two methodologies for appraising the environmental footprint of products and organisation, which are suggested as a common methodology to be employed in the EU by Member States, companies and private organisations. See Communication from the Commission COM/2013/0196 final. Building the Single Market for Green Products Facilitating better information on the environmental performance of products and organisations.

## 5.2 VSS and technical standards

At several junctures throughout this book, a comparison will be made between VSS and technical standards. The difference between technical standards and other standards has been identified by political scientists by looking at the reasons behind their elaboration. Technical standards are a coordination response to solve a network externality. Interconnectivity between different products and the related need to ensure physical uniformity of products generate such externalities. Conversely, VSS are drafted to address a prisoner's dilemma type of externality. These include physical externalities generated by an actor's behaviour which affects another's behaviour - such as pollution - and also policy externalities. For example, a regulatory regime in one country may detrimentally affect producers in another country.<sup>167</sup> VSS address these problems by aiming at correcting the physical externality - pollution *and* the policy externality - the comparative advantage enjoyed by producers which comply with more relaxed environmental regulations.

At the cost of oversimplification, technical standards are understood as the outcome of standardisation at the ISO level, the relevant national bodies within the ISO system, and from European Standardisation Bodies.<sup>168</sup> Such instruments possess strong technical features in the form of descriptive and performance standards, but are very rarely in the form of management system standards. Their specific objectives are interoperability between products and, in some cases, health and safety goals pursued by means of prescribing product requirements. Such standards, different from standards like VSS, have an inherently harmonisation objective, to the extent that greater (mostly efficiency-based) gains are generated by an increase in compliance.<sup>169</sup> It will be seen that most of the competition law debate about standards has involved technical standards. Granted, the dividing line between technical standards and VSS may be blurred, such as for eco-labels addressing emissions and environmental impact, which can contain highly technical standards. Nonetheless, such standards are normally not drafted by standardising bodies within the ISO system. In any event, VSS can also be seen as quality standards.<sup>170</sup> Quality standards allow complying and non-complying products to be ranked according to their performance *vis-à-vis* a specific feature. For example, MSC-certified fish is 'more sustainable' than non-certified fish.

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<sup>167</sup> Abbott, K.W., Snidal, D. (2009) *Supra* at 128, 507. Abbott, K.W., Snidal, D. (2001) *Supra* at 9, 347-348.

<sup>168</sup> See Section 2.1.1 of Chapter 4.

<sup>169</sup> Katz, L.M., Shapiro, C. (1985) Network externalities, competition, and compatibility. *The American Economic Review* 75(3), 424-440.

<sup>170</sup> A similar distinction can be found in economic literature concerning standards which contribute to vertical and horizontal product differentiation. In the first group belong standards which allow the classification of products as one being 'better' or 'safer' than another. In the second group, the standard identifies characteristics for differentiation between products, but the outcome cannot be ranked. See WTO (2005) World Trade Report 2005. Exploring the links between trade, standards and the WTO, 32.

### 5.3 Employment of a label

An important element of VSS is the presence or the absence of a label providing information to consumers about the product's compliance with the scheme at hand. Although a logo to be applied to product may not seem worthy of much attention, it does in fact reveal fundamentally different rationales in the establishment and functioning of the schemes, and it is capable of affecting the legal analysis both under EU competition law and under WTO law, as will be discussed in Section 2.4.2.1 of Chapter 4 and Section 2.1 of Chapter 6. The presence of a label highlights consumer preferences as the tool ensuring the functioning of a market for that specific sustainable product. Labels are almost the norm for multi-stakeholder schemes, which rely on consumer awareness as a vehicle for change. Sectoral and, in particular, company VSS employ labels much less frequently. This is due to the business-to-business purpose of such schemes, which is particularly evident for company VSS. The aim of those schemes is to address governance in the supply chain and they do not require direct involvement of consumers to be established and function. Nevertheless, if a company VSS is established with the purpose of creating a 'sustainable' product line, such as those of food retailers like Tesco and Carrefour, the recognisable product logo serves the same function as a label in providing information to consumers. As Section 1.2 of Chapter 1 elucidates, consumer confusion arises only for VSS which utilize a label. Other schemes do not necessitate consumer involvement to pursue their objectives.

The lack of a label is also connected to another rationale. Certain VSS certify products, and in some cases a label is affixed to goods; conversely, other VSS certify the whole company. For example, eco-labels addressing environmental features apply to products. Normally, VSS which employ a label require the certification of individual products and not of the whole entity. Other schemes instead require the entire company to be certified. This is the case of management system schemes certifying the social or environmental performance of an entity, such as SAI8000, but also of certain company VSS and GAP schemes.<sup>171</sup> This means that not just a specific product line has to be 'upgraded' to meet the requirement of the VSS, but the whole company requires reorganisation in order to meet the standards.

### 5.4 Stringency of the standards

The stringency of the requirements of a VSS is a crucial element determining adverse trade effects. A scheme's stringency can be appraised in abstract terms by comparison to the provisions that would normally be applicable for the producers absent such a

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<sup>171</sup> Nike, for example, requires their suppliers to be certified, and not just their products. For Nike's Code of Conduct, the reasons lies in the fact that the Code aims at ensuring acceptable labour conditions among suppliers. GlobalG.A.P. is a prime example of a GAP scheme certifying producers and not products.

private regime. Stringency is, however, not always easy to quantify. In the easiest scenario, the VSS requires the entities seeking certification to be in compliance with the existing regulatory regime. The VSS can therefore be said to 'hold the bar'.<sup>172</sup> For the purpose of compliance, this situation theoretically corresponds to a low level of trade-restrictiveness. Also standards addressing methodologies, for example for the calculation of polluting emissions, can be seen as 'holding the bar'. The standard itself does not require producers to comply with any specific substantive rule, but just to follow the indicated procedures to measure and report about certain product features connected to polluting emissions.

In other cases, the provisions contained in a VSS appear more stringent than the rules that would otherwise be applicable; the VSS can thus be described as 'raising the bar'. This scenario includes the obvious situation of more stringent requirements,<sup>173</sup> but also of VSS whose standards consist of new rules in an area where no other rules are present,<sup>174</sup> and the requirement of management system standards that would otherwise not be implemented by the entity seeking certification.<sup>175</sup> In those cases, a higher incidence of trade-barrier effects can be expected, which are linked to the difficulty in meeting and/or implementing the standards. For certain producers it may be impossible to modify products and process features without irremediably compromising their competitiveness.

Notwithstanding the above, in practice, it is not always easy to pinpoint whether a standard actually raises or holds the bar. The lack of rules which would otherwise be applicable is particularly evident for VSS and have the effect of implementing broad international law obligations referring, at large, to sustainable use of exhaustible resources. At the national level, in the case of implementing instruments, the actor implementing the general rules acts within the framework established by the delegating actors. Even in the presence of formal delegation and mechanisms of control, it has been observed that implementing actors may have in practice a wide margin to determine, for example, the level of protection which should have been set by their principals.<sup>176</sup> VSS clearly operate unconstrained by formal rules of delegation

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<sup>172</sup> Even schemes that in fact 'raise the bar' require, as a 'baseline', compliance with all applicable laws and regulations.

<sup>173</sup> For example, the FSC prescribes that natural water courses in the forest under certification must be protected and restored. See FSC International Standard. FSC Principles and Criteria for forestry stewardship, FSC-STD-01-001 (V5-2), Art. 6.8 Available at <https://ic.fsc.org/en/certification/principles-and-criteria>.

<sup>174</sup> For example, the Program for Endorsement of Forestry Certification (PEFC) provides that the use of pesticides shall be minimised, and appropriate silvicultural alternatives and biological measures shall instead be preferred. See PEFC International Standard: Requirements for certification schemes. PEFC ST 1003:2010, Art. 5.2.8. Available at [http://www.pefc.org/images/documents/PEFC\\_ST\\_1003\\_2010\\_SFM\\_Requirements\\_2010\\_11\\_26.pdf](http://www.pefc.org/images/documents/PEFC_ST_1003_2010_SFM_Requirements_2010_11_26.pdf).

<sup>175</sup> The requirement to introduce a management system, as discussed above, is a common feature of a sizeable majority of the schemes, and in particular of environmental ones.

<sup>176</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 related supervising mechanisms, and the approach to 'implementation' taken by certain schemes is very wide. It seems to transcend the original subject matter to incorporate holistically a host of other issues connected to the regulated area.<sup>177</sup> In such cases, it is therefore complicated to determine whether a scheme holds the bar, i.e. it has the effect of implementing internationally agreed upon rules, or it raises the bar by itself establishing new, more stringent, requirements.

Different rationales may lie behind the stringency of a standard. In some cases, the explanation is arguably connected with the nature of the risk or concern addressed by the scheme, and in particular whether it responds to specific problems in the supply chain or consumer perceptions. This is particularly the case for sectoral and company schemes. Assuming that the problem in a supply chain is to ensure that products are not made in breach of certain national and international provisions, a scheme aims at certifying products against the requirements that should be applicable in the country of production, but which end up being breached because of enforcement problems. This is the case of sectoral and company social VSS addressing labour conditions which, in most instances, simply verify that the producer is in compliance with the applicable labour standards.<sup>178</sup> Consumer perception about specific issues in a supply chain may determine the substance and the stringency of other schemes which can be seen as raising the bar. For example, consumers are becoming concerned about several issues in the palm oil supply chain,<sup>179</sup> such as deforestation and land-grabbing, which has led to the creation of the Roundtable on Sustainable Palm Oil initiative and standards.<sup>180</sup>

This is not to say that no trade-barrier effects are to be expected for bar-holding schemes. It is possible that trade barriers arise because of consumer preferences. For example, assuming that a CO2 label reporting the amount of polluting emission in a product's production process has a relatively small cost, which simply includes the appraisal of emissions at several stages, trade barrier effects can arise because of

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*Private Bodies*. Oxford: Hart Publishing, 252; Egan, M. (2001) *Constructing a European Market. Standards, regulation and governance*. Oxford, Oxford University Press; Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Oxford and Portland: Hart Publishing, 255-256.

<sup>177</sup> A holistic approach is arguably the most effective way to ensure 'sustainability'. Such a holistic approach is particularly evident in standards certifying sustainable forestry management. For example, the FSC standard covers areas as diverse as workers' rights and employment conditions, indigenous people's rights, relations with the affected communities, altogether with actual environmental requirements concerning more closely the ecological impact of forestry practices.

<sup>178</sup> For example the Nike's Code of Conduct, which applies to all its suppliers, requires compliance with ILO standards and applicable environmental laws and regulations. Available at <http://about.nike.com/pages/resources-faq>. A similar approach is also that of a sectoral organisation in the toy sector, the International Council of Toy Industries, and its Code of good practices. Available at [http://www.icti-care.org/e/content/cat\\_page.asp?cat\\_id=294](http://www.icti-care.org/e/content/cat_page.asp?cat_id=294).

<sup>179</sup> See, for example, the recent allegations directed towards Ferrero, the producer of Nutella, about the sustainability of the palm oil it uses in many of its products. <https://www.theguardian.com/environment/2015/jun/19/ferrero-accused-nutella-youre-really-spoiling-us>.

<sup>180</sup> See <http://www.rspo.org/certification>.

consumer choice, and possibly because other products are better performing, and are thus chosen by consumers. A VSS implementing labour law obligations can do so in a discriminatory manner or in an unnecessarily burdensome manner. However, it is doubtful that the trade-barrier effect would be in all cases, including those above, the proper categorisation of the situation. If a company, which has always produced under sweatshop-like conditions, cannot accede to a market any longer because compliance with widely accepted international labour standards detrimentally affects its competitiveness, it is probably inappropriate to worry about the existence of a trade barrier.

Stringency should not be equated with effectiveness. In other words, a stringent or burdensome standard should not be considered to be an improved outcome and a more effective tool towards change. The nature of management system standards and the form of standards often employed to pursue the scheme's objective makes it very difficult to quantify the actual effects and impact of specific VSS. Management system standards, as described above, result in different outcomes depending on the entity implementing them. System management standards in the environmental domain, for example, do not determine goals or targets to be achieved - such as the reduction of pollution. Rather, they set requirements defining the operational systems to be complied with within companies for activities which have an environmental impact. Management system standards provide a systematic framework within which to incorporate environmental concerns into a company's day-to-day operations.<sup>181</sup> Indeed, the system is supposed to be effective and deliver tangible outcomes.<sup>182</sup> However, their quantification is determined by the system's implementation at a company level and widely differs between entities.<sup>183</sup> It is therefore quite difficult to evaluate, and especially quantify exactly, the impact on the environment of a VSS including its management system standards without assessing the performance of each certified entity.

## 5.5 Local adaptation, recognition, overlap

There are other elements contributing to the erection of trade-barriers in addition to the stringency of the VSS. A feature of VSS which arguably facilitates standard acceptance is the adaptation of the set of standards to the local specificities. Some

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<sup>181</sup> Delmas, M. (2001) Stakeholders and competitive advantage: the case of ISO 14001. *Production and Operations Management* 10(3), 343-358.

<sup>182</sup> On the effectiveness and the positive effects of ISO 14000 see, generally, Bansal, P., Bogner, W. (2002) Deciding on ISO 14001: Economics, institutions, and context. *Long Range Planning* 35(3), 269-290.

<sup>183</sup> Jang, W., Lin, C. (2008) An integrated framework for ISO 9000 motivation, depth of ISO implementation and firm performance. The case of Taiwan. *Journal of Manufacturing Technology Management*, 19(1), 194- 216. For exhaustive literature review on this point, see Heras-Saizarbitoria, I Boiral, O. (2013) ISO 9001 and ISO 14001: Towards a research agenda on management system standards. *International Journal of Management Reviews* 15(1), in particular at 55.



VSS consist of a single set of standards applying to all countries.<sup>184</sup> For some VSS, a single set of standards is a consequence of the fact that no adaptation is really necessary. Provisions concerning labour standards can be applied in different contexts without further implementation being required. Some VSS, on the other hand, may arguably benefit from adaptation to reduce trade barrier effects or, simply, to be applicable. Standards applied with the same stringency do level the playing field and ensure uniformity, but do not address the fact that pursuing an objective at a certain level may not be reasonable in one context but will be in other contexts. In addition, a specific element of the standard addressing a particular issue may not be relevant in a given context and it may be more appropriate to address other issues, which are not covered, in order to achieve the objective of the scheme.

Conversely, other VSS consist of a broad set of principles, which is then turned into appropriate requirements for the local specificities through national standards. Certain provisions may not be applicable and others may require further clarification, or implementation, in order to be applied to a given context.<sup>185</sup> A similar type of adaptation can be observed for VSS in the form of eco-labels, which 'rank' products on the basis of certain environmental features, or award a label to particularly performing products. Such schemes prescribe specific standards for any category of products to which the scheme applies.<sup>186</sup>

A frequently reported problem generated by VSS is the presence of multiple initiatives addressing the same or very similar phenomenon. For example, in the domain of coffee certification, Utz Kapeh standards focus on trade relations and a series of good agricultural practices also cover food safety; Fair Trade is centred on a different approach to conventional trade, but without addressing directly environmental and food safety. So-called 'shade-grown coffee' initiatives such as the Smithsonian Migratory Bird Centre for 'bird friendly' coffee and the Rainforest Alliance certification schemes focus on the conservation of forest through the production of coffee under the shade of forest canopy, but they do not cover social issues at all. A producer may have to comply with several of those initiatives at the same time and also with the sourcing requirements of a retailer in the form of a company VSS.<sup>187</sup> The cost of certification does not just add up, but it may also be that conflicting standards among the different schemes prevent acceptance of more than just one of them.

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<sup>184</sup> For example SA8000, the most popular multi-stakeholder scheme for the appraisal of a company's social performance. See Social Accountability 8000 - International Standard' [http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf). An example of company VSS which does not contemplate adaptation is Tesco's Nurture program for environmental and responsible fruits and vegetable. <http://www.tesco.com/nurture/>.

<sup>185</sup> An example is the Marine Stewardship Council, whose broad requirements mandate, basically, nothing more than that fisheries shall be sustainably exploited. A technical committee appraises on a case by case basis the permissible amount of catch to prevent over-depletion when a fishery applies for MSC certification.

<sup>186</sup> Gertz, R. (2005) Eco-labeling - A case for deregulation? *Law, Probability and Risk* 4(3), 132-133.

<sup>187</sup> Abbott, K.W, Snidal D. (2009) *Supra* at 128, 551.

Proliferation differs from sector to sector. The factors contributing to proliferation and regulatory fragmentation in the domain of sustainability are a low level of business concentration combined with greater civil society involvement in governance and stringent standards set by the first-moving regulator. On the contrary, business concentration, a more business-driven form of governance and more lenient standards of the first-moving regulator are likely to result in a more cohesive regulatory domain, and thus in less proliferation.<sup>188</sup>

The consequences of competition between different VSS on the quality and the substance of standards are currently unclear. One study concerning halal certification - which, in spite of the similarities, cannot be considered as a VSS - shows that certain newly introduced schemes were particularly relaxed in their standards and conformity assessment in order to easily acquire market share.<sup>189</sup> To avoid all the problems above, some VSS allow for recognition of equivalent schemes or recognise parts of similar schemes.<sup>190</sup> Although suggested by the ISEAL Code,<sup>191</sup> multi-stakeholder VSS - and other types of schemes as well - only very rarely allow for recognition of similar schemes.<sup>192</sup> It is actually doubtful whether recognition, equivalence and even benchmarking are in the economic interest of schemes competing on a market for standardisation which, as in any market, cannot but value diversity.<sup>193</sup>

## 6 Conclusion

This Chapter brings some clarity to the multifaceted nature of VSS and their features. It starts from the definition of VSS in order to identify the boundaries of the subject matter of this book. VSS are 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 impacts resulting from the production of goods. VSS consist

<sup>188</sup> Fransen, L., Conzelmann, T. (2015) Fragmented or cohesive transnational private regulation of sustainability standards? A comparative study. *Regulation and Governance* 9(3), 259-275.

<sup>189</sup> Van Waarden, F. and van Dalen, R. (2013) 'Halal and the moral construction of quality. How religious norms turn a mass product into a singularity'. In Beckert, J., Musselin, C. (Eds.) *Constructing quality. The classification of goods in the economy*. Oxford: Oxford University Press, 197-222.

<sup>190</sup> This is the case, for example, of the 2BSVs scheme for biofuel certification, which provides the opportunity to recognise other schemes in the same domain which have been recognised by the Commission as well. See <http://en.2bsvs.org/news/single/article/reconnaissance-par-2bsvs-des-autres-schemas-volontaires.html>. GlobalGAP offers a system of benchmarking aiming at identifying 'equivalent' or 'resembling' schemes. See [http://www.globalgap.org/uk\\_en/what-we-do/the-gg-system/benchmarking/](http://www.globalgap.org/uk_en/what-we-do/the-gg-system/benchmarking/).

<sup>191</sup> ISEAL Code of Good Practice. Setting Social and Environmental Standards. Version 6.0 - December 2014, Clause 4.2.3. The requirement of exploring unilateral or mutual recognition is optional.

<sup>192</sup> 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, 16-17. 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).

<sup>193</sup> See also Bomhoff, J., Meuwese, A. (2011) The meta-regulation of transnational private regulation. *Journal of Law and Society* 38(1), 161 and the literature discussed therein.

of certifiable product standards addressing sustainability, i.e. a host of practices connected to environmental and social issues ranging from emission reduction to working conditions, and from organic agriculture to animal welfare.

Different typologies of VSS operate on what can be defined as a market for sustainable standards. This Chapter provides a classification of VSS bodies which identifies forms of collective governing as opposed to forms of (semi)private governing, and which is underpinned by different normative justifications of the regime's rules. All VSS, at least to a certain extent, contribute to the much-needed creation of global public goods such as regulation at the transnational stage, as well as social and environmental protection. However, some schemes more than others give a stronger weight to the pursuit of private benefits in addition to public benefits.

Multi-stakeholder VSS ensure a high degree of participation for a very large group of interests. They are able to gather considerable support and market success, also because of an increased perception by market actors and public bodies of their effectiveness and legitimacy. Such standards are open for acceptance by any interested actor in a given economic area. Sectoral VSS are more closely associated to self-regulation, although they apply to a broader range of actors than just those which drafted them. Normally they are drafted by a sectoral association to be applied in all contractual relations within a supply chain. Company VSS are standards set by a retailer to apply in contractual relations with its suppliers. At different degrees, sectoral and company VSS result, in addition to the abatement of an externality, also in private benefits within a supply chain, as a specific response to a crisis event or reputational damage, or stemming from product differentiation. Their openness, both in the standard-setting and acceptance is limited. Sectoral and company standards can be seen, respectively, as club and private goods, whereas multi-stakeholder standards are public goods.

This Chapter gives considerable relevance to institutional features of VSS, as they are particularly important in the normative identification of the proper public behaviour *vis-à-vis* VSS. Coordination and support is expected from the State with respect to bodies contributing to the production of global public goods. Forms of control over the substance shall, in addition, be exercised where distributional concerns are at hand. The institutional features of VSS also allow us to determine normatively certain legal tests, such as a normative approach to Art. 34 TFEU to be applicable to private measures in a manner which is respectful of private autonomy. Public interference over private goods and club goods should occur at a lesser extent than over public goods. The institutional structure of a VSS bears consequences for the application of EU competition rules as well; as Chapter 4 elucidates, they become more relevant for multi-stakeholders and sectoral schemes.

We concluded that the aggregate effort of private actors towards the creation of global public goods should be supported and coordinated by public authorities. This Chapter then presents a host of different ‘interactions’ between private and public authority that can contribute, directly and indirectly, to that goal. By means of such interactions public authorities coordinate, influence and may even exercise the degree of control required over private instruments which generate distributional concerns, aim at mediating between different sets of values, and prescribe normative behaviours. The interaction between Art. 34 TFEU and EU competition law provisions on the one hand, and VSS on the other can be considered as some of the means by which public authorities can exercise review over private regulatory behaviour. Another similar interaction takes place by means of the TBT Code of Good Practice, albeit at a less direct level.

More specific and narrower forms of interaction are also considered where EU regulators engage in market regulation influencing procedures and, particularly important for our purposes, the substance of VSS. EU public bodies can use VSS in their regulation, which occurs in the presence of requirements for recognition, and may on occasions even result in court review over the scheme in question. EU public bodies, more frequently, facilitate acceptance of VSS, by providing a policy or legal environment which is favourable to the development and acceptance of standards. Some of these interactions aim at ensuring, directly or indirectly, the trustworthiness of the regime and correct certain negative consequences from the schemes; other interactions simply foster the acceptance of standards. Public authorities can also support a specific scheme by providing financing, or by suggesting its uptake by softer means.

It is in VSS’ interest to establish connections with public authorities. A closer link to public authority, for example by means of interactions, enhances the scheme’s legitimacy which, in turn, generates a competitive advantage on the market for standards. Also court review can fulfil such a goal, but it should be exercised with moderation so as not to hinder creativity and experimentation of private rule-makers, and to avoid suffering the political cost of ‘patrolling’ sustainability.

The Chapter concludes by discussing formal features of VSS, which are of central importance in our legal analysis. Certain formal features are not just linked to trade-restrictiveness and the presence of consumer confusion, but also determine whether or not certain WTO law provisions are relevant for the standards here considered. As it will be seen, this is the case of the form of the standards, and specifically whether a scheme employs a label. The Chapter also clarifies a profound difference in purpose between VSS and technical standards. Such difference supports a diverse approach by public authorities towards the two groups of standards, which for technical standards should thus be limited to forms of coordination.

On the basis of such a framework, it is now appropriate to begin the analysis of the legal provisions through which public authorities can exercise support and control over VSS. EU rules of the internal market will be discussed first. Chapter 3 addresses freedom of movement, specifically Art. 34 TFEU, and a host of EU measures in the domain of market regulation. The objective is to study the extent to which Art. 34 TFEU, in its current application, can address market barrier and consumer confusion. It will also develop a normative test which is better suited to our purposes. From a more descriptive stance, the Chapter also addresses the seldom noticeable implications on VSS of several EU regulatory instruments which establish relations of coordination, influence and control between public and private authority.