Voluntary Social and Environmental Standards and Public Governance:

Reviewing the Evidence and setting Principles for Standards-setters

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About the authors and acknowledgements

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Introduction

In their work for the Pacific Institute cognitive linguists Real Reason (October 2009) identify three cognitive 'frames' used to describe and understand voluntary social and environmental standards (VSESs).[1] These are a 'market' frame, a 'governance' frame, and a 'communication' frame.

For purposes of better understanding the characteristics of each of these framing approaches (since they are not specifically defined in Real Reason's work), a market framing can be understood as "*impos[ing] market reasoning on the whole of the standards and certification arena*" (Real Reason 2009: 9); a governance framing conceives of standard-setting as a process of *governance* (Real Reason 2009: 13), and in a communication framing the *"things that standards and certification do"* are understood as processes of communication (Real Reason 2009: 18).

This paper has been written as a contribution to Pacific Institute's evolving work on one of these three frames, namely the 'governance' approach to understanding voluntary social and environmental standards.

Real Reason suggest that the "*Governance approach may be the least 'polished'* [of the three frames] *in terms of accessibility to the lay public and coherence of use to date, but it seems to best represent the stated values underlying the goals of social and environmental standards systems*" (Real Reason 2009: 14, 15).

For the authors of this paper, social and environmental standards systems are principally valuable as tools for the pursuit of sustainable development, a concept the essence of which can be understood in the terms proposed by the 1987 World Commission for Environment and Development as "*development which meets the needs of the present without compromising the ability of future generations to meet their own needs"* (WCED 1987: 8).

If Real Reason's governance frame best represents the normative values underlying social and environmental standards systems and *if* those values themselves reflect normative values associated with the process and goal of sustainable development, it would make sense to turn up the volume on the 'governance frame'. Helping governance framing to predominate in the overall mix of three framings could also help underlying (ethically desirable) values to become more important as guides for organisational behaviour.

In principle it seems that governance framing is a good thing. But it is not straightforward. Conceptually (rather than linguistically), there are a number of ways to approach the interface between voluntary environmental and social standards and 'governance'. These go well beyond the implications of a simple characterisation of VSESs *as* governance.

There are, for example, distinctions between:

- efforts to ensure that voluntary environmental and social standards themselves reflect principles of organizational 'good governance';

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[1] The work is based on a review of diverse English language (predominantly American English) literature.

- the contribution of voluntary environmental and social standards to 'good governance' of organizations that they address (or their role in governing the environmental and social impacts of organizations that they address)

- the implications of voluntary environmental and social standards for 'good governance' by the nation state in those countries where they are formulated or take effect, and

- the implications of voluntary environmental and social standards for 'global governance' (which ought itself to be in some sense normatively 'good'). What, for example, should be the role of voluntary environmental and social standards in the context of efforts to build governance frameworks that are adapted to twenty-first century environmental and social challenges?

The sense in which Real Reason describe the 'governance frame' does not speak directly or equally to all of these concerns. Rather, drawing on Real Reason's work, it appears that voluntary social and environmental standards are identified as 'framed' linguistically in governance terms when they are understood or described as:

a) responses to failures or weaknesses in governance of environmental and social impacts by public sector actors, that consequently are themselves

b) a means to govern the environmental and social impacts of organisations, and are potentially also

c) responses that themselves present governance challenges in terms of the governance of environmental and social standards.

There is evidence that the standards community has already paid significant attention to the 'governance framing' ideas of 'filling governance gaps' with standards and then ensuring that the standards themselves are governed 'well', or in line with ideas of 'good governance'.

At the same time, the rapid evolution and take-up of environmental and social standards in the marketplace *itself* has knock-on effects upon the behaviour of and policy options available to governments, and impacts more widely on public governance. This aspect of a 'governance framing' of standards is currently very underdeveloped; both analytically and, it would appear, cognitively.

Limiting 'governance framing' of voluntary social and environmental standards to the three approaches set out above means that this frame does not directly speak to the wider range of public governance *implications* of voluntary environmental and social standards.

In this paper, the starting point is an argument that attention to 'good governance of standards', 'standards *as* governance' and 'standards to fill governance gaps' respectively should not inherently weaken 'good public governance'. In other words, a decision to design interventions or communication tools that amplify governance *framing* of standards ought to be taken conscious of the public governance *consequences* of standards: the public sector governance angle needs to be integrated within such efforts. But shaping the cognitive manifestations of a 'governance frame' should not be the only goal.

The standards community's understanding of the public governance consequences of standards needs to be built, and subsequently those consequences need to be managed, so that they are in some sense desirable when measured against a coherent standards community vision of 'good governance' and the role of standards within that vision. This is 'framing' in a different sense of that word: developing and providing an analytical framework on the relationship between standards and public policy or public sector governance that standards-setters can draw on to guide their own efforts.

To express a similar set of issues in the context of international standards-setting: *"The lack of any accessible model or blueprint(s) on the differentiated roles of individuals, [non-governmental organizations], economic actors and other stakeholders in standards-setting processes hampers the smooth integration of voluntary environmental and social standards within mainstream notions of transnational or global governance. This is because participants in standard-setting processes do not currently have access to any framework that can build understanding on when to accord deference to different actors"* (Ward, 2011: 717).

On 'governance'

The term 'governance' carries a number of different possible meanings. At its simplest, one definition is that governance is "*the art of steering societies and organizations*." An alternative approach suggests that governance is "*the traditions, institutions and processes that determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern*" (Institute on Governance, 2005).

The term 'governance' is also used in a literature on 'new governance', which takes as its starting point the insight that governance is not the exclusive preserve of the public sector, and nor need it focus exclusively on the roles of citizens. After all, power in society is not exclusively exercised by citizens or the private sector, and neither are mechanisms for channelling power exclusively concentrated in the hands of the public sector.

Literature on governance is often closely linked to literature on governance *by* the public sector; a focus that analysts of 'new governance' argue is no longer justified. For example, Kevin Kolben (Kolben, 2011: 411) argues that governance is *"a process in which regulatory authority and legitimacy have become de-centred from the state and from government".* To take another approach; Timothy Cadman argues that interaction is key to governance, and *"is identified as a series of 'co'-arrangements between state and non-state actors, more oriented towards collaborative approaches to problem-solving based on the formulation of criteria, or the setting of standards"*. (Cadman, 2011: 4)

The end point of this paper is to develop a set of principles to guide development of appropriate relationships between standards systems that address environmental and social issues, governments (and government bodies), states, and public policy. In other words, it focuses on the public governance implications of voluntary social and environmental standards, providing guidance to ensure that the relationship between VSESs and public governance is supportive, rather than constraining or even undermining, of public sector action designed to strengthen attain social and environmental goals that are broadly progressive (rather than regressive).

Three underlying propositions inform the paper:

- That all things being equal, private voluntary social and environmental standards should not directly or indirectly undermine the proper exercise of the public governance roles and responsibilities of governments, states and public sector actors

- That the *form* of political system adopted within a state (in particular whether it is broadly speaking democratic or not) may be a relevant consideration for guidance on the relationship between voluntary social and environmental standards, public policy and governments. (This proposition is further developed below; though the paper does not arrive at a conclusion on this key issue).

- That among other political systems, democracy is the most appropriate political system for the pursuit of sustainable development and hence for the ethical, social and environmental objectives associated with VSESs.

The paper draws extensively on a comprehensive literature review on the relationship between voluntary social and environmental standards and public policy carried out by Mai-Lan Ha of the Pacific Institute (Ha, 2011). The next section of the paper discusses definitional issues and then reviews literature on the 'drivers' of voluntary social and environmental standards-setting activities. Subsequent subsections review the relationship between voluntary social and environmental standards and the rules of the multilateral trading system, the relationship between voluntary social and environmental standards public policy governments and the role of the state, and highlight the possible relevance of insights from literature on the roles of public sector actors in corporate social responsibility. The paper then turns to the implications of voluntary social and environmental standards for democracy understood both in terms of the 'internal' democracy of standards decision-making processes and their wider relationship with democracy as a political system.

In each subsection, the paper aims:

a) to bring out insights for efforts to amplify a 'governance framing' of standards that takes account of the relationship between voluntary social and environmental standards and public governance, in the sense of governance *by* public sector actors, and

b) to build the analytical foundations for guidelines for standards-setters on the relationship between voluntary social and environmental standards and public policy.

The final subsections of the paper are normative, asking 'what is the proper space for voluntary social and environmental standards in relation to public governance, democracy and the role of the state?'. The concluding section of the paper proposes an initial set of Principles on voluntary social and environmental standards and public policy, for application by standards-setters.

Which standards are Voluntary Social and Environmental Standards?

A key aim of this paper is to set out guidance on the relationship between certain standards and public policy, broadly understood, it is important at the outset to be clear about *which* standards that guidance is intended to address.

Literature on the relationship between standards, public policy, states and governments addresses a very wide variety of initiatives and standards. For example, the following terms (and associated definitions) are among the entry points for understanding the 'governance' issues raised by VSESs:

- Voluntary standards
- Voluntary codes
- Voluntary initiatives
- Soft law
- Civil regulation
- Private regulatory regimes
- Private governance
- Private environmental governance
- Non-state market driven governance mechanisms
- Voluntary sustainability standards

Pacific Institute has chosen to work with the term 'voluntary social and environmental standards' (VSES); but it is important to clarify what this terminology refers to.

One important distinction from the outset is between *product* and *process* standards. At a very general level, product standards are those related to the quality and safety of the product concerned, whereas process standards are those concerned with how a product is produced. Standards addressing environmental and social issues may be further divided according to their participants and audiences. For example, Vorley, Beekmans and Homer (2010: 17-24) distinguish between business to business standards; consumer targeted standards, commodity-specific standards (e.g. relating to forestry, soy or palm oil), company-specific standards and GAP based standards with consumer labels (e.g. Utz, which integrates GAP standards with SA8000 and other standards and makes use of a label to provide consumer information). GLOBAL G.A.P serves as a practical manual for Good Agricultural Practice anywhere in the world. It is a private sector body that sets voluntary standards for the certification of production processes of agricultural products (including aquaculture) around the world.

One of the most significant bodies of work addressing VSESs has been carried out by Benjamin Cashore and the Yale School of Forestry and Environmental Sciences (Cashore, et. al, 2002, 2004, and 2007). Cashore's focus is 'non-state market driven' governance mechanisms (NSMDs). He considers that NSMDs have four characteristics which are not necessarily captured by broader terminology such as 'private voluntary regulations or standards'.

The characteristics of NSMDs are:

1. The absence of state authority to force compliance and 'adherence to rules' with the mechanisms or systems

2. The presence of an internal multistakeholder evaluation process that grants authority to the system

3. The existence of an institutional setting (within a market's supply chain) in which authority is granted

4. The existence of an enforcement mechanism based on verifiable on the ground compliance.

For purposes of this paper, the instruments and processes (VSESs) that are addressed by the Principles set out in the final section of the paper are those that meet six criteria set out below.

1. They address the activities of organizations rather than individuals

2. They address social and environmental issues or impacts arising out of the activities of organizations *as market actors* (rather than as 'public' actors). For these purposes, the word 'social' should be understood in its broadest sense as 'societal', encompassing for example ethical considerations. And the term 'market actors' is designed to exclude those codes, initiatives or standards that apply to behaviour in public life or to those activities that lie in the exclusive competence of governments, parliaments and states (including for example legislative processes)

3. They are normative, in the sense that they set out expectations for organizational management, practice or behaviour

4. They are designed for repeated, rather than one-off, use or reference by organizations that they address

5. They are not directly legally enforceable without action on the part of some other actor to 'harden' the norms that they contain (for example by incorporating their terms within a contract for supply of goods and services)

6. Their take-up by the organizations that they address and their external legitimacy does not inherently *depend* on involvement or action by state or public sector actors; even if such legitimacy and/or take-up may be enhanced by state action by such involvement or action

Instruments and processes meeting these six criteria might be variously described as 'standards', 'initiatives' or 'codes', among other terms. They may or may not be associated with third party certification processes.

A seventh criterion has been considered and rejected; namely that relevant VSESs result from a process of negotiation and engagement by multiple parties, in which the parties in the negotiation process either include participants from more than one type of organization *or* are developed by one kind of organization (non-governmental organizations or NGOs for example) for application by another kind of organization (businesses for example). This criterion was initially attractive, but would have excluded from the outset those customer-facing VSESs that are developed by major retailers whose supply chain decisions potentially have very significant economic impacts for suppliers and potential suppliers. Examples of such VSESs include Carrefour's AGIR, Tesco's Nurture and Starbucks CAFÉ Practices (Vorley, et al. 2010: page 13).

It should be noted that the proposed criteria do not incorporate the idea that a standard must be 'international'. This does not seem to be a consistently relevant consideration for purposes of determining which relationships between VSESs, public policy and the role of governments are particularly significant.

The criteria also avoid the use of the term 'voluntary'. That is because for many organisations, meeting or signing up to or complying with the norms contained within a VSES may in reality be a condition of market entry. In reality, the focus on 'voluntary' standards can be misleading if incorporated within the definition of relevant standards.

The standards addressed by the six criteria could be further filtered in almost limitless ways, including by geographical scope; by sectoral application; by take-up; by participants in the negotiation process for development of the standard and so on. For example, the Pacific Institute is particularly concerned to develop framings for those standards that are certifiable.

For the time being a reference to 'voluntary social and environmental standards' (VSESs), is a reference to those standards that meet the six criteria set out above.

Drivers for establishing Voluntary Social and Environmental Standards

A review of literature on the overall *drivers* for the establishment of VSESs reveals changing conceptions on the relationship between government, or state, and market, with broader implications for efforts to amplify a governance framing of standards that takes account of the relationship between VSESs and 'good' public governance. Four distinct perspectives stand out.

1. Kirton and Trebilcock (2004) implicitly consider that voluntary standards have the potential in some sense to 'serve as equivalents' to legislation, government law and regulation. This is the essence of the 'standards *as* governance' framing.

2. Governance systems that are non-state 'in character and in practice' are seen by some commentators as a direct outcome of (or adjunct to) neoliberalism (Eisner, 2011; Steuer, 2010; O'Rourke, 2003; Cashore, 2002; and Vogel, 2007). For these purposes, neoliberalism can be understood as a set of ideas that place faith in free markets and consequently a diminution in command and control regulation by states.

3. VSESs are often understood as a response to 'gaps' in governance of social and environmental impacts by governments or markets. On the government side, such gaps might take the form either of poor implementation and enforcement of existing laws and regulations, or roll-back of state regulation in an era of economic liberalisation. Thus, for the ISEAL Alliance, *"Voluntary multi-stakeholder standards systems developed as a response to perceived market or government failures to effectively deliver on an ethical outcome."* (ISEAL, 2008: 8).

   Tracey Roberts (2010: 101) goes so far as to actively *exclude* the state (or its subsidiaries) in her description of 'private governance institutions': she says that they provide *"governance without governments; they are rules and structures by which individuals, communities, firms, civic organizations and other entities govern their interests without the direct involvement of the state or its subsidiaries"*. In this regard, it is notable that ISEAL's key guidance publications, including its Code of Good Practice for Setting Social and Environmental Standards (2010) and its 2009 *Code of Good Practice on Assessing the Impacts of Social and*

Environmental Standards Systems[2] make no reference to public policy either in the setting of standards, or in evaluating their impacts on the ground.

Another concern set out in a paper by Ward, Wilson and Zarsky and Fox (2007: 2) is that VSESs *"applied through supply chains can supplant domestic legislation. This may be because they are more closely linked to commercial outcomes (market access) than domestic legislation that reflects less stringent standards or because, where there is weak public sector capacity, they are more likely to be monitored and enforced than domestic legislation"*.

4.   A number of scholars go further than either 'governance gap' or 'rise of neoliberalism' explanations of the role of VSESs to consider in a more nuanced way the *intertwined relationship* between VSESs, markets and public governance. For example, one approach considers the role of competition between different actors in attempting to regulate global capitalism, and another advocates a 'political institutional' approach that allows for consideration of institution building and the role of 'institutional entrepreneurs' (Bartley, 2007: 309). In their seminal work, Drahos and Braithwaite (2000) argue that globalisation of business regulation has taken place through a messy process involving a web of state and non-state actors who exert influence at a variety of levels, and build global regulation through a variety of tools and norms in a process of competing principles and models in which no single set of actors emerges as dominant (Ward, 2011: 708, citing Braithwaite and Drahos, 2000)

These four perspectives can all be understood as falling within 'governance' framings of standards. But market-related drivers of VSESs are also significant. For example, in a description of the circumstances that led to the creation of the Forest Stewardship Council Bartley (2007) points, among other factors, to the desire of a group of forestry firms in the 1980s to create a certification system to differentiate their products from others.

If one accepts that states are important in managing the environmental and social aspects of organisational impacts, it is worrying that a 'governance gap' perspective on VSESs can underplay their role. In some respects, VSESs may even undermine the role of the state, in the sense that VSESs create alternative forms of regulation that can become self-perpetuating once taken up in the marketplace; thereby potentially reducing (e.g. for reasons of cost-efficiency) the priority given by public sector actors to regaining or filling 'public governance gaps' in areas that are addressed by VSESs. Moreover, if VSES are understood by their creators as a *substitute* for weak or absent state-led regulation and governance, or somehow 'equivalent' to it, it is unlikely that deference to states, to the unique roles of public policy, or to the outcome of democratic decision-making by nation states, will naturally follow.

Taking a critique of neoliberalism as a starting point might in principle lead to a perspective that is more sympathetic to considerations of public policy and the role of states by the architects of VSESs. Such a perspective might view states or public sector actors in a sense somehow as victims of a wider ideology that reduces their policy space. But processes of globalisation have also generated a distinctly different insight; one which also has implications for the relationship between VSESs, states and public policy. That insight amounts to a suggestion that in a globalised and highly interdependent world where social and environmental challenges are polycentric and incapable of

being effectively tackled through action by any single set of actors, it is inherently useful to bring different stakeholders together to agree on normative frameworks for governing the environmental and social impacts of organisational activity.

This perspective also potentially brings a blinkered approach to the role of public policy or of states. It brings that potential because it is a perspective that does not bring with it any inherent sense that *political* boundaries are important in setting the boundaries for negotiation over the issues at stake in the VSES. Rather, the 'multistakeholder governance' perspective tends to focus more on the process-related negotiation boundaries generated by the practical challenges of building agreement across stakeholder groups.

Taken together, these ways of understanding the relationship between VSESs and public governance in the round generate three principal insights:

1. Understanding VSESs in the context of the neoliberal agenda lends itself to focusing on the role of market actors in the globalised economy and their influence on public governance. It has the potential to give rise to critiques of VSESs as manifestations of, or even sustaining, the neoliberal global economy; but it does not lead naturally to any resolution of the complex relationship between VSESs and public policy.

2. The 'governance gap' starting point and framing of VSESs is inherently critical of states (and thereby governments). In some respects it may also undermine the exercise of their policy-making and regulatory functions. It is also blind to the *kind* of political system at play within states; allowing no distinction to be drawn for example between a highly authoritarian government and one that is endeavouring to live up to the ideal of democracy as a political system, but has weak capacity.

3. A more nuanced view of 'networks of actors' working in competition and collaboration has potential to offer insightful descriptions of VSES processes; but tends to lead naturally to the conclusion that those processes should be fair, equitable, or internally democratic. It has not thus far given rise to detailed analysis of the unique roles of governments, states, and public policy nor given rise to deference to those roles and their outcomes.

VSESs and the World Trade Organization

The rules of the multilateral trading system embodied in the World Trade Organization (WTO) play an important role in the evolution of certain kinds of VSESs. This is because WTO rules accord preference to 'recognised' international standards as a basis for government 'technical regulations' and animal and plant health regulations. The WTO-compatibility of such VSESs is governed respectively by the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures.

Drawing heavily on analysis in Ward (2012), the issues under the TBT Agreement (by way of example) are in essence as follows.

The WTO's TBT Agreement incorporates a preference for state product regulations (so-called 'technical regulations') to be based on 'relevant international standards' where they exist or their completion is imminent *unless* circumstances spelled out in the relevant part of the TBT Agreement exist (Article 2.4). More than this, when a technical regulation is in accordance with 'relevant'

international standards it shall be 'rebuttably' presumed not to create an unnecessary obstacle to international trade (Article 2.5). In these two ways, the existence of an 'international standard' has a very direct impact on public policy decisions made by WTO Members. An extension in the subject matter addressed by the private standards community means an extension in the reach of the standards to which WTO Members must have regard under their WTO TBT Agreement obligations.

One concern is that provisions of a 'relevant' VSES might be cited in support of unnecessarily trade-restrictive technical regulations. For example, in negotiation of the ISO 26000 standard, some government experts in ISO 26000 were concerned that even technical regulations that are 'unnecessarily trade-restrictive' (for example certain kinds of measures on trade in, for example, energy intensive or genetically modified product that might be justified using the 'precautionary approach') could be shielded from scrutiny within the WTO if ISO 26000 were cited as a 'relevant' international standard on which they had based the offending *(sic)* technical regulations.

A second related set of concerns is that WTO rules could hamper policy innovation in some of the areas addressed by 'relevant' VSESs. This is because a WTO Member wishing to depart from a 'relevant' international standard (for example in order to adopt a more stringent technical regulation) might find that they were forced to justify the more stringent technical regulation in terms of the exceptions set out to the general principle that technical regulations should be based on relevant international standards. David Wirth (2009: 96) argues that *"through the TBT Agreement, non-binding ISO standards may acquire international legal significance, may be transformed from minimum standards of performance into regulatory ceilings from which governments must justify departure in terms of greater rig[o]ur... [which may] metamorphose from strictly private, non-governmental instruments to standards with international legal significance."*

A further important distinction lies between 'non product-related production or process methods', and those which are product-related. Non product-related process methods are those which have no bearing on the physical characteristics or performance of the goods and services that they address. There are different legal views, however, on whether non product-related production and processing methods fall – or fail - under WTO rules – including those of the TBT Agreement - in different circumstances.

Furthermore, whilst the WTO's Agreement on Technical Barriers to Trade and its Agreement on Sanitary and Phytosanitary Measures clearly address government-backed standards initiatives, there is much less clarity about how WTO rules address non-state-sponsored VSESs.

Against a background of legal uncertainty, Digby Gascoigne and O'Connor and Company (2007: 7) note that *"there is no case law that assists understanding of the applicability of the TBT Agreement to voluntary standards that are not product related"*. In relation to NGO-led VSESs and the TBT Agreement, Samir Gandhi (2005) notes that no developing country government has yet mounted a formal legal challenge to such a standard within the WTO. He writes (Gandhi, 2005: 877) that developing country WTO Members are *"[apprehensive] that by challenging NGO standards which are based on [NPR PPM criteria they] are implicitly acknowledging that not all NPR-PPMS are WTO inconsistent per se. Since this could open the door for the use of 'non-trade related' standards, such as labour and human rights, several developing countries are averse to going down this route."*

Ward (2011 and 2012) goes further; showing through the example of negotiation for the ISO 26000 international guidance standard on social responsibility that lack of clarity over the application of

WTO rules (particularly the TBT Agreement) to VSESs has the potential to exert a significant 'chilling effect' on the development of VSESs; at least within the formal international standards community and in circumstances when governments are involved in standards-setting negotiations.

How VSESs relate to public policy, governments and the role of the state

Overall framings for multiple relationships

VSESs intersect with public policy and the roles of governments and states in multiple ways. Literature to date has explored the relationship between private regulatory systems and public policy through four lenses:

1.   A lens that sees private governance, voluntary codes and self-regulation as created by and/or complementary to government policy making. For example, as Marc Eisner points out (2011), the power of private environmental governance tools to shape corporate decision making is dependent on and responds to contraction or expansion on national regulatory policy. Eisner points to mechanisms through which public policy has created integrated co-regulatory systems whereby governments explicitly delegate authority to firms to self-regulate.

In one striking example, Levin, Cashore and Koppell (2009) highlight the role of the Gold Star Standard in promoting the Clean Development Mechanism (CDM) under the Kyoto Protocol to the UN Framework Convention on Climate Change. The Gold Star Standard was developed in 2002 by a number of NGOs including the World Wildlife Fund to address civil society concerns that many approved CDM projects had environmental weaknesses or did not meet the CDM's goal of providing sustainable development benefits (Levin, Cashore, and Koppell, 2009: 12-13). The Gold Star Standard requires projects not only to meet the CDM's requirements but also its own criteria. It effectively offers a market incentive for business engagement (through a decrease in reputational and financial risks and increased credibility) and provides guidance on how to develop a successful carbon offset program. In this case, international public policy in sustainable development was an essential prerequisite for the existence of the standard; and in turn the standard provides a tool for meeting those international public policy objectives.

In another example, Ralph Espach (2009) analyses the effectiveness of the Forest Stewardship Council (FSC) scheme. In Argentina and Brazil government support for the initiative was not a determinant of success. However in Bolivia, government legislation requiring compliance with sustainable forest management standards in order to obtain logging licenses was critically important to FSC uptake. It was easy for firms adopting FSC certification both to comply with government regulation and gain access to lucrative Northern markets.

2.   Ways in which transnational standards are *constrained* by national level legislation or policy. For example, Bartley (2011) considers how transnational standards interact with public policy. Focusing on the example of forestry governance in Indonesia, for example, he identifies multiple ways in which the Forest Stewardship Council interacts with both national law and customary law. For example, he cites the difficulty of maintaining FSC certification for forests because of conflict between FSC certification requirements and national laws related to community rights. And he notes that the FSC requirement of obtaining 'free, informed and prior consent from communities' is difficult to meet in circumstances where government authorities grant logging permissions prior to

community consultations. FSC's ability to change corporate behaviours in these circumstances is itself constrained by national law, rather than transcending it. National law in this example makes corporate compliance with FSC requirements difficult if not impossible; there is no question of choosing to *disobey* national legislation so as to achieve compliance.

3.   Government attempts to embed better regulatory practices by their own industries operating overseas. For example, David Vogel (2006) argues that some 'civil regulations' can be a manifestation of *government* concern in 'home countries' to ensure that 'their' businesses adopt high environmental or social standards when operating in regions where regulation is weak, poorly enforced, or non-existent.

This is a reflection of the idea that governments may be as, or more, concerned with outcomes rather than processes or choice of policy tool. Such efforts are unlikely to be welcomed by host countries, however, if they give rise to operating practices that conflict with local legislation or norms (for example in the field of gender or racial or religious discrimination).

4.   Ways in which 'non-governmental regulatory strategies' can undermine national and local policy frameworks. For example, Dara O'Rourke (2003) points to ways in which non-governmental labour standards with their own monitoring and verification systems applied in transnational supply chains can impede local unionisation, undermine traditional regulatory processes or lead to corporate co-option of NGOs. In some circumstances, non-governmental organisations engaged in monitoring or implementation of such standards can supplant the role of labour unions, even in countries where labour rights legislation is in place. Even when negative effects of non-governmental regulatory strategies do not conflict with public policy priorities expressed through explicit state regulation or measures, they can nonetheless undermine the expression of social or environmental values at local or national level by hampering the efforts of local or national actors to take steps to improve social or environmental conditions.

All authors agree that governments bear primary responsibility for establishing the principal regulatory frameworks operating within their own borders. Importantly, they also stress that the success of the private initiatives on which they focus can depend on the extent to which those initiatives are complemented by   government policy making. For example, Mayer and Gereffi (2010: 19-20) argue that:

> *"unless private governance is supplemented and reinforced by public institutions of governance, it cannot provide adequate governance capacity for the global economy …. As globalization progresses, particularly as the larger developing country economies mature, it is both likely and desirable that some significant part of the private governance innovations be institutionalized within the national governments of those countries. "*

In a similar vein, Bryne Purchase (2004: 95) also suggests that *"governments can act to reinforce 'private' collective actions, either very formally through legislation or more informally by simply giving acknowledgement and public support."*

Public or government policy making that plays these roles can take the form of public or state action to institutionalize private governance, or of governments or states playing a significant role in overseeing the development of VSESs, steering them, and ensuring they meet government objectives and serve the public interest (See further David Cohen: 2004).

These four categories offer strong characterisations of distinct VSES/public policy interfaces. But they do not capture the *systems* nature of the relationship. That is addressed by other authors. For example, Levin, Cashore, and Koppell's work on NSMD governance mechanisms (2009) is grounded in the idea of a *symbiotic framework* around NSMD systems and public policy making. In that framework, both national and international public- policy play a vital role in creating the arena and policy framework for meeting sustainability objectives. NSMD governance mechanisms do not undermine these policies, but work in symbiotic relationship to ensure that the policies reach their goals. Neither can be successful without the other, as in the case of the Gold Standard and its relationship with the CDM. As the Gold Standard is adopted by more businesses or companies, it might eventually reach a point at which it is appropriate for the CDM to absorb or adopt the Gold Standard or its content officially into the CDM itself.

A general literature on the relationship between the wide range of private regulatory systems and the role of the state has grown up alongside the literature on 'new governance'. For example, one new governance theorist, Julia Black (1996), suggests that there are four types of relationship between 'self-regulation' and the state: mandated self-regulation, coerced self-regulation, sanctioned self-regulation and voluntary self-regulation (with the latter the focus in this paper).

In a later paper, Bartle and Vass (2007) categorise self-regulatory schemes according to the *form* of state involvement. They highlight two broad categories (mandated and non-mandated) and a number of subcategories (cooperative, delegated, devolved, facilitated and tacitly supported). These categorisations do not adequately map onto the full range of VSES/public policy nexuses, because those nexuses do not themselves flow from the *form* of state involvement in the standard. Even in the 'tacitly supported' subcategory that they propose, for example, the state can be vital to self-regulatory schemes; for example by providing a threat of legislation or greater intervention if self-regulation fails in meeting its objectives. It is important to note, however, that Bartle and Vass's particular focus on industry self-regulation addresses just one sub-category of VSES.

Both Black and Bartle and Vass envisage the relationship between the state and regulatory processes as diverse and multiply layered (heterarchical) rather than hierarchically, vertically, ordered with the state on top. At the same time, both Black and Bartle and Vass' typologies appear to assume that it is the *state*, rather than the (self) regulation itself that determines the nature of the relationship between the two.[3] But states are not entirely free to determine their relationship with VSESs, for such standards take effect within the market, and states do not have any right either to accede to them or to veto their effects. The two sets of typologies are more relevant in addressing choices made by states in determining how they will choose to relate to *implementation* of the standard.

Insights from Public Sector Roles in Corporate social responsibility and public sector engagement in VSESs

Literature on public sector roles in corporate social responsibility (CSR) can also yield valuable insights in understanding the relationship between VSESs and governments. All of the major papers in this field emphasise that government or public policy engagement in CSR can contribute to the overall success of governments' sustainable development policies and commitments, as well as potentially helping to enhance national competitiveness: in other words, this body of work

encourages greater public sector engagement in VSESs as one manifestation of a 'voluntary' CSR movement.

Richard Steurer (2010) adds that promotion of CSR can offer an attractive complement to hard law regulation for governments in circumstances where new regulation may not be viable or feasible. He identifies four broad policy themes at play in government engagement with CSR: raising awareness; transparency; socially responsible investment; and leading by example. He concludes that government promotion of CSR policies has given rise to a fundamental shift in business-government relations. That shift, he suggests, represents a move away from a hierarchical, regulatory state towards a more "networked, enabling, relational, or embedded form of societal co-regulation" in which business self-regulation and societal co-regulation work together and are embedded in the fabric of the regulatory state.

In a paper for UNDESA, Ward, Wilson, Zarsky and Fox (2007) argue that there are two broad sets of justifications for public sector actors in middle and low-income countries to engage with CSR: *defensive* and *proactive.* These 'justifications' are related to, but distinct from, the drivers for the establishment of VSESs identified in the literature and considered earlier in this paper.

The *defensive* justification, according to Ward *et al*, relates to minimizing the potential adverse effects of CSR (including VSESs) on local communities, environments and markets when it is applied through international supply chains and investment. In some respects, China's CSC9000T can be understood in this way.

When VSESs generate barriers to market entry which take effect across state boundaries, rather than simply at the domestic level, an exporting state wishing to take action to address those barriers faces hurdles that would not arise in the case of purely domestic impacts of a VSES. The transnational impacts of VSESs in supply chains, in other words, generate particularly tricky policy challenges. There is a mismatch between transnational multi-stakeholder governance and the reality of state-centred territorial sovereignty.

VSESs applied in international trade have become a particular area of defensive engagement, as we saw in the Section above on the implications of WTO rules. For whilst they can provide positive opportunities for niche marketing by producers and suppliers based in middle and low income countries, they can also act as a barrier to market access (an issue highlighted further below). This is particularly a concern when certification requirements, or the cost of meeting supply chain requirements, harm the local small or medium-sized enterprises that represent the large majority of enterprises and account for a significant part of employment in developing countries.

In the case of business-to-business standards, costs and benefits tend not to be equitably distributed along value chains, with costs of private standards borne by producers whereas benefits accrue to the retailer. These issues are partly rooted in bargaining power disparities between producers and buyers. Further problems arise for supplier firms that have to comply with multiple, even conflicting, codes of different buyers.

Tensions can also arise when VSESs are designed and/or applied with little or no input from governments or firms in supplier countries. An analysis for the OECD Roundtable on Sustainable Development by Vangelis Vitalis (2002) finds three problems with the application of VSESs (specifically private voluntary eco-labels) to products in international trade:

1. Some voluntary eco-labels may become *de facto* market entry requirements as they become the accepted norm due to their market dominance. Vitalis cites US NGO and shrimp industry efforts to create a 'turtle friendly' label for shrimp products. By 1999, the label had created a *de facto* market requirement for all shrimp to be turtle friendly. But Vitalis argues that fishing practices in many developing countries are very different and the use of 'turtle excluder devices' would be neither useful nor necessary.

2. Many voluntary eco-labelling schemes apply a 'one size fits all' approach that doesn't allow sufficient room for regional or local variations (as in the EU Ecolabelling Regulation example above). Vitalis also cites Marine Stewardship Council requirements which make it particularly difficult for artisanal or small-scale fishermen to meet MSC requirements as they are likely to have only limited data on species; data that is required to institute an MSC management programme.

3. When schemes are developed in partnership with domestic producers, those producers may have vested interests in ensuring that schemes are developed in such a way as to favour their own local market.

The proactive justification for public sector actors to engage with VSESs arises out of the opportunity to increase the domestic public benefits of CSR practices in economic, social and environmental terms. This argument was centrally important in the early 2000's work of the World Bank Group's CSR Practice on public sector roles in CSR. And in countries whose export sectors are closely associated with consumers' social, health or environmental concerns (e.g., in agriculture and textiles), there may be positive opportunities for governments to facilitate market access gains for their producers through engagement with VSESs. Cashore, Auld, Bernstein, and McDermott (2007) argues that NSMDs have the potential to create a 'race to the top'; a process through which market access advantages flowing from compliance with an NSMD can themselves lead to changes in (state) regulatory standards to raise the floor on environmental and social behaviour and impacts. In other words, public policy can come in behind successful VSESs so that innovation is rewarded and a race to the bottom avoided.

Both the proactive and the defensive justification have potential to describe parts of the case for public sector actors to engage with VSESs. ISEAL (2008: 8) notes that "*Governments are increasingly choosing to participate in the development of standards systems, or otherwise support, use and facilitate voluntary standard-setting and certification... The relationship has been described as 'the next big thing' or even already now part of 'a new reality'... [However] many governments still have underlying concerns they may feel need to be addressed before they fully engage with voluntary standards systems*".

In its 2008 study, ISEAL researchers considered not *justifications* but *drivers* for a range of government uses of voluntary standards, drawing on ten case study examples. Their aim was to identify why governments use standards and to find ways to secure more widespread use of standards, based on the assumption that standards are a 'win-win' tool, providing both for economic growth and for environmental protection. Nine of the ten case studies considered in the ISEAL report consider how governments have *"engaged with standards systems members of the ISEAL Alliance"* and one considers how they have "linked to them". ISEAL's research identified "more than seventy" additional examples of governmental use of voluntary standards.

ISEAL's report identifies two kinds of drivers for government engagement with standards: 'governance' drivers and 'mission' drivers. ISEAL's characterisation of governance drivers relates principally to governance functions performed by standards, and mission drivers relate principally to the environmental or social goals associated with the standards.

The five governance drivers identified in the case study research are:
- Best practice in independent verification (e.g. by outsourcing the burden of verifying whether live marine ornamentals were being imported into Israel)
- International recognition and credibility (e.g. when the Tunisian government based its national organic agriculture policy in part on IFOAM Basic Standards)
- Sharing Resources (because of the cost savings benefit to the government of Israel in the instance cited above)
- Reputational Risk Management (e.g. in relation to forest harvesting in a Guatemalan biosphere reserve)
- Promoting Change Without Regulatory Burden (for example through the adoption of sustainability-related public procurement targets).

In a sense, these 'governance drivers' only exist because of a market-oriented mindset on the part of governments, in which it is not who ought to do what (as between government and stakeholders) that matters, nor (in the case of all but the last of the 'governance' drivers listed above) normative judgments about the substantive policy goals pursued, but the market access, competitiveness, or cost benefits to be gained through engagement.

A distinct set of drivers identified by ISEAL are described as 'mission drivers'. These exist when governments choose to engage with a voluntary standard "*because the standard's mission relates to the public policy objective it aims to deliver*". Three examples given in the paper relate to fairtrade, labour practices (SA8000) or adding value to agricultural products (Rwanda's engagement with, rather than use of, the East Africa Organic Products Standard).

In a distinct approach, Morrison and Roht-Arriaza (2006) focuses on the *substantive content* of the provisions of VSESs. They argue that a conceptual distinction can be drawn between three kinds of directly public policy-relevant provisions within VSESs:

1. A VSES that offers a conflicting (and competing) alternative to norms set by legal requirements in countries where the standard is negotiated or where it will generate impacts on organizational behaviour.

2. A VSES that exists and takes effect in a space where legal requirements are absent or are poorly enforced (the mainstream 'governance gap' analysis).

3. A VSES that goes *beyond*, or that seeks to encourage market actors or organizations to go beyond, the norms set by minimum (non-contractual) legal requirements for environmental or social performance.

The first and second set of circumstances demand some normative basis for understanding the distinctive role of nation states, and public policy, in the governance of environmental and social

issues (or organisational impacts). Only the third set of circumstances is relatively neutral in terms of implications for the role of public policy, governments and states.

Morrison and Roht-Arriaza's suggested distinctions are helpful, but they do not offer comprehensive guidance on the relationship between VSESs, states, public policy and the role of governments. One might add a stronger dimension of intergovernmental processes to them as follows:

> 4. A VSES that alters the balance of substantive obligations accepted by states in the context of intergovernmental agreements (the only current example, to our knowledge, being the obligations accepted by states under relevant provisions of the World Trade Organization's rules)

> 5. A VSES that conflicts with norms set through intergovernmental processes

> 6. A VSES that supplements norms set through intergovernmental processes

> 7. A standard that endorses or replicates, or is used to implement, norms set through intergovernmental processes

A fully comprehensive analysis would then add additional distinctions to allow for the existence of overlapping or competing VSESs – in other words, to allow for the fact that VSESs exist in a competitive normative marketplace, and that the outcomes of that competition may themselves have implications for (global and national/subnational) sustainable development governance.

In the latter case (as, e.g, in the case of distinctions between Forest Stewardship Council and the CSA Standard for Sustainable Forest Management), not only would the potential impacts of one mechanism upon another need to be considered, but also their *relative* contributions to sustainable development governance, so that the relative significance of those impacts could be evaluated.

A further problem is that in relation to categories 4 to 7, not all 'norms set through intergovernmental processes' ought to have the same weight, for purposes of guidance or principles on the relationship between a VSES and norms resulting from intergovernmental processes.

Much ought to depend on the intended scope of application of the VSES under consideration. For a globally applicable VSES, a norm associated with an intergovernmental process for application globally might carry a very different weight to a norm associated with an intergovernmental process for regional or more limited application alone. Furthermore, not all intergovernmental processes have equal reach. For example (drawing heavily on Ward, Fox and Grieg-Gran, 2004):

> 1.   Even norms established by the UN and ratified by governments are frequently far from globally endorsed or ratified (e.g. the Kyoto Protocol and the UN Convention on Biological Biodiversity have not been formally ratified by the United States).

> 2.   Not all norms set through intergovernmental processes are relevant to organisations, and are consequently not very helpful sources of practical guidance on principles for inclusion within VSESs. They need translating.

> 3.   Not all international norm-setting processes that are potentially relevant lie within the UN family of international organisations (e.g. the OECD Anti-Bribery Convention).

4.   Not all potentially relevant norms are universally endorsed, even if they are applicable worldwide for those organisations that they address. For example, the OECD Bribery Convention or the OECD Guidelines for Multinational Enterprises only formally apply to businesses operating in or from those countries that have committed to them (though in fact, the OECD Guidelines for Multinational Enterprises have attracted declarations of adherence from some non-OECD countries in addition to the OECD members).

5.   Not all intergovernmentally agreed norms are formally ratified by governments (e.g. the OECD Guidelines for Multinational Enterprises or the Rio Declaration or the ILO Declaration on Fundamental Rights). The distinction between 'soft' and 'hard' law is easy to ignore – but the reasons why intergovernmental norms emerge as 'soft' rather than 'hard' norms need also to be considered. For example, the 1998 ILO Declaration on Fundamental Principles and Rights at Work[4] might be considered to offer a suitable basis for identifying minimum globally applicable labour rights for application by businesses. As a 'soft law' reflection of international treaty obligations, the ILO Declaration is a helpful source of guidance on core business principles. But international conventions in the areas that it addresses are not universally ratified by ILO member countries. The Declaration can itself in part be understood as a political compromise among states – a reflection of 'soft law' commitments to the follow-up procedure that it outlines as a politically achievable alternative to universal ratification of related conventions.

VSESs and democracy

Introduction

Aside from literature on the relationship between VSESs and public policy and the role of governments in relation to VSESs, there is also a body of work which considers *democracy* dimensions of VSESs.

There is a strong argument to be made (though it does not carry a global consensus) that at the national and subnational levels it is democracy (in ideal form rather than its multiple flawed present forms) that offers the most appropriate political system from which to pursue the environmental and social goals associated with sustainable development. One consequence is that the extent to which a VSES strengthens undermines or weakens political democracy will ultimately have implications for the effective pursuit of sustainable development.

VSESs should not undermine the practice of democracy when it is important for the political system and governments to maintain their capacity to govern environmental and social issues and impacts. At the same time, VSESs have developed their own understandings of what is 'fair' and/or 'democratic' in terms of internal processes.

When considering the relationship between VSESs and democracy it is helpful to bear in mind two ways of understanding democracy.

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[4] Available online at
http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT

- The idea of a democracy as a system of *social* organisation; capable of inspiring and informing decision-making processes in any organisational or social setting, from workplaces to corporate governance to civil society based organisations or even families (and VSESs).

- The idea of democracy as a *political* system attached to the idea of the state and its organs.

This distinction between social and political democracy can be problematic, since the 'social' may also be intensely 'political'. In particular, if the term 'politics' pertains simply to 'the allocation of values' (Rudder, 2008, citing Easton 1953), even the internal democracy of VSESs can be understood as 'political democracy'. However, for present purposes, this paper adopts an understanding of 'democracy as a political system' limited to understanding of the political system applied at the level of states.

The distinction between democracy as *social* organisation and democracy as a *political* system can also be related to a distinction between 'internal' and 'external' democracy of VSESs. 'Internal democracy' refers to how well a particular VSES system reflects elements identified as necessary for democratic decision-making; specifically participation, transparency and accountability. 'External democracy' refers to how well VSESs are able to contribute to building more democratic societies above and beyond their own settings. One sub-category of 'external democracy' might then be an assessment of the contribution of a VSES to democracy as a political system.

Internal democracy

Literature on the 'internal democracy' of VSESs is well developed, and examines participation, transparency and accountability of VSESs. Many studies have found that even in the case of well-regarded VSESs, serious questions remain concerning power dynamics and equity in participation. In particular, studies highlight clear disparities between developing and developed country participants. For example, in relation to the FSC, Klaus Dingwerth (2008) found that a majority of participants from the South were individuals whilst most from the North were from organizations. He argues that this distinction lends Northern participants a stronger position, overall, as organizations carry more weight than individual voices. This is the case despite the FSC's proactive approach to ensuring parity between Northern and Southern voices, including by means of equal representation in the three chambers of the FSC's General Assembly and equal representation on the Board of Directors. In substantive terms, Dingwerth finds that discourse is dominated by Northern viewpoints on sustainable development and 'liberal environmentalism' rather than the (potentially) more critical discourse of Southern participants.

Doris Fuchs, Agni Kalfagianni and Tetty Havings (2011) apply a 'democratic' legitimacy lens to private retail food governance, including both industry and civil society led private voluntary standards and certification. Like Dingwerth, she finds that although the systems analysed (MSC, ETI and GlobalGap) have governance structures in place that strive to be democratic, they fail to be truly inclusive due in part to financial constraints and also in power asymmetries that arise not only in terms of participation opportunities but also during monitoring and evaluation.

Fransen and Kolk (2007) also find that multistakeholder initiatives are dominated by Northern NGOs. And within monitoring and implementation processes, they find too much reliance on independent or professional auditing groups rather than a focus on social auditing which, by drawing on the skills of local groups and diverse stakeholders, has potential to monitor compliance in ways that have

potential to drive greater empowerment than more mainstream approaches. Anne Tallontire's (2009) work on governance issues in the fairtrade movement reinforces these insights. She argues that instead of empowering local producers and involving them directly, a shift towards branding and mainstreaming of fair trade has meant that local producers – mostly in developing countries – are simply entities at the bottom of the value chain.

Tallontire, Opondo, Nelson, and Martin's work also stands out in a relatively modest body of literature to consider empirically the experience of developing VSESs in middle and low income countries. In a study focusing on Kenya (Tallontire, Opondo, Nelson, and Martin, 2011), they consider KenyaGap (dealing with food safety and benchmarked to GlobalGap) and HEBI (concerned with labour standards and developed on the basis of the Ethical Trading Initiative). They investigate how power relations shape discussions around these initiatives and impact upon them on the ground.

In an echo of writers who focus on a lack of 'internal democracy' in VSES processes, Tallontire, Opondo, Nelson, and Martin highlight a lack of proper consultation and representation in the development of both initiatives. In the case of KenyaGap, it was the influence of (foreign) donor agencies and technical NGO experts that played the major role in the standard's development, to the exclusion of smaller stakeholders. And in HEBI, conflict between NGO representatives and a lack of proper union representation meant that the standard never fully 'took off'. A perception on the part of NGOs that trades unions were *'too close to government'* and therefore lacked independence meant that unions were not accepted in the process. In both cases, the attempt to 'localise' the standards failed: in the case of KenyaGap, buyers continue to favour GlobalGap standards over the adapted KenyaGap standard, and in the case of HEBI, conflicts between local groups never allowed the standard to sufficiently emerge.

But there are positive insights too: in a box discussing the establishment of KenyaGap, Tallontire, Opondo, Nelson, and Martin highlight the important role that the government (this is in addition to technical support from USAID, other foreign donors and NGOs) played in attempting to make the GlobalGap standard more accessible for more small and medium enterprises seeking entry to the UK, Switzerland, and other European markets.

It is clear that public sector engagement in the creation of VSESs does not necessarily lead to positive outcomes in terms of take-up of the VSES concerned. For example, as noted by Ward, Wilson, Zarsky and Fox (2007: 6), India's voluntary product labelling scheme, Ecomark, was adopted in 1991 at the initiative of the Indian Parliament: *"But the initiative has not been successful, with just 12 manufacturers applying for the Ecomark license in the 15 years since its adoption. The Indian NGO CUTS cites heavy reliance on government agencies in the overall administration of the scheme as among the reasons, making it susceptible to being weakened by frequent changes in government personnel"*.

At the same time, Spencer Henson and John Humphrey (2010) consider that in many developing countries it is governments' responsibility to develop their own national standards programmes for products and processes or for governments (or producers) to take on ownership of international standards; as with the creation of KenyaGap. But it is easier for some governments and public policy actors than others with less market leverage. Long, Zadek and Wickerham (2009: 57-58) argue that China should engage in the establishment of voluntary sustainability standards and develop policies

on the development and application of standards. Among the first such initiatives is the CSC9000T standard, created by China's Textile and Apparel Council, a government led industry group.

Analyses of transparency and accountability also form part of the literature on the *internal* democracy of VSESs. For example, Jem Bendell argues that many private standards initiatives are not accountable, particularly to actors in the South (Bendell, 2005). Graeme Auld and Lars Gulbrandsen (2009) study the transparency of PVSES through two lenses: procedural transparency (in terms of transparency and information in standards processes) and outcome transparency (which considers how outcomes of decisions are publicised or what behaviour changes have or have not occurred through implementation of a system).

Applying their framework to PVSESs in forestry (FSC) and fisheries (MSC), Auld and Gulbrandsen find: a) that greater transparency has not necessarily led to greater decision making power for a wider group of stakeholder because merely *providing* information does not at the same time include a delegation of power to different groups in the process of decision-making; and b) that both procedural and outcome transparency allow both organisations to ensure that the systems and certified bodies are held to account for what they do.

Concerns for internal democracy were also a significant feature of negotiations towards the ISO 26000 international guidance standard on social responsibility, which saw a number of procedural innovations designed to secure greater equality of opportunity for participants from middle and low income countries to participate in the development of the standard.

The internal democracy of VSESs can help to secure their internal legitimacy (a subject considered in more detail below). But it does not necessarily have anything to say about how VSESs relate to democracy in the outside world; and consequently a focus on internal democracy can be associated with a tendency to view VSESs as somehow hermetically sealed - or simply borrowing from – other tools for environmental and social governance. Achieving *internal* democracy of VSESs is a good thing; one addressed for example by ISEAL's *Code of Good Practice for Setting Social and Environmental Standards*; but it is a good thing independently of their wider public policy impacts; let alone their implications for democracy as a political system.

Certainly, VSESs have the potential to generate positive impacts on public actors. For example, Tallontire, Opondo, Nelson, and Martin's (2011: 439) study of KenyaGap and HEBI finds that *"the cases do not suggest that the role of government is being usurped, on the contrary, the KenyaGAP example suggests that private governance has stimulated parts of the Kenyan government to act in a more co-ordinated way to promote the production of safe food."* (We consider the potential for VSESs to impact on 'external' democracy further in the next subsection).

But *internal* VSES democracy cannot be a complete or lasting substitute for governance gaps or flaws *within* democracies. And simply seeking by way of response to gain that public endorsement from governments of countries whose citizens, organisations or economy might be affected by the VSES raises difficult questions of process. The *demos* of public governance (i.e definitions of who has a right to a say or a vote in public policy) is not the same as the idea of a 'stakeholder' or 'expert' for purposes of a VSES process.

External democracy

Work on the impact of VSESs on *external* democracy is more limited than work to date on their *internal* democracy. A handful of studies focus on understanding the implications of VSESs for external democratic structures; either for *democracy as a wider social system* or (in a more limited body of work) for *democracy as a political system*.

Within this overall category, one body of work considers how new governance mechanisms help to deliver greater *societal* democratic potential by creating new processes for involvement by new stakeholders. The second body of work takes a more critical view of private voluntary standards systems as processes with clear democratic deficits that result in what is overall a deficient system in terms of its democratic accountability; *or* (more relevant to the present paper's concerns) undermine democratic regulatory processes.

In the former body of work, Sasha Courville considers the extent to which VSESs – particularly in relation to social auditing and accountability – might be used as a model for greater stakeholder involvement and positive regulatory outcomes. Rather than seeing democratic governance as rooted in elections and nation states, she subscribes to an alternative view (Courville, 2003: 282) wherein *"legitimacy comes from constituencies consenting to processes and procedures based on shared values and principles".* As such, *"legitimacy can only be generated through a public discourse".*

Focusing on SAI and FLO, Courville (2003) argues that these systems enhance democratic structures as they not only maintain internally democratic organizational model that offers an alternative to business as usual decision making, but they also adopt key *international* norms and stimulate necessary 'public discourse.' This absorption of international norms is also a feature of a number of other VSESs, including the ISO 26000 international guidance standard on social responsibility and many of the sector-specific corporate codes of conduct and voluntary standards analysed in a World Bank compendium spanning sectors including apparel, footwear and light manufacturing, agribusiness, tourism, mining and oil and gas (World Bank, 2003-2004).

One might question however whether adoption of key international norms is a component of a democratic organizational model, as distinct from a component of a model that expresses deference to states and intergovernmental decision-making. After all, there are many who would argue that the processes through which intergovernmental norms are developed are far from democratic.

Courville herself points to the possible relevance of a distinction between democracy at the national (or subnational) level and the idea of democratic legitimacy at international (intergovernmental) level. She notes obstacles to establishing democratic governance at the international level; particularly a representative form of democratic governance based upon the election of leaders and in which accountability is brought about through periodic elections that function as a check on power (Courville, 2003: 282-283). After all, non-democratic states are properly active in intergovernmental negotiations and are at least as numerous as more or less democratic states. And at international level ideas of statehood and of territorial sovereignty are more significant in allocating rights and responsibilities than the form of governance deployed by a particular state.

Given the difficulty of achieving democratic governance at the international level (i.e. governance based on the free and fair elections state representatives) coupled with the fact that states are

almost always free to choose whether to accede to public international commitments or not; it is more meaningful to focus on *legitimacy* as emerging out of a process of public (i.e. open) discourse and the building of shared values through that discourse. Legitimate governance, for these purposes, requires gaining of popular assent through justification of goals, principles and actions. It follows from this that VSESs might be understood as *more* democratic than existing mainstream: they operate within a different, and potentially superior, paradigm.

To this one might counter that there are plenty of actors who are working to democratise intergovernmental decision-making: the work of the campaign for a democratic United Nations is one example; the campaign for a UN Parliamentary Assembly another.[5] If intergovernmental decision-making were democratic, might that mean that the legitimate space for VSESs under Courville's model would recede? In other words, is she presenting the multistakeholder dialogue of VSESs as a temporary solution to the weaknesses of intergovernmental democracy, or a lasting substitute for it?

Errol Meidinger's study on transnational governance adopts a similar starting point to Courville's. He focuses specifically on what he calls "competitive supragovernmental regulation," or systems that are established by non-state actors, work through the supply chain, and utilize mechanisms including standards and certification (Meidinger, 2007: 513-514).

Meidinger (2007: 523) defines democracy as "rule by the people" that can take either an aggregative form (where people vote for their laws or their representatives vote on laws) or a deliberative form (where people develop laws together or their representatives reason together on laws). In a similar characterisation, Ward (2011) distinguishes between representative democracy at the political level and the deliberative democracy of standards-setting.

Meidinger argues that the incorporation of local and state laws within 'competitive supragovernmental regulations', including the maintenance of strict internal procedures around deliberative decision making, participation, transparency, and accountability; and the competition between systems, will drive democratization forwards within transnational governance. For Meidinger, the competitive nature of these supgragovernmental regulations will mean that the more legitimate organizations – those that are effective and gain widespread acceptance - further "democratic experimentalism", driving out lesser systems. The implication is that the more legitimate processes are likely both to be more effective and to gain widespread acceptance.

Competition for public acceptance amongst a wide range of stakeholders from NGOs to corporations to consumers means that systems will need to develop in a manner that effectively addresses the needs and concerns of all the groups, whilst also arriving at processes, norms, and acceptance that are vital in the development of greater transnational democracy.

Just three papers that we are aware of (Wirth 2009, and Ward 2011 and 2012) might be sited within the category of analyses that critique VSESs on grounds that they undermine (parliamentary or governmental) democratic regulatory processes.

In a paper published in 2011, Halina Ward examines the multiple points of intersection between ISO 26000, public policy, the roles of states and governments, and what she terms 'emerging

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[5] See further http://www.unpacampaign.org/

transnational democracy' (Ward, 2011). She argues that there is currently no coherent narrative for how the internal democracy of VSESs fits with other (political) systems of democracy, even though VSESs impact upon them.

In a later paper published by the International Institute for Environment and Development, Ward (2012) argues that for 'market governance mechanisms' that are *internally* democratic there is a distinction between public policy impacts upon a) states that fundamentally and consistently undermine basic procedural rights of public participation and of access to information, and b) impacts upon states that are more 'democratic' in this regard. Whether that basic distinction is capable of reflection within guidance on public policy impacts of VSESs is a moot point. There is an argument that internal democracy of VSESs may serve to legitimise their public policy impacts upon undemocratic states, whereas the relationship is more problematic in the case of an internally democratic VSES with negative policy impacts upon democratic states.

In some respects Ward (2012) is limited in scope, since it focuses on insights from a single (albeit far-reaching) standard; the ISO 26000 international guidance standard on social responsibility. But it is unusual both in drawing attention to a wide range of interactions between standards setting, public policy, governance and global governance; and in proposing that whether a state is a *democracy* or not (in terms of the political system applied) may provide a key determining factor for any normative framework for understanding the relationship between government or public regulatory norms and the norms of PVSESs in circumstances where there is a conflict. In such circumstances, one logical consequence is that the *internal* democracy of a VSES could become a distinguishing factor.

Finally, in a 2009 article, David Wirth also considers ISO standards; specifically ISO 14001 and those standards in the 14000 series. Wirth argues that a core problem of ISO 14000 is its relationship with government public policy. Unlike public regulations that are, in theory, designed to be responsive to and address the greater public good, Wirth suggests (Wirth, 2009: 88) that ISO standards are often designed by and are responsive to private interests who are, *"motivated primarily by market-driven factors, such as profitability."* In turn these market-driven factors could undermine *"democratic legitimate"* public regulatory processes.

For Wirth, *"it is not difficult to imagine a setting in which the array of interests that shape an industry dominated, voluntary standard-setting process is expressly contrary to the well-being of the public in the United States and abroad… there is frequently a residual concern about a potentially hidden agenda to substitute ISO standards for federal regulation."* (Wirth, 2009: 89). Wirth's analysis takes us full circle to those analyses that explore the overall contextual context and drivers for VSESs; particularly those that site VSESs in the context of neoliberal economic ideology.

Legitimacy

Democracy is linked to *legitimacy*. For example, Anthony Ogus highlights a lack of 'democratic legitimacy' as one of three traditional critiques of self-regulation (Ogus, 1995). And whilst the internal democracy of a VSES is potentially among the determinants of its overall legitimacy, it would be a mistake to understand the internal democracy of a VSES as the *principal* determinant of its legitimacy given the potential impact of VSESs on *external* democracy. Links to public sector actors (and, potentially to *external* democracy) are also potentially sources of legitimacy. For example, ISO itself suggests that its links with governments and public policy are among the factors that contribute to its 'recognition' as a developer of formal international standards, including national

standards bodies' respect for the disciplines of the TBT Agreement's Code of Good Practice and National Standards Bodies 'associated remits from their governments'.

It is useful to consider the distinction between two approaches to understanding legitimacy as presented by Máire Dugan: *"The first view -- rooted in international law -- contends that a rule or a norm is legitimate if it is **created by legitimate institutions**. This understanding of legitimacy has led to the importance of "right process" as a standard for assessing international law and legal rules. A second view, however, contends that legitimacy exists primarily at the level of the individual actor rather than the community. That is, a particular rule or norm is legitimate if it **enjoys support from the relevant set of actors.**"*[6] (Emphasis added).

Dugan's perspective begs the question 'who are the relevant set of actors' in the case of a VSES: is it only those that have participated in the development of the VSES or have chosen to adopt it; or does it extend to those who are *impacted* by it; including those who are potentially negatively impacted by it as a result of its impact on and implications for market access.

Here too, theory is lacking. As US political scientist and academic Catherine Rudder argues, political scientists should reimagine their discipline fully to incorporate what she calls 'private governance' within the domain of political science (Rudder, 2008). She suggests that existing approaches shut off *"discussion of whether people affected by the decisions of these groups should have a say in their decision making"* (Rudder, 2008: 900)*.* Arguably, in many if not most VSESs, people (or organisations) affected by VSESs do not have a say in their decision-making, because the decision-making processes are initially designed to draw in those organisations that are more likely to take up the VSES in the initial stages. As Ward (2011) puts it in the context of ISO: *"what would be an optimal fit between internal ISO democracy and the external democracy of the political realm in states whose citizens' future policy choices may be affected, or their lives impacted, by ISO?"* (Ward, 2011: 712)

Bernstein and Cashore (2007) also focus on legitimacy. They suggest that there are three phases through which 'non state market driven governance' (NSMDG) gains legitimacy. The three phases are: **initiation** (during which NSMD governance systems gain support from businesses in their key constituency); **building widespread political support** (during which systems build functional legitimacy by striving to attract firms for whom the costs of compliance are much higher. At this stage firms are often pressed to join through sustained pressure and boycotts), and **political legitimacy**. The term 'political legitimacy' does not refer to the role of states or to democracy as a *political* system. Rather, Bernstein and Cashore say that it emphasises *'a shared sense of community and norm generation'*. During this phase there is a critical mass of actors within a given sector who form a community that recognizes and gives NSMD systems the legitimacy to govern their actions to address social and environmental problems.

Bernstein and Cashore's framework has little to say about the role of governments, public policy actors or states in the development or implementation of NSMDs. To some extent that should not be surprising given their focus on 'market-driven' governance; a focus that lends itself to emphasising the role of governments in creating an enabling environment for markets rather than their role in delivering on environmental and social goals.

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[6] As described by Máire Dugan, University of Colorado in a discussion of legitimacy originally found at
http://www.intractableconflict.org/m/legitimacy.jsp (last visited August 2004 and no longer accessible)

In a later study, Bernstein (2010) concludes that NSMD systems are among the few structures that offer *legitimate* governance mechanisms. For these purposes, they suggest that 'good' global governance through NSMD systems[7] has four building blocks:

1. Authority that includes power legitimacy and political community that requires the acceptance of rules shaped around an understanding and establishment of shared values, norms, or beliefs.

2. Epistemic validity refers to the fact that the system is based on accepted knowledge, whether norms, science, ideological belief that is agreed to by a community

3. Good Practices including democratic procedures around accountability, transparency, representation.

4. Practical reason that takes into consideration historical and cultural contexts.

In one sense, it might be argued simply that multistakeholder decision-making on environmental or social issues offers the potential to be more democratic than conventional means of consultation of participatory decision-making led by public institutions or governments. From this starting point, VSESs can be understood as showing the way towards *better* and more participatory decision-making on the part of governments. This is the sense in which Cadman (2011) examines the comparative of legitimacy of two types of institutions working in the forestry governance space; namely private voluntary standards setting institutions, and multilateral institutions (the United Nations). He measures legitimacy in relation to the levels of 'productive deliberation' and 'meaningful participation' respectively. For Cadman, the more deliberative and participatory an organisation, the more legitimate it is.

However, this perspective is only *un*problematic to the extent that the VSES in question has no impact on norms set by public policy and exists as a sort of 'island of good practice'. In reality, as we have seen, VSESs have multiple interactions with public policy and governance by the public sector: they are not neutral in public policy terms.

A VSES that has strong legitimacy with its constituents because it has adopted strong *internal* democratic practices can lay a stronger claim to legitimacy in areas where its norms conflict with the laws of *undemocratic* nations or public policies developed by such nations. However, the 'clash of legitimacies' remains where there are conflicts with public policies or laws developed by *more* democratic nations; and it is a problem in any event given the principle of respect for the rule of law and respect for sovereignty of states.

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[7] Specifically, Bernstein defines 'global governance' as *"[t]he full range of norm-promoting, regulatory, administrative, and adjudicative activity that cannot be located in the traditional governance mechanisms of single sovereign states."* (Bernstein, 2010: 92.) In the same paper, he goes on to define a number of characteristics of global governance including: *political authority* (when there is a good probability that a command with a given specific content will be obeyed by a given group of persons) that combines *legitimacy* (acceptance and justification of shared rule by a community) and *power*, that need not be monopolistic, territorially based, or universal.

Framing the governance role of VSESs: principles for healthy democracy, public policy, and sustainable development

So much for the critique: what, then, is the proper space for VSESs? It is to this question that the final section of this paper now turns.

Conceptual approaches

A number of studies propose frameworks for formulating a desirable relationship between PVSESs and state-led public policy.

Albareda, Lozano, Tencati, Midttun and Perrini advocate (2008) (in the context of CSR) a co-responsibility framework in which governments play the lead role as mediators between NGOs and private sector actors, with a view to identifying new innovative avenues for meeting regulatory goals and creating 'win-win relationships'. This is not dissimilar to the 'facilitating' and 'partnering' identified in Fox, Ward and Howard's work for the World Bank Group (2002); and has echoes of the 'symbiotic relationships' proposed by Levin, Cashore and Koppell (2009), albeit with government accorded a more significant ('lead') role.

David Cohen (2004) envisages government playing the role of a public interest mediator; setting broad objectives which voluntary mechanisms can meet. Governments can then ensure that there is sufficient oversight around the development and implementation of voluntary codes in order to meet policy objectives.

A third approach proposed by Kevin Kolben (2011) complements Cohen's approach. He terms his approach an *"integrative approach to transnational regulatory regimes"* (2011: 405) proposing that the state is neither ignored nor bypassed; rather that a system is created in which the state is re-centred as a vital actor that recognises the role of private voluntary initiatives (in his case transnational labour regulations). The state's role then is to establish communication channels between different sectors and actors that allow them to work towards meeting public regulatory goals.

In their work considering the role of the state in what they call 'regulatory standard-setting' (RSS), Drawing on a wide range of RSS processes, including SAI, FSC, MSC, the OECD Guidelines on Multinational Enterprises and the UN Global Compact, Abbott and Snidal see NGOs as the main players; constantly engaged in a 'bargaining game' for their own interests. Abbott and Snidal (2009) place the state in a background role at each stage of RSS process, as follows:

1. **Agenda-setting:** states place regulatory issues on the agenda and support RSS schemes by bringing together interested stakeholders to discuss solutions or provide financial support to the schemes.

2. **Negotiation:** states create norms that RSSs then incorporate within their own schemes. The inclusion of state generated norms lends legitimacy to RSS schemes. When states issue new policies or norms or amend existing policies or norms it can signal new expectations that strengthen the hand of firms or NGOs over the other.

3. **Implementation:** states' roles are limited except in the areas of procurement or by provision of technical assistance to help implement RSS schemes.

4. **Monitoring:** states play a large role in monitoring by requiring certain practices such as transparency or disclosure of RSS schemes.

5. **Enforcement:** states' roles are indirect through the threat of statutory or mandatory regulation as the impetus for firms to adopt better practices (see Abbott and Snidal, 2009: 43-47).

Analytical gaps

There is currently no theoretical framework for the shifting relationships and points of interface between *social* systems for organisation of decision-making and the ideal of democratic decision-making within organisations or VSES processes on the one hand and *political* systems for the organization of decision-making at the level of the state on the other hand.

One problem is that a 'market' framing of VSESs (in which VSESs are viewed as market-driven instruments through which businesses can gain competitive advantage for their goods and services) tends to lead to a perspective in which calls for greater 'democracy' within VSESs are viewed principally as appeals for greater *internal* democracy. A market framing, in other words, lends itself to the idea that the content of VSESs is inherently amenable to multi-stakeholder negotiation *irrespective* of whether public sector actors are involved or not. From this perspective, it is the market of standards-setting actors alone rather than any set of normative values related to the roles of governments, public sector actors, or democracy, which should determine the content and application of VSESs.

Even from a 'democracy' perspective, in which democracy is (crudely) governance by the people of the people for the people, one might in principle ask why it should matter whether the space in which 'the people' determine norms of organisational behaviour is a private or a public space. And since the ideal of democracy as a guide to decision-making and weighing competing values or claims to resources can be pursued, in principle, in any kind of organisation; why should it matter if there VSESs emerge as alternative structures to states?

One immediate objection to this liberal perspective might be to counter that in VSESs 'the people' typically include economic actors: businesses. And businesses are not 'the people'. Whilst the real-world fact is that businesses are significant political actors, they are rarely formally enfranchised in systems of political (democratic) decision-making and voting, though they often exert significant influence in terms both of lobbying and formation of the dominant values in society.

Another objection might be that 'the people' in a VSES process are determined not by citizenship, residency or impact, but through a variety of other considerations including expertise, membership of relevant associations, or ability to impact on the rate at or extent to which a VSES is taken up.

Literature on the future of democracy (understood as a political system) lends itself to the view that political and social forms of democracy might increasingly merge, so that democracy becomes a continuous process across the complete range of human endeavours. For the future there may come to be no distinction between public and private just as there is no easy distinction between 'online' and 'offline'. Rather, there may simply be individuals, and the groups and communities through which they engage in many diverse ways. Leadership might become far more dispersed, and society far more like a natural rather than an engineered ecosystem, with the state reduced simply to being

the actor with a monopoly on the legitimate use of force and on applying and enforcing the rule of law.[8]

Such a system of 'continuous' or 'simultaneous' democracy is still far in the future. For now, there is an immediate need to tackle the dissonances and tensions that are result from the lack of any integrated understanding of the respective roles of VSESs and states, governments and public policy.

For the time being, a number of problems emerge out of the lack of a clear framework or set of principles for understanding the relationship between VSESs, states, public policy and the roles of governments.

A governance framing on the role of VSESs, and efforts to shape the cognitive narratives associated with that framing as (currently) identified in the work of Real Reason (2009), need to be linked to a clear conceptual and thereafter cognitive linguistic framing of the role of governments, states and public policy in addressing social and environmental issues. That is no easy task.

The 'government/state/public policy' framing needs to emerge from and speak to sustainable development rather than any particular point on the 'left-right' spectrum if it is to prove resonant across party-political boundaries. And given that VSESs have in part at least emerged out of a neoliberal economic agenda that sits more comfortably towards the right of the political spectrum, the political economy of such an exercise is arguably inherently biased.

Towards Integration

David Held proposes a 'cosmopolitan model' of democracy that brings together the multiple realities of democracy as both a political system and as a 'way of life'. He suggests that "*the case for cosmopolitan democracy is the case for the creation of new political institutions which would coexist with the system of states but which would override states in clearly defined spheres of activity where those activities have demonstrable transnational and international consequences.*" (Held, 2006: 305)

Ideas about the internal democracy of 'multistakeholder public policy networks' might well be attractive in the struggle to create normative coherence in the apparent chaos of globalisation; but they fail to provide for truly cosmopolitan democracy – for they have not evolved so as to "*override states in clearly defined spheres of activity"* (save for the accident of the evolving reach of certain rules of the World Trade Organization, which is hardly 'clearly defined'). On the contrary, they have the potential to snag against, interfere with, even undermine, decision-making by states (Ward, 2012).

Multistakeholder decision-making can also sit uncomfortably with established systems of global governance in which governments (rather than individuals or non-governmental organisations and interest groups) hold the final decision-making authority. When government representatives participate in transnational multistakeholder consensus-building decision-making processes, they take with them all of the positions that they bring to other intergovernmental settings. They cannot do otherwise, for the positions taken by government representatives in such fora are for the time

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[8] See further Halina Ward, *How might democracy and participatory decision-making have evolved to cope with the challenges of climate change by the years 2050 and 2100?*, Foundation for Democracy and Sustainable Development, 2012

being among the relevant factors to which international lawyers are required to look when determining the current state of international law between nations.

Held points to two distinct requirements of cosmopolitan democracy: first, that the territorial boundaries of systems of accountability be restructured (so that issues which escape the control of the nation state can be brought under better democratic control); and second, that the role (and place) of regional and global 'regulatory and functional agencies' be rethought so they provide a more 'coherent and effective focal point' in public affairs. Both, however, are currently missing, since a) the accountability mechanisms associated with VSESs cannot rely on the same systems of punishment and reward that are available in the case of government instruments, and b) the role of 'regulatory and functional agencies' has not been rethought.

There is currently no coherent and comprehensive *normative* narrative` for how VSESs should mesh with the overall web of national and global governance. At the same time, David Held's 'cosmopolitan democracy' potentially points to a way forward that could help to unpack the shifting relationships and points of interface between a) social systems for the organisation of decision-making and the ideal of democratic decision-making within organisations (such as international standards bodies including ISO) and b) political systems for organising decision-making at the level of the state.[9]

As the involvement of VSESs with key issues of global public policy action such as human rights, environment and labour gets deeper and broader; tensions between government and intergovernmental policy and law on the one hand and multistakeholder negotiation of good organisational practice on the other will likely get worse. In two papers, Ward (2011 and 2012) points to the example of ISO 26000, where these tensions were particularly pronounced in discussions on the precautionary approach. Grounding the process of developing VSESs in expertise rather than representation (as many VSESs do) can be useful in managing complex multistakeholder processes but it does not ultimately demonstrate a systemic commitment to the ideal of democracy – whether understood as a social or a political system.

For all these reasons, coupled with the potential for VSESs to undermine public policy, there is value in seeking to establish principles for developers of VSESs designed to ensure positive relationships between VSESs, public policy, public governance, and the role of the state.

The final section of this paper proposes a tentative initial set of Principles, designed for initiators and developers of VSESs rather than for governments. Consequently, some issues at the interface of VSESs and public policy are underplayed. For example, in earlier papers, Ward (2011 and 2012) argues that WTO Members should renegotiate key provisions of the Agreement on Technical Barriers to Trade to ensure that the preference accorded to 'relevant international standards' as a basis for public policy is appropriate given the expanding scope of international standards in public policy areas of key environmental and social concern. This recommendation is not considered in this paper: the Principles frame responsibilities only on the VSES side, not in relation to intergovernmental commitments.

One further major gap in the Principles lies in the fact that they do not offer guidance on whether, and if so how, developers of VSESs might seek to draw a distinction between the 'public policy

interactions' between a) VSESs and the policies of states that are broadly 'democratic' on the one hand, and b) on the other hand public policy interactions between VSESs and the specific policies of those states that are at the opposite end of the spectrum (i.e. those that are highly undemocratic).

For the time being, the Principles seek to build only on distinctions between states, governments, or public policy makers, and other actors, rather than distinctions between non-state (or public) actors of various shades of 'democratic commitment' and other kinds of actors.

A lasting and deep reframing of the governance frame identified by Real Reason (or 'cognitive strategic initiative' designed to shape that frame) ought to seek to do just that.

As a first step, the building blocks for longer-term reframing of the cognitive signposts offered by the 'governance frame' as identified by Real Reason in 2009 could lie with an effort to amplify understanding, within the standards community, of the multiple points of intersection between VSESs, public policy, and the roles of governments and states.

The Principles that follow are designed as a modest step in that direction.

Eleven Principles for VSESs and public policy

Introduction

The Principles that follow are based on five overarching ideas or 'meta-principles'. All of the Principles are designed to apply to all Voluntary Social and Environmental Standards (VSESs), the scope of which is defined by a set of six criteria.

Overarching Ideas ('meta-principles') (RESBAR):

- **Respect** the unique roles of governments and states

- **Engage** public sector actors

- **Support** sharing of information and resources with public sector actors

- **Build on** existing public sector and international norms

- **Assess and review** the range of public sector implications and relationships

VSESs are all those Voluntary Social and Environmental Standards that meet the following criteria.

1. They address the activities of organizations rather than individuals

2. They address societal and environmental issues or impacts arising out of the activities of organizations *as market actors* (rather than as 'public' actors). The term 'market actors' is designed to exclude those codes, initiatives or standards that apply to behaviour in public life or to those activities that lie in the exclusive competence of governments, parliaments and states (including for example legislative processes)

3. They set out expectations for organizational management, practice or behaviour

4. They are designed for repeated, rather than one-off, use or reference by organizations that they address

5. They are not directly legally enforceable

6. Their take-up by the organizations that they address and their external legitimacy does not inherently *depend* on involvement or action by state or public sector actors.

Respect

Principle 1 - Do no harm: to public sector or government capacity to address the environmental and social issues addressed by the VSES

VSESs should supplement or support, rather than directly or even directly undermine, public sector or government capacity progressively to address social or environmental issues.

If your VSES is a direct response to a public governance failure or gap, consider how best to ensure that it does not hamper efforts to strengthen public sector capacity over the longer term. That could mean for example sharing information and resources with relevant public sector actors (as envisaged in later Principles). It could mean that any 'alternative' conformity assessment provisions under your VSES (i.e. those that provide alternatives to government or public sector-led conformity assessment mechanisms) are designed with the direct engagement of public sector enforcement agencies; even if it is their practices that give rise to the governance gaps at stake. This Principle could also mean considering how to ensure that any interventions under your VSES for purposes of monitoring, assurance, certification or auditing do not give rise to operational relationships that marginalise the proper exercise of public enforcement functions or the full realisation of rights (e.g to freedom of association) that are guaranteed by law or in other ways by the state in the countries concerned.

Principle 2 - Minimise conflict: where conflicts arise between proposed public policy or legislative requirements in host countries or supplier countries, seek to understand why and act to minimise conflict wherever possible

Governments and public sector actors are not just another 'stakeholder'. They have unique roles and responsibilities. Only public sector actors can set 'public policy'. Only governments and parliaments can legislate. Intergovernmental negotiations must always be centred in states, even where non-state actors are given a role.

The social and environmental goals of initiators of VSESs may quite properly differ from those of governments in supplier or host countries. Sometimes (for example in areas such as gender discrimination) there are conflicts between provisions of VSESs and the policies reflected in laws and regulations in other countries. You should consider whether it is possible to draft your VSES in such a way that organisations can find ways to meet the objectives of your VSES whilst respecting the rule of law wherever they operate or source from. Excluding goods and services from the scope of a VSES on the basis of public policy choices in countries where they are produced must be a last resort.

In some cases, investigation of areas where there are conflicts between the proposed provisions of your VSES and national laws or policies in the countries and markets where it will take effect may point to the potential for recognising different approaches as 'equivalent'. You should consider

whether this might be preferable to excluding certain products, organisations or suppliers from the scope of your VSES.

For the time being, this Principle does not set out a detailed framework for understanding when it *ought* to be acceptable for the norms of VSESs to embody conflict with national laws and regulations, nor circumstances in which it might be permissible, from a sustainable development perspective, for VSESs actively to promote approaches at odds with legislated policy approaches enacted by governments.

One compromise would be to invite VSESs both to reflect a commitment to the rule of law (so that any potential conflict between a VSES norm and a legal norm in a country where the VSES is to take effect ought in the first instance be resolved in favour of respect for, or going beyond, existing legal requirements) and to minimum norms of behaviour derived from international law.

Principle 3 - Prior notification: where it is not possible to achieve the objectives of the VSES without creating conflict with laws in countries and markets where the VSES will take effect, ensure that affected suppliers, organisations and public sector actors are given ample prior notice of your VSES and an opportunity to engage in dialogue on alternative approaches

As a developer of a VSES with market impacts, you should notify potentially conflicting provisions to public sector actors, suppliers and other interested parties in those countries and markets that may be affected and offer an opportunity to engage in dialogue on whether alternative approaches might meet the social and/or environmental objectives of your VSES.

Principle 4 - Advisory roles on international law: Develop rules of procedure to ensure that government participants have an 'advisory' rather than 'veto' or 'consensus' role on issues which raise questions about interpretation of international law

Principle 4 is designed to address the reality that the positions and views of governments in VSES negotiations in such talks potentially have an impact through evolving international law on the content of their governments' international obligations as states. It would not however be appropriate for those views to act as 'trump cards' in VSESs that are designed to set norms for *organisations* in the market rather than *states* as legislators.

This is why Principle 4 suggests that VSESs set rules of procedure that allow for seeking the input of government participants on an advisory basis where issues of interpretation of international law are concerned.

Engage

Principle 5: Ensure that public sector actors are offered opportunities to engage in the VSES in ways that are appropriate to the VSES under consideration whilst respecting their unique roles and responsibilities

Engaging public sector actors in your VSES will allow them to offer insights and engage in a process of learning that can help to strengthen understanding of how best to reach public policy goals. It can also help to ensure that the substantive provisions of the VSES are, to the greatest extent feasible (in light of their objectives), compatible with public policy goals.

If public sector actors who choose to engage in the development of your VSES do not have responsibility for all areas under discussion, investigate whether there are ways to ensure that the full range of public sector interests are represented.

Support

Principle 6: Explore how best to link monitoring and assurance mechanisms associated with your VSES to existing public sector monitoring and enforcement activities in markets where your VSES will take effect.

By building links with public sector regulatory bodies and sharing relevant monitoring and assessment methodologies and potentially data, the implementation of VSESs has potential to strengthen existing capacity within public sector regulatory agencies. Equally, where possible it is important to see to maximise consistency between public and private (VSES-related) monitoring procedures and approaches. Early appraisal of what already exists is important if potential synergies are to be maximised and the impact of shared human resources strengthened for mutual benefit.

Build

Principle 7: Draw on intergovernmentally agreed principles and norms where these fall within the scope of the VSES

Not all intergovernmentally agreed principles or norms can appropriately be transferred into the context of VSESs and organisations (as distinct from states). However, where it is feasible to do so, the inclusion of such principles or norms can not only help to strengthen the legitimacy of VSESs, but also help to foster the emergence of an effective international floor for social and environmental expectations. In determining whether to incorporate an intergovernmentally agreed norm within a VSES, relevant considerations will likely include the extent and relevance (to the sectoral or geographical reach of the VSES) of intergovernmental endorsement for the norm; its relevance to organisations (as distinct from states); and whether the norm itself has been endorsed as a matter of 'hard' law or simply amounts to 'soft law'.

Principle 8: Seek opportunities to maximise alignment and synergies between VSESs and complementary public policy goals and norms in countries where the VSESs will take effect

VSESs have the potential to add to the impact and reach of existing public policy goals on social and environmental issues, for example by taking those goals up and into transnational supply chains, or by adding implementation detail to existing regulatory norms. The inclusion of local and state laws within VSESs can also serve to enhance their legitimacy, particularly when they are incorporated within VSESs as a result of a deliberative and inclusive participatory process. Equally, public sector actors may wish to absorb VSESs or certain of their norms within their overall approaches to achievement of existing public policy goals in socially or environmentally sensitive sectors such as those associated with primary natural resources or with labour-intensive manufacturing.

Assess and review

Principle 9: Assess why public sector actors and/or international organisations are engaging in the development of your VSES, understand their remit, and assess which may have actively chosen not to engage (and why)

VSESs have multiple points of intersection with public policy, laws, and intergovernmentally agreed norms. Any assessment should consider *whose* public policy is at stake, including host and home countries and international organisations.

Where governments have an interest in pursuing foreign policy goals through the VSES, particular care should be taken to ensure that public sector actors in target countries know that the VSES is being developed, and why.

Principle 10: Assess and share with affected parties the range of public sector implications, relationships and impacts of your VSES

Prior assessment and information exchange can help to ensure alignment between public policy goals and the provisions of VSESs, so that VSESs actively strengthen rather than undermine public policy and good governance of environmental and social issues.

A full assessment would encompass the full range of overlaps, dissonances, parallels and other relationships between the substantive normative provisions of VSESs and norms with the force of law, as well as public policy commitments, in those countries where the market governance mechanism might take effect.

Principle 11: Assess the likelihood that the VSES could be considered a "relevant international standard" for purposes of the rules of the World Trade Organization (including its Agreement on Technical Barriers to Trade)

Do participants in the VSES want it to provide a 'floor' for public policy in other countries? If so, and if there is a possibility that the VSES could be considered a 'relevant international standard'; there is an even greater onus on the developer of the VSES to ensure that the standard is developed through a highly internally democratic process in which the full range of affected stakeholders are given a seat at the table.

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